



SCRUTINY OF ACTS AND
REGULATIONS COMMITTEE

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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 Act 2006*;
- (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 Act 2006*;
- (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 Act 2006*;
 - (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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CHAIRPERSON'S FOREWORD

It is with pleasure that I present the Annual Review of the operations of the Regulation Review Subcommittee (the Subcommittee) to the Parliament of Victoria. The Report reviews the activity of the Subcommittee during the first year of the 57th Parliament.

The Report incorporates the entire 2011 statutory rule series. The *Subordinate Legislation Amendment Bill* was introduced in August 2010. Amendments to the *Subordinate Legislation Act* 1994 (the Act) came into effect on 1 January and 1 July 2011. The amendments essentially duplicated and extended the current arrangements relating to the scrutiny of statutory rules to legislative instruments. The Report reviews the first year of the scrutiny of legislative instruments from 1 July 2011 to 30 June 2012.

There have been some initial 'teething' issues in the first year of the operation of the new legislation. This is not surprising as departmental officers come to grips with what is required under the Act. The matters raised by the Subcommittee were the subject of correspondence with the Minister. The matters were resolved. The Subcommittee thanks Ministers for their responses. The scrutiny of legislative instruments is still in its infancy. The Subcommittee will continue to monitor the operation of the legislation. A complete review of the first year of the scrutiny of legislative instruments is in Chapter 3.

I wish to thank the current members of the Regulation Review Subcommittee. The members are Ms Christine Campbell MLA, Mr Don Nardella MLA, Mr Edward O'Donohue MLC and Mr Graham Watt MLA. Their constant attendance at meetings and commitment to the process is greatly appreciated. The Subcommittee works well with a spirit of bipartisanship and cooperation.

I also thank our staff for their commitment and dedication. Ms Helen Mason carefully scrutinises all regulations and legislative instruments. I thank her for the provision of timely, informative legal advice. I thank Ms Sonya Caruana for her efficient administrative support. Mr Simon Dinsbergs has also kindly provided additional administrative support when required. I thank Dr Jeremy Gans, a legal consultant for the provision of additional human rights advice.

The Subcommittee will continue to use its best endeavours to perform its role.

Mr Michael Gidley MLA
Chairperson
Regulation Review
Subcommittee

June 2012

CHAPTER 1 – INTRODUCTION

This *Annual Review* examines the major issues arising out of the scrutiny of regulations made in Victoria in 2011 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 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

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

² (1979) 155 CLR 374 at 394.

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;
- Legislative Instruments prescribed to be statutory rules by the Governor-in-Council; and
- Legislative Instruments deemed to be statutory rules by their own authorising Act.

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

³ Australian jurisdictions which examine regulations and bills include the ACT, the Commonwealth, New South Wales, Queensland, Victoria and Western Australia and those committees include – Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) (ACT), Senate Standing Committee for the Scrutiny of Bills (Cth); Senate Standing Committee on Regulations and Ordinances (Cth); Legislation Review Committee (NSW), Scrutiny of Legislation Committee (Qld), Scrutiny of Acts and Regulations Committee (Vic), Legislation Committee (WA) and Delegated Legislation Committee (WA).

Australian jurisdictions which examine regulations only include Northern Territory, South Australia and Tasmania and those committees include – Subordinate Legislation and Tabled Papers Committee (NT); Legislation Review Committee (SA); and Standing Committee on Subordinate Legislation (Tas).

⁴ *Subordinate Legislation Act 1956* (Vic).

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

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

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);

The Subcommittee generally meets once each month to discuss regulations. This also includes ‘legislative instruments’ which are discussed later in this chapter. 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.⁷ The Committee may adopt or reject the report or part of it or make any changes it deems necessary.⁸ 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 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.⁹ 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.¹⁰

DISALLOWANCE

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

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

⁷ The Regulation Review Subcommittee has all the powers and privileges of the full Committee. However it cannot report directly to Parliament.

⁸ *Parliamentary Committees Act 2003* (Vic), s. 32(4).

⁹ *Subordinate Legislation Act 1994* (Vic), s. 22(1).

¹⁰ *Ibid.*, s. 22(5).

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.¹¹ 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);
- 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;¹² 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;

¹¹ *Subordinate Legislation Act 1994* (Vic), s. 21.

¹² Department of Premier and Cabinet, *Premier's Guidelines*, December 2004.

- 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 from the RIS process, some of the procedural requirements the Subcommittee examines include whether:–

- the regulation is correctly exempted or whether it should have been made with a RIS;
- the regulation is exempted under the appropriate category in the Act;
- the exemption or exception certificate specifies the section under which the exemption was granted;
- the exemption 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 twelve 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.

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;¹³
- policies concerning the removal, disposal or reduction of litter in the environment;¹⁴
- policies concerning the re-use and recycling of substances.¹⁵

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.¹⁶ Waste management policies are now enacted under s. 16A of the *Environment Protection Act 1970* (Vic).¹⁷

Waste Management Policies include policies dealing with:–¹⁸

- the generation, storage, treatment, transport and disposal and general handling of waste;

¹³ *Environment Protection Act 1970* (Vic), s. 16(1).

¹⁴ *Ibid.*, s. 16(1B).

¹⁵ *Ibid.*, s. 16(1C).

¹⁶ See definition of 'waste' in the *Environment Protection Act 1970* (Vic), s. 4.

¹⁷ Previously Industrial Waste Management Policies were made under section 16(1A) of the *Environment Protection Act 1970* (Vic).

¹⁸ *Environment Protection Act 1970* (Vic), s. 16A.

- 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*.¹⁹ 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*.²⁰

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:–

- during a minimum period of twenty-one 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 twenty-one 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.

¹⁹ *Ibid.*, s. 16(1).

²⁰ *Ibid.*, s. 18D(1).

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.²¹

The disallowance provisions contained in sections 23 and 24 of the Act apply to State Environment Protection Policies and Waste Management Policies.²² This means that the eighteen sitting day deadline applies, that is the Committee must table a motion for disallowance within eighteen sitting days after the policy has been tabled before that House.

THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

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. The compatibility of each statutory rule with the Charter is examined. This applies to all statutory rules in the 2011 series, the subject of this report. Mention is made here of this area of scrutiny for the sake of completeness. It is discussed in further detail in Chapter 2.

HISTORY - AMENDMENT OF THE SUBORDINATE LEGISLATION ACT 1994 – THE SCRUTINY OF LEGISLATIVE INSTRUMENTS- THE FIRST YEAR OF OPERATION

In 1985, Victoria introduced a range of regulatory reforms including a regulatory impact statement (RIS) process for the making of statutory rules and the automatic sunseting of regulations after 10 years of operation.²³ In 1995 changes were made to the Act which imposed stronger RIS requirements on the regulation making process, specifically targeting regulation likely to impose an appreciable economic or social burden.²⁴

²¹ Ibid., s. 18D(4).

²² Ibid., s. 18D(6).

²³ Scrutiny of Acts and Regulations Committee, *Inquiry into the Subordinate Legislation Act 1994*, September 2002

²⁴ Department of Premier and Cabinet, *Subordinate Legislation Amendment Bill Discussion Paper*, December 2009, page 7

The Committee tabled a report in September 2002 '*Inquiry into the Subordinate Legislation Act 1994*²⁵. In that Report the Committee examined the effectiveness of the regulation making system in Victoria. It made a number of recommendations to improve the system to enable Victoria to achieve best practice standards set by the Organisation for Economic Co-operation and Development (OECD). The Government's response to the Committee's Report was tabled in the Legislative Assembly in 2003. In 2004 the Victorian Competition and Efficiency Commission (VCEC) was created to act as an independent regulatory review body. VCEC's role includes reviewing regulatory impact statements and advising on the economic impact of significant new legislation.²⁶

In December 2009 the *Subordinate Legislation Amendment Bill Discussion Paper*²⁷ was released seeking submissions. The Committee carefully considered many issues raised by the Discussion Paper. The Committee considered the implications of Appendix B of the Discussion Paper including those instruments for prescription as a legislative instrument exempt from the operation of the draft Bill. The Committee also considered the proposed changes in respect of the definition of 'legislative instrument' and its implications in terms of resources. Of interest to the Committee is the impact of the Charter on its scrutiny of regulations. The Committee sent a written submission to the Department of Premier & Cabinet. In addition, the Committee had several productive and informative meetings with representatives of the Department of Premier & Cabinet to discuss various matters.

The *Subordinate Legislation Amendment Bill 2010* was introduced in August 2010. Amendments to the *Subordinate Legislation Act 1994* came into effect on 1 January and 1 July 2011. The amendments relate to the scrutiny of legislative instruments and specifically inserted a new Part 3 into the Act. The amendments essentially duplicate and extend the current arrangements relating to the scrutiny of statutory rules to legislative instruments.

The scrutiny of legislative instruments commenced on 1 July 2011. This year saw the Committee's first year of the scrutiny of legislative instruments from 1 July 2011 to 30 June 2012. The Committee makes further comment the first year of its operations in relation to the review of legislative instruments in Chapter 3.

²⁵ Op. cit

²⁶ Op. cit, p. 7

²⁷ Department of Premier and Cabinet, *Subordinate Legislation Amendment Bill Discussion Paper*, December 2009

CHAPTER 2 – SIGNIFICANT ISSUES

During 2011 and the early part of 2012 the Subcommittee held 15 meetings. During those meetings it considered the entire statutory rule series 2011 comprised of 166 statutory rules. Of those 166 statutory rules, 12 were accompanied by Regulatory Impact Statements.

During 2011 and the early part of 2012 the Subcommittee also considered 24 legislative instruments. None of the legislative instruments were accompanied by Regulatory Impact Statements.

The Subcommittee did not make any reports to Parliament in relation to statutory rules series 2011. It did not make any reports to Parliament in respect of any legislative instruments. However, the Subcommittee sought further clarification in relation to 3 statutory rules. The Subcommittee sought further clarification in respect of 3 legislative instruments. 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	10
(b) Consultation	10
(c) Consideration of Submissions – General Expectation – Response Required	11
(d) Technical Matters – Incomplete Certificates – Dates of Publication in the Government Gazette and Newspaper – Premier's Certificate – Details of 'Special Circumstances'	12
(e) Setting a package of fees – 'The Basket Approach' – The Premier's Guidelines	12
(f) Sighting of material incorporated by reference	13
(g) Section 9(1)(a) – Section 21(1)(l) – Requires explanation as to its form or intention	14
(h) Other matters – The 'Balanced Scorecard Approach' – What is it?	17
(i) Section 8(1)(A) – Is there any appreciable economic or social burden on any sector of the public?	18
(j) Commendation	18
(k) Human Rights	18
(l) An Unusual Matter – Melbourne College of Divinity	25

(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

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 Premier's 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

Sections 6 and 12C of the Act set out the requirements for consultation. These requirements apply to regulations and legislative instruments made with or without RISs. Responsible Ministers must ensure that there is consultation "where the guidelines require consultation"²⁸ with "any sector of the public on which a significant economic or social burden may be imposed."²⁹

The Premier's Guidelines³⁰ 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.

[Victorian Guide to Regulation, 2001 – page 54, also appendix E 'Subordinate Legislation Act 1994 Guidelines' to this, Part 3 – Making a statutory rule or legislative [63 – 90]]

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".³¹ 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. 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. Generally, however the Subcommittee's experience is that the consultation process in relation to statutory rules has been thorough and appropriate.

²⁸ Section 6, *Subordinate Legislation Act 1994*.

²⁹ *Ibid.*, s. 6(b).

³⁰ Paragraph 5.19, *Premier's Guidelines*, December 2004.

³¹ *Ibid.*, Paragraph 5.13

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

General Expectations

Sections 11(3) and 12I(4) of the Act imposes a duty on Ministers to “ensure all comments and submissions are considered” before the relevant instrument or rule is made.”³² The Premier’s Guidelines also emphasise the need for proper consultation³³ 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.

Submissions received by the Subcommittee

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 sections 11(3) and 12I(4) of the Act. The Subcommittee’s view is that publication of a response to issues on a website is generally an inadequate response.

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. Frequently, the labour already undertaken has borne fruit in terms of illuminating issues. The Subcommittee is of the firm view that this needs to be shared to add a further degree of transparency.

The Subcommittee has generally 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 were 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 a few submissions Departments have written individual letters to those who made submissions, discussing the various matters raised in detail.

Email

The Subcommittee has had requests from various Departments seeking clarification as to the means of communicating responses. The Subcommittee has considered the issue of response by email. In its deliberations, the Subcommittee will consider the response itself rather than the form in which it is sent. The Subcommittee appreciates that electronic and technological changes of course mean that email is an efficient and cost effective means of responding. Email is an appropriate way to communicate provided the response itself is detailed, sufficient and deals with

³² Sections 11(3) and 12I(4), *Subordinate Legislation Act 1994*.

³³ Sections 5.12-5.17, *Premier’s Guidelines*, December, 2004.

the particular issues at hand. For an example, an email to many recipients attaching a formal letter from the Department is appropriate provided the letter itself is sufficient. Posting letters to those who do not have an email address of course remains an appropriate manner with which to deal with submissions.

(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(1)(a) and (b) and 12(1)(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.

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

The Premier’s Guidelines³⁴ 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 needs to be undertaken as the fee increase may have a significant and adverse impact on the community and business.

[Also *Victorian Guide to Regulation, 2001*, appendix, Division 2 – Exemptions from the RIS process, (103) and Part 4 – Significant burden (237)]

By way of example in SR No. 57 – *Plumbing (Fees Amendment) Regulations 2005*³⁵ 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

³⁴ Section 5.25, *Premier’s Guidelines*, December, 2004.

³⁵ *Annual Review 2005, Regulations 2005*, p. 21

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.

During the year when necessary there have been informal discussions with officers from the various Departments and the Legal Adviser. The discussions suggest that a strict interpretation of the Premier's Guidelines occasionally 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 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 15A 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:³⁶

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:

- o 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;*
- o that the incorporated material may not be readily available at a reasonable cost;*
- o 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.*

³⁶ Sections 7.03-7.08, *Premier's Guidelines*, December 2004.

- 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.*
- 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.*

[Also *Victorian Guide to Regulation*, 2011, appendix, Rules or instruments which refer to other documents, pages 43-44]

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)(I) – REQUIRES EXPLANATION AS TO ITS FORM OR INTENTION

This year the Subcommittee sought further explanation in relation to three statutory rules.

Example 1:

SR No. 71 – Funerals (Infringements) Regulations 2011

Subcommittee's Letter³⁷

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations at a meeting on 15 August 2011.

³⁷ Letter dated 15 August 2011 to the Hon. Michael O'Brien MP, Minister for Consumer Affairs, from the Regulation Review Subcommittee.

Could you please advise the Subcommittee how the regulations will be monitored to ensure compliance? The Subcommittee would appreciate your explanation as to the processes in place.

Please do not hesitate to contact me should you wish to discuss the matter.

Minister's Response³⁸

Thank you for your letter dated 15 August 2011 regarding the above regulations.

As you are aware, the infringements system enables relatively minor offences that are clearly expressed in legislation and readily detectable to be made enforceable by infringement notice under the framework provided by the Infringements Act 2006. Once an offence is prescribed to be an infringement offence, an inspector or other authorised person in each case can issue an infringement notice if they have identified evidence of non-compliance.

In this case a number of offences under the Funerals Act 2006 ("the Act") were assessed as being suitable to be made infringeable under the Attorney-General's Guidelines for the Infringements Act 2006, in consultation with the Infringements System Oversight Unit in the Department of Justice.

Prior to the Regulations being made stakeholders were consulted to advise them of the proposal. These included industry associations and a number of individual funeral providers.

Part 8 of the Act empowers the Director of Consumer Affairs Victoria ("CAV") to investigate compliance with the Act. This is conducted via inspectors authorised under the Act, and where an inspector identifies that the offence has occurred, he or she is empowered to issue an infringement notice for that offence.

Further more, the decision to issue an infringement notice is made in the context of CAV's Compliance and Enforcement Policy, which recognises a range of remedial measures from warnings and undertakings through to prosecutions, depending upon the seriousness and circumstances of the conduct in question.

The recipient of the notice can elect to pay the relevant penalty, request an internal review of the decision to issue the infringement notice, or to contest the matter in court. If the recipient elects to pay the penalty the matter is finalised, and no conviction is recorded.

Unpaid infringement penalties can be enforced in a number of ways, including prosecution in the Magistrates' Court, lodgement with the Infringements Court or the application of regulatory measures available under the Act.

The Infringements Court may apply a range of enforcement sanctions to enforce unpaid infringement matters, including the issue of warrants, which authorise Sheriffs to apply further sanctions. The Department of Justice monitors payment rates for infringement offences throughout the enforcement process.

I trust this information is of assistance to you.

³⁸ Letter dated 2 September 2011 to the Regulation Review Subcommittee from the Hon. Michael O'Brien MP, Minister for Consumer Affairs.

Example 2:

SR No. 108 – Health Practitioner Regulation National Law Regulation Amendment (Midwife Insurance Exemption) Regulation 2011

Minister's Response³⁹

I am writing to provide background information in relation to the making of the Health Practitioner Regulation National Law Amendment (Midwife Insurance Exemption) Regulation 2011 ('Regulation'). This Information was requested by Ms Sonya Caruana on 16 November 2011.

Regulation making process

The Regulation was made in accordance with section 245 of the Health Practitioner Regulation National Law by the Australian Health Workforce Ministerial Council on 26 September 2011.

The Health Practitioner Regulation National Law Amendment (Midwife Insurance Exemption) Regulation 2011 amends the Health Practitioner Regulation National Law Regulation to extend the professional Indemnity Insurance arrangement for midwives practicing private midwifery.

The Regulation was published by the Victorian Government Printer on 7 October 2011, as required by section 245(3) of the National Law.

I tabled the Regulation in both Houses of Parliament on 11 October 2011. Whilst the National Law did not require me to do so, I took this step, as agreed with my fellow members of the Ministerial Council, in order to enhance Parliamentary scrutiny and awareness that the Regulation had been made.

As the Regulation was not made In Victoria, it was neither necessary nor possible to provide the Scrutiny of Acts and Regulations Committee with the usual certificates that accompany proposed statutory rules. I have been advised that the Chief Parliamentary Counsel has no power to issue a certificate under section 13 of the Subordinate Legislation Act 1994. I take the same view with respect to the certificates issued under sections 9 and 12A of that Act.

Enclosed is an explanatory note prepared by the Department of Health which contains further information on the making of the Regulation.

I trust that this advice is of assistance to the Committee.

Explanatory Note – Health Practitioner Regulation National Law Amendment (Midwife Insurance Exemption) Regulation 2011

The Health Practitioner Regulation National Law (the 'National Law'), as enacted by participating jurisdictions, establishes a National Registration and Accreditation Scheme in Australia.

Section 284 of the National Law enables regulations to be made to set the end date for the exemption for midwives attending homebirths from holding professional indemnity insurance.

The Health Practitioner Regulation National Law Regulation first set the date as 30 June 2012. The Health Practitioner Regulation National Law Amendment (Midwife Insurance Exemption) Regulation 2011 (the 'Regulation') amends the Health Practitioner Regulation National Law Regulation to extend the professional indemnity insurance arrangement for midwives practicing private midwifery until 30 June 2013.

The Regulation was made by the Australian Health Workforce Ministerial Council and commenced on 26 September 2011. In order for the Regulation to have legal effect they must

³⁹ Letter dated 2 December 2011 to the Regulation Review Subcommittee from the Hon. David Davis MP, Minister for Health.

be published by the Victorian Government Printer in accordance with section 245(3) of the National Law. This occurred on 7 October 2011.

While there is no requirement for the Regulation to be tabled in Parliament, the Ministers agreed to table the Regulation to enhance Parliamentary scrutiny and awareness of their making.

Example 3:

SR No. 79-Water (Long Service Leave) Regulations 2011

Subcommittee's letter⁴⁰

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations at a meeting on 12 September 2011.

The Subcommittee notes that the purpose of the regulations is to provide for long service leave for employees of water corporations. The Subcommittee requests your advice as to whether army reserve work is still counted as long service leave under these regulations.

The Subcommittee would appreciate your written response by no later than 20 October 2011, to allow for tabling at its next meeting.

Please do not hesitate to contact me should you wish to discuss the matter.

Minister's response⁴¹

Thank you for your letter dated 12 September 2011 regarding Army Reserve work and the Water (Long Service Leave) Regulations 2011.

Regulation 7(g) of the previous 2001 Regulations provided for service with the Army Reserve to be recognised for Long Service Leave.

This Regulation has been retained in the new Regulations albeit under a different Regulation (Regulation 12(1)(c)(iii)).

Thank you again for raising this matter with me.

(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 does not always 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.

However, the Subcommittee notes that many of the RIS's this year have included a much more detailed explanation. This is of assistance to the Subcommittee. However, it is also of more

⁴⁰ Letter dated 12 September 2011 to the Hon. Peter Walsh MLA, Minister for Water, from the Regulation Review Subcommittee.

⁴¹ Letter dated 24 October 2011 to the Regulation Review Subcommittee from the Hon. Peter Walsh MLA, Minister for Water.

assistance to the average reader of the RIS. The Subcommittee acknowledges these efforts and hopes this trend will continue.

(I) SECTION 8(1)(A) – IS THERE A SIGNIFICANT ECONOMIC OR SOCIAL BURDEN ON ANY SECTOR OF THE PUBLIC?

Many regulations are accompanied by a section 8(1)(a) certificate of exemption which states that they do not impose a significant economic or social burden on any sector of the public.

Paragraph 5.33 of the Premier's Guidelines⁴² set out the particular requirements in respect of the exemption certificates:

The Minister must include in the exemption certificate detailed reasons as to why the proposed rule does not impose a significant economic or social burden on a sector of the public under section 9(2). It will not be sufficient to simply assert that there is no significant economic or social burden on a sector of the public in the exemption certificate.

[Also *Victorian Guide to Regulation*, 2011, appendix, Division 2 – Exemptions from the RIS process, page 61 (97)]

The Subcommittee also takes the view that it is not sufficient to simply assert that there is no significant 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 significant economic or social burden on a sector of the public and will examine those reasons closely.

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 a significant economic or social burden” imposed or not. The Subcommittee 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 and their staff for 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) HUMAN RIGHTS

History

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 bills⁴³ was first mooted and indeed recommended in 1987 in a “Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights”⁴⁴ 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:–

⁴² Section 5.33, *Premier's Guidelines*, December 2004.

⁴³ Scrutiny of Acts and Regulations Committee, *First Annual Report*, April 1994, p. vii.

⁴⁴ Legal and Constitutional Committee, *Report on the Desirability or otherwise of Legislation Defining and Protecting Human Rights*, April 1987 pp. 123.

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

Rights

The Chair's introduction to the First Annual Report⁴⁵ is useful in considering the concept of rights. It demonstrates the complexities associated with rights:

⁴⁶Human rights have been generally argued to include civil and political rights and legal and political rights⁴⁷. 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 sixteen 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

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

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

⁴⁶ Ibid.

⁴⁷ Legal and Constitutional Committee, *Report on the Desirability or otherwise of Legislation Defining and Protecting Human Rights*, April 1987, Chapter 2, pp. 8-18.

.....

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

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

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*
 - (iia) prescribes under section 4A(1)(a) an instrument or a class of instrument for the purposes of paragraph (h) of the definition of legislative instrument; or*
 - (iib) prescribes under section 4A(1)(b) an instrument or a class of instrument to be, or not to be, a legislative instrument or class of legislative instrument for the purposes of this Act or any specified provision or provisions of this Act; or*
 - (c) the proposed statutory rule is an extension regulation.*

12D. Certificates and composite certificates

- (1) A certificate issued under this Part must be—*
 - (a) signed by the responsible Minister issuing the certificate; and*
 - (b) dated with the date of signing.*
- (2) A certificate issued under this Part may be a composite certificate which incorporates the certificates required by sections 6, 6A, 8 and 10(4) or any combination of those certificates.*

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 or legislative instrument 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 or legislative instrument 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. 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 an

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 Operation of the Charter in Relation to Statutory Rule Series 2011

The Subcommittee has considered the Charter in relation to one statutory rule this year. The relevant section 12A Human Rights certificate accompanies a regulation. The Subcommittee then considers the regulation, the section 12A certificate and any issues raised.

Example 1:

SR No. 153 – Offshore Petroleum and Greenhouse Gas Storage Regulations 2011

Subcommittee's Letter⁴⁸

The Regulation Review Subcommittee (the Subcommittee) considered the Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (the Regulations) at a meeting on 27th February 2012. The Subcommittee makes the following comments.

(1) Identification of relevant provisions

First, the Subcommittee notes that whilst the accompanying Human Rights Certificate (the Certificate) describes two provisions of the Regulations which limit Charter rights, it does not specifically identify those provisions by number.

Could you confirm that the Certificate's references to two requirements to 'produce documents associated with certain environmental reports' (limiting Charter rights against self-incrimination) and 'to leave a facility when instructed to do so by the person in command of the facility' (limiting the Charter right to freedom of movement) are to regulations numbers 33 and 97 respectively?

(2) Discussion of certificate

If the former reference is to regulation 33, then the Subcommittee draws your attention to some possible inaccuracies in the Certificate's discussion:-

- *On page 1 (at A.1.), the requirement is described as one to 'produce documents associated with certain environmental reports'. However, regulation 33 appears to encompass a wider range of documents (including reports of OHS incidents) by virtue of regulation 32(2)(f) which covers documents notifying or recording 'reportable incidents', including breaches or non-compliance with the Offshore Petroleum and Greenhouse Gas Storage Act 2010 (the Act).*

⁴⁸ Letter dated 5 March 2012 to the Hon. Michael O'Brien MP, Minister for Energy and Resources, from the Regulation Review Subcommittee

- On page 2 (at C.1(c)), the maximum penalty for a breach of regulation 33 is described as 'a civil penalty'. However, regulation 33(1) appears to provide for a criminal penalty – a fine of 20 penalty units.
- On page 2 (at C.1(e)), reference is made to the statutory immunity against self-incrimination in section 725 of the Act. However, section 725 only applies to persons 'giving information or evidence or producing a document under section 722' and therefore does not apply to requirements to produce documents under the regulations.

(3) Definition of 'reportable incident'

The Subcommittee seeks further advice about the definition of 'reportable incident' in regulation 7 which is expressed in different terms to the equivalent definition in regulation 4 of the Offshore Petroleum and Greenhouse Gas (Environment) Regulations 2009 (Cth). In particular, paragraph (b) of the definition extends the notification, reporting and production requirements in regulations 29, 30 and 33 to include incidents relating to an activity that has caused or has the potential to cause a breach or non-compliance with the Act. It appears to have no equivalent in the Commonwealth regulations and may (in the case of breaches or non-compliances that are criminal offences) be relevant to the right against self-incrimination. However, the Subcommittee observes that any rights concerns would only arise where the operator of an activity is a human being (as opposed to a corporation) and that the reasonable excuse defences in regulations 29(2) and 30(2) may remove any obligation for to notify or record incidents that may reveal a breach of the criminal law by the operator of an activity.

(4) General comments

Whilst the Subcommittee appreciates that it is useful to avoid overly technical certificates, it is considered desirable for an accompanying certificate to expressly refer to section numbers of the regulations when identifying provisions which limit human rights.

The Subcommittee would appreciate a response to the matters raised by 20 March 2012 so that they can be considered at its next meeting. Please do not hesitate to contact me should you wish to discuss the matter.

Minister's Response⁴⁹

Thank you for your letter dated 5 March 2012 in regard to the human rights certificate issued pursuant to s 12A of the Subordinate legislation Act 1994 (the certificate) for the Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (the Regulations). The Regulations commenced on 1 January 2012, having been considered by the Governor in Council on 13 December 2011.

My response to the matters raked in this letter is outlined below.

Identification of relevant provisions

I confirm that the references in the certificate to the requirements to 'produce documents associated with certain environmental reports' and to 'leave a facility when instructed to do so by the person in command of the facility' are references to regulations 33 and 97 respectively.

Regulation 33 requires that the operator of an activity make copies of records available that are specified in regulation 32(2). These records generally relate to environmental reports, such as the environment plan in force for the activity, any variations to that environmental plan, written reports (including monitoring, audit and review reports) about environmental performance, records of emissions and discharges into the environment in accordance with the environmental plan and records of calibration and maintenance of monitoring devices.

⁴⁹ Letter dated 30 March 2012 to the Regulation Review Subcommittee from the Hon. Michael O'Brien MP, Minister for Energy and Resources

As the Subcommittee correctly identifies, regulation 33 also encompasses a wider range of records and copies of notifications and reports relating to reportable incidents (regulations 29 and 30) and recordable incidents (regulation 31).

Definition of 'reportable incident'

A reportable incident is defined in the definition regulation (regulation 6) of the Environmental chapter of the Regulations. A reportable incident, in relation to an operator of an activity, means an incident relating to the activity, whether or not described in an environment plan in force for the activity that has caused, or has the potential to cause, moderate to catastrophic environmental consequences. A reportable incident also includes a breach of, or non-compliance with the Act, the Environmental Chapter of the Regulations or the environmental performance objectives set out in an environment plan in force for the activity.

As the Subcommittee has observed, the definition of a reportable incident is expressed in different terms to the equivalent Commonwealth definition and catches a wider range of incidents. In particular, paragraph (b) of the definition of reportable incident extends the notification, reporting and production requirements in regulation 29, 30 and 33 to include incidents relating to an activity that has caused or has the potential to cause a breach or non-compliance with the Act, irrespective of environmental considerations.

In response to the Subcommittee's request for further advice about the definition of reportable incident, I advise that the policy rationale for extending the reporting requirements is to enable the regulator to be provided with timely information on incidents that have resulted, or may result, in detrimental environmental consequences, or reflect a company's operational culture of recurrent non-compliance.

Additionally, the regulator must be notified of incidents whether or not such incidents are described in an environment plan. In the absence of the information contemplated in the definition of reportable incident, the regulator may not be adequately informed to require compliance with regulation 10, which prohibits operators from continuing to operate after a significant new or increased environmental risk is presented.

It is intended that only environmentally significant breaches must be reported. The Regulations will therefore be amended to remove the 'or' between paragraphs (a) and (b) of the definition of reportable incident in regulation 6 to clarify this at the next available opportunity.

Right against self incrimination

The Regulations limit a human right as listed in section 25(2)(k) of the Charter of Human Rights and Responsibilities Act 2006, being a right not to be compelled to testify against oneself, by the requirement in regulation 33 to produce documents associated with certain 'environmental reports' and any other reports of reportable incidents that breach the Act, the Environmental Chapter of the Regulations or the environmental performance objectives set out in an environment plan in force for the activity. The subcommittee correctly highlights that the maximum penalty for a breach of regulation 33 is a criminal penalty (as provided in section 111 of the Sentencing Act 1991) which is currently set at 20 penalty units.

The purpose of requiring the production of certain documents is to address risk to the environment or safety arising from incidents or occurrences recorded within the documents. There is a significant public interest in ensuring that the regulator possess information sufficient to require corrective or remedial actions to be taken by the holder of an authority to prevent or minimise such risks.

The certificate indicated that a number of safeguards to the right against self-incrimination are in place, including section 725 of the Offshore Petroleum and Greenhouse Gas Storage Act 2010 (the Act). This section provides immunity against both direct and indirect use of the information obtained against the individual in any criminal or civil proceeding (other than proceedings regarding failure to comply with a request for information, or proceedings regarding provision of false or misleading information).

I confirm that the certificate inadvertently refers to section 725 of the Act , which only applies to persons giving information or evidence or producing a document under section 722 and therefore does not apply to requirements to produce documents under regulations 29, 30, 32 and 33 of the Regulations.

However, any limitations on the right against self-incrimination in this context are not likely to affect individuals, as the requirements in the Act and Regulations make it prohibitive for an individual to be an operator of an offshore facility. The operator has obligations for administration of a facility, which requires a number of employees. In so far as the Act is breached, the corporation, as the operator of those activities, would be liable as opposed to specific individuals.

Furthermore, the obligation to produce documents applies only to an operator who has voluntarily chosen to enter into a necessarily highly regulated industry. It does not apply to the general public. In the unlikely event that the powers did relate to natural persons, the obligation to produce documents relates only to specific documents that the operator is required to keep.

The right against self-incrimination is limited in a manner that is intended to assist in managing risks to the environment and the health and safety of workers and the public. Petroleum and greenhouse gas operators must be subject to rigorous environmental and safety reporting requirements in order to ensure that an appropriate level of protection is afforded to the environment, workers and the public.

Therefore, the limitation on the right to self-incrimination is acknowledged but considered to be a justifiable limitation.

Finally, the principle of the right against self-incrimination covers the compulsory admission of documents or things which might incriminate a person. However, the High Court has held that the protection against self-incrimination accorded to compelled production of documents that were already in existence is considered weaker than the protection accorded to oral testimony or to documents that are brought into existence expressly in order to comply with an information request.⁵⁰

The delivery of existing documents on request in most circumstances is different from compelling a person to compile an incriminating document. Some jurisdictions have therefore regarded an order to hand over existing documents as not constituting self-incrimination at all. Accordingly any protection afforded to documentary material by the Charter right is limited in scope and is not as fundamental to the principle of the right as the protection against compelling verbal responses.

Administration

Your comments about express reference to specific section or regulation numbers in certificates submitted to the Governor in Council for consideration are noted and will be reflected in Departmental practice in future.

(L) MELBOURNE COLLEGE OF DIVINITY – AN UNUSUAL MATTER

The Committee received a phone call on 7 December 2011 from Mr Greg Deakin, Manager of the Victorian Registration and Qualifications Authority (VRQA). Mr Deakin rang to ascertain whether there had been any issues in relation to the notice approving the decision by the VRQA for the Melbourne College of Divinity to operate as a University (the Notice). The Committee was unaware of any such notice. Mr Deakin advised the Committee that the Notice had been tabled in Parliament on 30 August 2011 and that the disallowance period expired on 6 December 2011. Mr Deakin also was in receipt of legal advice that did not indicate that the material should be sent

⁵⁰ See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 472, 502 (Mason CJ and Toohey J); 527 (Deane, Dawson and Gaudron JJ); 55 (McHugh J).

to SARC. The material had however been sent to the Clerks for tabling in Parliament. The Committee requested copies of the letters and the Notice.

The Committee made further enquiries. No material was received by SARC in relation to the Notice. Further research indicated that Section 4.3.32 of the *Education and Training Reform Act 2006* applied Part 5 of the Subordinate Legislation Act 1994 (the Act) to the notice as if it were a statutory rule. However, the provisions of Section 4.3.32 only apply the provisions of Part 5 of the Act and *not Parts 3 and 3A which contain the obligations to send the documents to SARC.*

The issue was that SARC was obliged to scrutinise the Notice but did not receive the relevant material. Statutory rules are sent to SARC by Anstat. However, this was a notice which was to be treated as a statutory rule. Parts 3 and 3A of the Act which contain the relevant obligations to send the material to SARC were not applied by the Section 4.3.32 of the *Education and Training Reform Act 2006*. The disallowance period had expired.

The relevant material was sent however to the Clerk by the VRQA. The letter is set out:-

'Dear Mr Purdey

In accordance with section 4.3.32 'Disallowance of notices' under the Education and Training Reform Act (ETR Act 2006), I submit the notice of the decision of the Victorian Registration and Qualifications Authority to approve the Melbourne College of Divinity to operate as a university.

It is a requirement under section 4.2.32 of the ETR Act 2006 that a copy of the notice is laid before both Houses of Parliament on or before the 6th sitting day after the publication of the notice in the Government Gazette.

The notice was published in the Government Gazette on Monday 29 August 2011.

I understand that 18 sitting days must be available for a notice of resolution in Parliament to disallow the VRQA notice of approval. To this effect, could you please arrange for the notice to be tabled in the Legislative Council on or before 1 September to ensure sufficient sitting days in 2011.

Yours sincerely

Lynn Glover

Director

Victorian Registration & Qualifications Authority.

The relevant Notice is set out: -

"Authority

This notice is issued pursuant to section 4.3.30(1) of the Education and Training Reform Act 2006.

Definitions

Melbourne College of Divinity means the Melbourne College of Divinity continued as a body corporate under the Melbourne College of Divinity Act 1910.

Approval of institution to operate as a University

Pursuant to section 4.3.30(1) of the Education and Training Reform Act 2006, the Victorian Registration and Qualifications Authority (VRQA) approves the Melbourne College of Divinity to operate as a specialised university under the specialised title of 'MCD University of Divinity'.

Period of Approval

The approval herein remains in force for 5 years commencing 1 January 2012.

Signed Stuart Hamilton

VRQA Chair

*Witness
Robyn Timmins
VRQA Deputy Director
Dated 25 August 2011"*

The Committee received an email.

Further to our conversation I attach the Gazette notice and our letter of transmission to the Clerks of both Houses. The notice was tabled in both Houses on 30 August 2011 and the 18 day period of disallowance by Parliament concluded yesterday. There is some urgency to conclude this process in 2011. While we were aware of SARC, our legal advice did not indicate we were required to advise SARC separately.

The assessment of the application under Section 4.3.30 of the Education and Training Reform Act 2006 has been comprehensive and conducted in accordance with the relevant National Protocol for higher education approval processes, including assessment by an appropriate higher level expert committee and a public consultation process: and consideration and final approval by the VRQA at Board level.

It is useful to consider the facts. The Notice itself was unexceptional. The disallowance period had expired. There was an obligation on SARC to scrutinise the Notice by virtue of the application of Part 5 of the Act. However, the obligation to send the material to SARC is set out in Parts 3 and 3A of the Act. There was compliance with the obligation to send the material to the Clerk and have the material tabled in both Houses of Parliament. But for Mr Deakin's telephone call to the Committee to make general enquiries, SARC would not have become aware of the Notice.

As a result of various communications the matter was resolved. The Committee received a further email clarifying matters. The email is set out: -

I refer to our emails and conversation of today on the notice by the Victorian Registration and Qualification Authority (VRQA) approving the MCD (Melbourne College of Divinity) to operate as a University.

The notice was tabled in Parliament but regrettably was not sent to SARC at the same time it was sent to the Clerk for tabling.

Our emails and discussions have noted the provisions of section 4.3.32 of the Education and Training Reform Act 2006, which only apply the provisions of Part 5 of the Subordinate Legislation Act 1994 to the VRQA notice and not Parts 3 and 3A which contain the obligations to send the documents to SARC.

I confirm I advised the VRQA on the procedures it should follow, that I strictly followed the obligations under section 4.3.32 of the Education and Training Reform Act 2006, and that I assumed that the Clerk of Parliaments (or some other procedure operating within Parliament) would have arranged for the documents to be sent to SARC to enable it to perform its functions under Part 5 of the SLA.

I have now discussed the above matter with the Director of the VRQA and can confirm that the VRQA will amend its procedures to ensure that in the future, a copy of the relevant documents are forwarded to SARC at the same time as they are forwarded to the Clerk for tabling.

The Committee sent the following email which concluded the matter.

Thank you for your email.

The notice was tabled in the Parliament on 30 August. The period of disallowance for the notice expired on 6 December 2011. I note your advice that the VRQA will amend its procedures to ensure that in the future, a copy of the relevant documents are forwarded to SARC at the same time as they are forwarded to the Clerk for tabling.

I have discussed the matter with Mr Edward O'Donohue, Chair of the Scrutiny of Acts and Regulations Committee (SARC). SARC is appreciative of the material in your email and notes the oversight in not forwarding the notice to it. In the circumstances, SARC will discuss the matter generally at its next meeting which is 5 February 2012.

The Committee sent the following letter to the Minister

Committee letter⁵¹

Pursuant to section 4.3.30(1) of the Education and Training Reform Act 2006 (ETR Act 2006), the Victorian Registration and Qualifications Authority (VRQA) approved the Melbourne College of Divinity (MCD) to operate as a University.

In accordance with section 4.3.32 of the ETR Act 2006 the VRQA submitted the notice of its decision (the Notice) to approve the MCD to operate as a university to the Clerk of the Parliament for tabling in both Houses of Parliament. The Notice was duly tabled in both Houses of Parliament on 30 August 2011. The Notice was also published in the Government Gazette on 29 August 2011.

Section 4.3.32 of the ETR Act 2006 applies the provisions of Part 5 of the Subordinate Legislation Act 1994 (the Act) to the Notice. However, it does not apply Parts 3 and 3A which contain the obligation to send the relevant documents to the Scrutiny of Acts and Regulations Committee (SARC). The VRQA complied with its statutory obligations. However, SARC was therefore unable to perform its statutory role because it did not receive the material. This is an unusual circumstance.

The VRQA has confirmed it will amend its procedures to ensure that in the future, a copy of the relevant documents are sent to SARC at the same time as they are forwarded to the Clerk for tabling. It seems that section 4.3.32 of the ETR Act 2006 which applies Part 5 of the Act to the Notice indicates a clear intention as to SARC's scrutiny role. SARC seeks your advice as to whether there ought to be a legislative amendment to the ETR Act 2006 to ensure that Parts 3 and 3A of the Act are applied where appropriate to correct this oversight.

SARC looks forward to receiving your advice. Please do not hesitate to contact Mr Michael Gidley MP should you wish to discuss the matter.

Minister's response⁵²

Thank you for your letter to the Hon. Martin Dixon, MP, Minister for Education, regarding a suggested amendment to the Education and Training Reform Act 2006. As the matter falls within my portfolio responsibilities, Minister Dixon has referred your letter to me for response.

The anomaly has arisen in the Act as a result of changes made to the Subordinate Legislation Act 1994, in 2010, with the insertion of section 15A in Part 3. These changes have not yet been reflected in the Education and Training Reform Act 2006.

I can confirm that this irregularity will be rectified in the next scheduled Bill to make minor and technical amendments to the Education and Training Reform Act 2006.

Thank you for bringing this matter to our attention.

⁵¹ Letter dated 8 February 2012 to the Hon. Martin Dixon MP, Minister for Education from the Regulation Review Subcommittee

⁵² Letter date 1 March 2012 to the Regulation Review Subcommittee from the Hon. Peter Hall MLC, Minister for Higher Education and Skills and Minister responsible for the Teaching Profession.

CHAPTER 3 – THE REVIEW OF LEGISLATIVE INSTRUMENTS – THE FIRST YEAR OF OPERATION

(A) THE COMMITTEE’S OBLIGATION TO SCRUTINISE LEGISLATIVE INSTRUMENTS – THE POWER TO REVIEW

The *Subordinate Legislation Amendment Bill* was introduced in August 2010. Amendments to the *Subordinate Legislation Act 1994* came into effect on 1 January and 1 July 2011. The amendments related to the scrutiny of legislative instruments and specifically inserted new Parts 2A, 3, 3A and 5A into the Act. The amendments essentially duplicated and extended the current arrangements relating to the scrutiny of statutory rules to legislative instruments.

The Committee’s power to review legislative instruments is set out in section 25A, 25B and 25C of the Act.

25A. Review of legislative instruments by the Scrutiny Committee

- (1) *The Scrutiny Committee may report to each House of the Parliament if the Scrutiny Committee considers that any legislative instrument laid before Parliament—*
 - (a) *does not appear to be within the powers conferred by the authorising Act or the statutory rule under which it is made;*
 - (b) *without clear and express authority being conferred by the authorising Act or the statutory rule under which it is made—*
 - (i) *has a retrospective effect; or*
 - (ii) *imposes any tax, fee, fine, imprisonment or other penalty; or*
 - (iii) *purports to shift the legal burden of proof to a person accused of an offence; or*
 - (iv) *provides for the subdelegation of powers delegated by the authorising Act or the statutory rule under which it is made;*
 - (c) *is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;*
 - (d) *has been prepared in contravention of any of the provisions of this Act or of the guidelines with respect to legislative instruments and the contravention is of a substantial or material nature.*
- (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 legislative instrument should be—*
 - (a) *disallowed in whole or in part; or*
 - (b) *amended as suggested in the report.*

25B. Suspension of legislative instrument or part of an instrument

- (1) *If the Scrutiny Committee—*

- (a) proposes under section 25A to recommend that a legislative instrument should be—
 - (i) disallowed in whole or in part; or
 - (ii) amended; and
 - (b) is of the opinion that considerations of justice and fairness require that the operation of the legislative instrument or any part of the legislative instrument should be suspended pending the consideration by the Parliament of the legislative instrument—

the Scrutiny Committee may propose in the report under section 25A that the operation of the legislative instrument or part of the legislative instrument be suspended.
- (2) If the Scrutiny Committee proposes that the operation of a legislative instrument or part of a legislative instrument be suspended—
 - (a) the Scrutiny Committee must forthwith send a copy of the report to the responsible Minister, the Governor in Council and the instrument maker; and
 - (b) subject to subsection (3), the operation of the legislative instrument or part of a legislative instrument is suspended at the end of the period of 7 days after the sending of the report to the Governor in Council until the end of the period during which the legislative instrument or part of the legislative instrument could be disallowed under section 25C.
 - (3) The Governor in Council, on the recommendation of the responsible Minister made within the period of 7 days referred to in subsection (2), may by Order published in the Government Gazette declare that the operation of the legislative instrument or part of the legislative instrument is not suspended.
 - (4) As from the date on which the Order is published, the provision in a report of the Scrutiny Committee providing for the suspension ceases to have any force or effect.
 - (5) While the operation of a legislative instrument or part of the legislative instrument is suspended under this section, the legislative instrument is deemed not to have been made or to have been made without that part.

25C. Disallowance

- (1) This section applies to a legislative instrument if—
 - (a) the authorising Act under which the legislative instrument is made states that the legislative instrument is subject to disallowance by the Parliament or by a House of the Parliament; or
 - (b) in a report under section 25A, the Scrutiny Committee has recommended that the legislative instrument be disallowed in whole or in part; or
 - (c) there was a failure to comply with section 16B(1) and the Scrutiny Committee has reported that failure to each House of the Parliament.
- (2) A legislative instrument to which this section applies is disallowed in whole or in part if—
 - (a) a notice of a resolution to disallow the legislative instrument is given in a House of the Parliament—
 - (i) on or before the 18th sitting day of that House after the instrument is laid before that House; or
 - (ii) in the case of failure to comply with section 16B(1) in respect of a legislative instrument, on or before the 24th sitting day of that House after—
 - (A) the legislative instrument has been published in the Government Gazette under section 16A(1); or
 - (B) if section 16A(2) applies, notice of making and availability has been published in the Government Gazette; and

- (b) *the resolution is passed by that House on or before the 12th sitting day of that House after the giving of the notice of the resolution.*
- (3) *Notice of a resolution to disallow a legislative instrument may be expressed to apply to the whole or to any part of the legislative instrument.*
- (4) *A resolution to disallow the whole or any part of a legislative instrument has effect according to its tenor.*
- (5) *If a House of the Parliament is prorogued or the Legislative Assembly is dissolved—*
- (a) *the prorogation or dissolution does not affect the power of the House to pass a resolution disallowing a legislative instrument; and*
- (b) *the calculation of sitting days of the House is to be made as if there had been no prorogation or dissolution.*

(B) WHAT IS A LEGISLATIVE INSTRUMENT? – DEFINED IN SECTIONS 3(1) AND (2) OF THE ACT

What is a legislative instrument?

The term ‘legislative instrument’ is defined in sections 3(1) and (2) of the Act.

A legislative instrument may therefore include but is not limited to: -

- An instrument of delegation;
- An evidentiary certificate;
- An instrument of appointment or an instrument of appointment which changes conditions or terms of appointment;
- An instrument which has the sole purpose of giving notice of the making of another instrument;
- An instrument which grants, renews, varies, transfers, suspends or cancels a lease, licence or permit that authorises a specified entity to do any act or not to do any act or an instrument refusing to grant, renew, vary or transfer such a lease, licence or permit;
- An instrument that registers a specified entity or an instrument refusing to register a specified entity;
- An instrument that renews, varies, transfer, suspends or cancels a registration of a specified entity or an instrument refusing to renew, vary, transfer, suspend or cancel a registration of a specified entity;
- An instrument imposing conditions on a lease, licence, permit or registration held by a specified entity;
- An instrument for the principal purpose of taking disciplinary or enforcement action to ensure compliance with an Act, subordinate instrument or any other law.

3 Definitions

(1) *In this Act—*

...

legislative instrument *means an instrument made under an Act or statutory rule that is of a legislative character but does not include—*

- (a) *a statutory rule; or*
- (b) *a local law made under Part 5 of the Local Government Act 1989 and any other instrument made by a council under that Act or any other Act; or*

- (c) *a proclamation of commencement of an Act or any provision of an Act; or*
 - (d) *a planning scheme or an amendment to a planning scheme under the Planning and Environment Act 1987; or*
 - (e) *the Victoria Planning Provisions within the meaning of the Planning and Environment Act 1987; or*
 - (f) *a practice note or practice direction issued by or on behalf of a court or tribunal or an instrument which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal; or*
 - (g) *an instrument of purely administrative character; or*
 - (h) *a prescribed instrument or a prescribed class of instrument;*
- (2) *For the avoidance of doubt, but without limiting paragraph (g) of the definition of legislative instrument, instruments of purely administrative character for the purposes of this Act include, but are not limited to, the following—*
- (a) *an instrument of delegation;*
 - (b) *an evidentiary certificate;*
 - (c) *an instrument of appointment or an instrument which changes conditions or terms of appointment;*
 - (d) *an instrument which has the sole purpose of giving notice of the making of another instrument;*
 - (e) *an instrument which grants, renews, varies, transfers, suspends or cancels a lease, licence or permit that authorises a specified entity to do any act or not to do any act or an instrument refusing to grant, renew, vary or transfer such a lease, licence or permit;*
 - (f) *an instrument that registers a specified entity or an instrument refusing to register a specified entity;*
 - (g) *an instrument that renews, varies, transfers, suspends or cancels a registration of a specified entity or an instrument refusing to renew, vary, transfer, suspend or cancel a registration of a specified entity;*
 - (h) *an instrument imposing conditions on a lease, licence, permit or registration held by a specified entity;*
 - (i) *an instrument for the principal purpose of taking disciplinary or enforcement action to ensure compliance with an Act, subordinate instrument or any other law.*

(C) POWER TO PRESCRIBE AN INSTRUMENT TO BE A LEGISLATIVE INSTRUMENT OR TO BE EXEMPT – DEFINED IN SECTION 4A

The power to prescribe an instrument to be a legislative instrument or to be exempt is set out in section 4A of the Act.

4A Prescribing instrument to be a legislative instrument or to be exempt

- (1) *The Governor in Council may make regulations under this Act—*
 - (a) *prescribing an instrument or a class of instrument for the purposes of paragraph (h) of the definition of legislative instrument;*
 - (b) *prescribing an instrument or a class of instrument to be, or not to be, a legislative instrument or class of legislative instrument for the purposes of this Act or any specified provision or provisions of this Act, whether or not subject to conditions;*

- (c) *exempting an instrument or a class of instrument that is a legislative instrument from the operation of this Act or any specified provision or specified provisions of this Act, whether or not subject to conditions.*
- (2) *If an instrument or a class of instrument is prescribed to be a legislative instrument or legislative instruments—*
- (a) *this Act applies to the instrument or class of instrument; and*
- (b) *subject to this Act, any provision of the authorising Act under which the instrument or class of instrument is made which is inconsistent with, or duplicates, any provision of this Act does not apply to the instrument or class of instrument.*
- (3) *If an instrument or a class of instrument is prescribed as exempt—*
- (a) *the specified provision or provisions of this Act from which the instrument is prescribed to be exempt does not, or do not, apply to the instrument or class of instrument; and*
- (b) *unless provision is made to the contrary by the authorising Act under which it is made, the instrument or a provision of it comes into operation—*
- (i) *at the beginning of the day on which the instrument is published in the Government Gazette; or*
- (ii) *at the beginning of a later day that is expressed in the instrument as the day on which the instrument or provision (as the case requires) comes into operation.*

(D) WHAT IS A LEGISLATIVE INSTRUMENT? A FURTHER DEFINITION – THE SUBORDINATE LEGISLATION (LEGISLATIVE INSTRUMENTS) REGULATIONS 2011

Schedule 1 – Prescribed not to be legislative instruments

The *Subordinate Legislation (Legislative Instruments) Regulations 2011* (the Regulations) further define which instruments are prescribed legislative instruments and which instruments are not prescribed to be legislative instruments.

Schedule 1 of the Regulations set out the provisions of various acts which are prescribed not to be legislative instruments. The seventy four acts are listed alphabetically from the *Aboriginal Heritage Act 2006* to the *Zoological Parks and Gardens Act 1995*.

Schedule 2 – Prescribed to be legislative instruments

Schedule 2 of the Regulations sets out the provision of various acts which are prescribed to be legislative instruments. The thirty seven acts are listed in alphabetically from the *Accident Compensation Act 1985* to the *Water Act 1989*.

Schedule 3 – Exempt legislative instruments

Schedule 3 sets out those provisions of various acts which are exempt from the operation of Parts 2A, 5A, Section 16B, Section 16C, Section 16E and Section 16F of the Act. The one hundred and twenty six acts are listed alphabetically from the *Aboriginal Heritage Act 2006* to the *Wrongs Act 1958*.

(E) THE FIRST YEAR OF OPERATION – A TIMING ISSUE

The first year of operation of the scrutiny of legislative instruments dated from 1 July 2011 to 30 June 2012. The Subcommittee has considered 24 legislative instruments. None of the legislative instruments were accompanied by Regulatory Impact Statements.

The Subcommittee did not make any reports to Parliament. However, it did have some issues in relation to the provision of the material to it at a date which did not allow appropriate time for scrutiny.

Example 1

This is best understood by example. The matter was initially raised in relation to a Legislative Instrument – *Approval of Sports Betting Event (International Rule Series)* (the LI International Series). The LI International Series allowed sports betting competitions in relation to the International Rule controlled by the Australian Football League in conjunction with the Gaelic Athletic Association on 28 October and 4 November 2011. By the time SARC received the material to scrutinise, those events had already passed. Whilst there was compliance with the Act in terms of the provision of material, the Committee wrote to the Victorian Commission for Gambling Regulation. It made the point that it was unable to perform its scrutiny task if instruments are received after the event.

Subcommittee's letter⁵³

Making of a Legislative Instrument – Approval of Sports Betting Event (International Rule Series)

The Regulation Review Subcommittee (the Subcommittee) considered the 'Approval of Sports Betting Event (International Rule Series) Legislative Instrument' (LI) at a meeting on 5 December 2011.

The Subcommittee notes that the LI is an instrument within the meaning of the Subordinate Legislation Act 1994 (the Act). The LI was published in the Victorian Government Gazette on 27 October 2011. Pursuant to section 16C of the Act, the LI and any accompanying documents must be given to the Scrutiny of Acts and Regulations Committee (SARC) within 10 working days after the making of the instrument. Ten working days after the publication in the Government Gazette expired on 11 November. In this instance, SARC received the relevant documents on 10 November 2011 which is within ten working days of publication in the Government Gazette.

Whilst it appears there has been compliance with the Act, the Subcommittee notes that this is the first year of operation of its scrutiny of legislative instruments. There may be some debate as to whether the 'making' of the LI can be considered the same as the 'publication' of it in the Government Gazette. The Subcommittee also notes there is no guidance in the Act as to whether the 'publication' of the instrument in the Government Gazette can be considered the 'making' of a legislative instrument in terms of the application of section 16C of the Act.

However, the practical effect of the LI is that allowed sports betting competitions in relation to the International Rule Series controlled by the Australian Football League in conjunction with the Gaelic Athletic Association on 28 October and 4 November 2011. By the time SARC received the material the events had already passed. The events held on 28 October and 4 November were advertised well prior to those dates on the AFL website on 24 June 2012.

The Subcommittee is of the view that it is unable to perform its task of scrutinizing such legislative instruments if it receives them after the events have been held. The Subcommittee requests that in the making of any future legislative instruments, any documentation sent to it should be done well prior to the event. This will enable SARC to perform its statutory tasks. Where events are planned well in advance, the Subcommittee is of the view that this should not be a burdensome task.

The Subcommittee would appreciate your response.

⁵³ Letter dated 7 December 2011 to the Jane Brockington, Executive Commissioner, Victorian Commission for Gambling Regulation, from the Regulation Review Subcommittee.

Please do not hesitate to contact Ms Helen Mason in the first instance on 868 22893 should you require any further information.

The Victorian Commission for Gambling responded by way of letter dated 20 December 2011. The letter set out in detail the timing relating to obtaining the approvals and publication in the Government Gazette.

Victorian Commission for Gambling's response⁵⁴

I refer to your letter dated 7 December 2011 regarding the Approval of Sports Betting Event (International Rule Series) controlled by the Australian Football League (AFL) in conjunction with the Gaelic Athletic Association (GAA).

The matters raised in your letter have been examined and the following advice explains the particular circumstances of this case.

The advertising of the events on the AFL website on 24 June 2011, well before the actual matches on 28 October and 4 November 2011, is a commercial matter to promote the staging of the event. The actual conduct of such an event, the International Rule Series, does not require any approval by the Commission.

The Commission's approval relates only to the event as an "Approved Event for betting purposes". This approval then enables betting to be offered on the event in Victoria and for the Sports Controlling Body (in this case the AFL) to enter into an agreement with betting operators regarding payment of a fee for offering betting on that event.

On 19 July 2011, Tabcorp requested the Commission's approval of the sport of International Rules, controlled and regulated by the Australian Football League (AFL) and the Gaelic Athletic Association (GAA), as a betting event. In approving events, the Commission considers a range of criteria that must be satisfied one of which is that appropriate integrity controls are in place.

As the International Rules game was not captured by the codes of conduct for either the GAA competitions or AFL/NFL competitions, the VCGR was informed that the AFL would be reluctant to allow betting on the event as it could not ensure the integrity of the games. The AFL undertook to progress the necessary agreements by way of a Memorandum of Understanding (MoU) with the Gaelic Athletics Association, that would bind all players to a code of conduct, modelled on the current AFL code of conduct, during the International Rules series.

As such, the Commission was unable to progress consideration of the submission until the MoU was finalised.

The MoU was finalised on the 27 October 2011 and this advice was communicated to the Commission on that date.

Section 4.5.10 of the Gambling Regulation Act 2003 states that the approval takes effect from the date of publication in the Government Gazette.

Following the Commission's approval on 27 October 2011, publication in the Government Gazette took place that same day to afford "approved event" status prior to the conduct of the first game on 28 October 2011.

I note your comment that while the subsequent advice provided to the Scrutiny of Acts and Regulations Committee (SARC) was within the prescribed 10 day period it did not allow adequate time for scrutinizing the event prior to its occurrence.

The Commission recognises and respects the importance of the role of SARC and is committed to always giving punctual and technical effect to this in respect of the requirements of the Subordinate Legislation Act 1994 and the relevant legislative instruments.

⁵⁴ Letter dated 20 December 2011 to the Regulation Review Subcommittee from Jane Brockington, Executive Commissioner, Victorian Commission for Gambling Regulation.

The Subcommittee further responded stating it understood the timing of events. However, it reiterated the point that there is little utility on a practical level in scrutinizing material after an event has taken place.

Subcommittee's letter⁵⁵

Making of a Legislative Instrument – Approval of Sports Betting Event (International Rule Series)

Thank you for your letter dated 20 December 2011.

The Regulation Review Subcommittee (the Subcommittee) considered it at a meeting on 6 February. The Subcommittee appreciated the detailed outline of events and your explanation of the particular circumstances of this case.

The Subcommittee understands the timing of the events. However, the Subcommittee is of the view that as these events are foreshadowed many months or even a year in advance, it is reasonable for the Victorian Commission for Gambling Regulation (the Commission) to seek the appropriate approvals at a much earlier stage and therefore provide the relevant material to it further in advance.

Notwithstanding the provision of the material within the prescribed 10 day period, the Subcommittee is of the view that on a practical level there is little utility in it scrutinizing the material after an event has taken place. The provision of the material at a much earlier stage would enable the Subcommittee to perform its role and fulfil its statutory obligations. The Subcommittee also makes the further comment that this is the first year of the operation of the Subordinate Legislation Act 1994 (the Act) in relation to the scrutiny of legislative instruments. The Subcommittee will comment on the first year of operations of the scrutiny of legislative instruments in its Annual Report which will be tabled later this year. After reviewing the year as a whole, there may be some matters which require further consideration.

The Subcommittee notes your advice that the Commission recognizes and respects the importance of the role of the Scrutiny of Acts and Regulations Committee (SARC). The Subcommittee further notes your comments that the Commission is committed to always giving punctual and technical effects to the requirements of the Act and the relevant legislative instruments.

The Subcommittee thanks you for your advice and co-operation.

Please do not hesitate to contact Mr Michael Gidley MP, Chair of the Subcommittee should you wish to discuss the matter.

Example 2

The Subcommittee grappled with the same issue again in relation to another legislative instrument. The Legislative Instrument – *Exemption from Section 65(A) of the Road Safety Act 1986 for persons participating in the Valvoline Shepparton SpringNats 2011* (the LI Shepparton SpringNats). The practical effect of the LI Shepparton SpringNats was to exempt persons from the operation of section 65A(1) of the *Road Safety Act 1986* whilst participating in the Valvoline SpringNats 2011 at the Shepparton Showgrounds on 25, 26 and 27 November 2011. The Committee received the material on 2 December 2011 after the event had already passed. Whilst there was compliance with the Act the Committee was unable to properly fulfil its statutory obligations. The Committee wrote to the Minister in those terms.

⁵⁵ Letter dated 8 February 2012 to the Jane Brockington, Executive Commissioner, Victorian Commission for Gambling Regulation, from the Regulation Review Subcommittee.

Legislative Instrument – Exemption from Section 65(A) of the Road Safety Act 1986 for persons participating in the Valvoline Shepparton SpringNats 2011 in Shepparton Showgrounds

Subcommittee's letter⁵⁶

The Regulation Review Subcommittee (the Subcommittee) considered the Legislative Instrument - Exemption from Section 65(A) of the Road Safety Act 1986 for persons participating in the Valvoline Shepparton SpringNats 2011 (the Instrument) in Shepparton Showgrounds at a meeting on 27 February 2012.

Two matters are the subject of comment.

(1) The 'making' of an instrument

The Subcommittee notes that the Instrument is an instrument within the meaning of the Subordinate Legislation Act 1994 (the Act). The Instrument was published in the Government Gazette on 23 November 2011 and commenced operation on the day after on 24 November 2011. Pursuant to section 16C of the Act, the Instrument and any accompanying documents must be given to the Scrutiny of Acts and Regulations Committee (the Committee) within 10 working days after the 'making' of the instrument. In this instance SARC received the material on 2 December 2011 which is within 10 workings of publication in the Government Gazette and also within 10 working days of their 'making'.

Whilst it appears there has been compliance with the Act in terms of the obligation to send material to SARC, the Subcommittee notes that this is the first year of operation of its scrutiny of legislative instruments. There may be some debate as to whether the 'making' of the Instrument can be considered the same as 'publication' of it in the Government Gazette. The Subcommittee also notes there is no guidance in the Act as to whether the 'publication' of the Instrument in the Government Gazette can be considered the 'making' of a legislative instrument in terms of the application of section 16C of the Act. When is an instrument 'made'? Is it the date it is signed by the Minister or is it the date of publication in the Government Gazette? The Subcommittee would appreciate any comments you may have with respect to these matters.

(2) The practical effect of the Instrument

The practical effect of the Instrument is to exempt persons from the operation of section 65A(1) of the Road Safety Act 1986 whilst participating in the Valvoline SpringNats 2011 at the Shepparton Showgrounds on 25, 26 and 27 November 2011.

The Instrument was tabled in the Parliament on 6 December 2011. The period of disallowance expires on 1 May 2011. By the time SARC received the material on 2 December 2011, the event had already passed. Notwithstanding the provision of the material within the prescribed 10 day period, the Subcommittee is of the view there is little utility in it scrutinizing the material after an event has taken place. The Subcommittee understands the timing of these events. However, the Subcommittee is of the view that as these events are foreshadowed many months in advance, it is reasonable to provide material to it further in advance. The Subcommittee therefore requests that in the making of any future legislative instruments, any documentation sent to it should be done well prior to the event.

The provision of the material at a much earlier stage would enable the Subcommittee to perform its role and fulfil its statutory obligations. In the event there were matters upon which the Subcommittee wished to comment, either with respect to the Instrument itself or the procedures relating to its making, it is of the view that it should have the opportunity to do so in a timely manner. The Subcommittee will comment on the first year of the operations of the scrutiny of

⁵⁶ Letter dated 5 March 2012 to the Hon. Terry Mulder MP, Minister for Roads, from the Regulation Review Subcommittee.

legislative instruments in its Annual Report which will be tabled later this year. After reviewing the year as a whole, there may be some matters which require further consideration.

The Subcommittee would appreciate your response to these matters by no later than 20 March 2012 so that they can be considered at its next meeting.

Please do not hesitate to contact Mr Michael Gidley MP should you wish to discuss these matters.

The Minister responded by way of letter. The Minister accepted the Committee's point that there was little utility in scrutinising materials after the event to which they refer has already taken place. VicRoads advised that it would undertake a number of initiatives to inform applicants for such exemptions of the necessary lead in time to process such applications. It took the view that ideally, an application needs to be made three months prior to the event to enable the material to be promptly sent to the Committee.

Minister's response⁵⁷

Thank you for your letter dated 5 March 2012 advising that the Regulation Review Subcommittee (the Subcommittee) of the Scrutiny of Acts and Regulations Committee have raised two matters for comment regarding the instrument of exemption from section 65A of the Road Safety Act 1986 for persons participating in the Valvoline Shepparton Springnats 2011.

In relation to the first matter, you have asked for an opinion as to whether an instrument is "made" within the meaning of section 16C of the Subordinate Legislation Act 1994 on the day it is signed by the Minister or on the day it is published in the Government Gazette.

I am advised that the better view in relation to an instrument made under section 65A(3) of the Road Safety Act 1986 is that the instrument is made on the date of publication. This is due to the actual wording of that sub-section which provides that the Minister may, by notice published in the Government Gazette, declare that the provisions in subsections (1) and (2) and any regulations do not apply (which in effect enables persons covered by the exemption to drive in a way that may cause a vehicle to lose traction). It appears from this wording that publication in the Government Gazette is a precondition to the notice taking effect. If this is the case, then the 10 day time limit in section 16C of the Subordinate Legislation Act 1994 for provision of the Notice and relevant certificates only begins to run from the date of publication in the Gazette.

In relation to the second matter, you note correctly that even though the provision of the Gazette Notices and relevant Certificates complied with the requirements in the Subordinate Legislation Act 1994, there is little point in the Subcommittee scrutinising those materials after the event to which they refer has already taken place.

VicRoads has advised that it will undertake a number of initiatives to inform applicants for such exemptions of the necessary lead in time to process such applications. This should allow for publication of Gazette Notices in sufficient time before the event, which should in turn enable earlier notification to the Scrutiny of Acts and Regulations Committee. In this instance, the initial application was made to VicRoads on 27 October 2011 by Greater Shepparton City Council, Events and Promotions Branch and a significant amount of dialogue was required before VicRoads could be satisfied that it was appropriate to grant the exemption.

Ideally, in line with information on other government agency websites, an application three months prior to such events will be requested. In my view, that time line needs to remain flexible, as the need to support suitable tourism and community initiatives could be compromised if a blanket refusal to consider such applications in a period less than three

⁵⁷ Letter dated 25 March 2012 to the Regulation Review Subcommittee from the Hon. Terry Mulder, Minister for Roads. Please refer to paragraphs 1 and 2 of page 9. Please note the 2011 statutory rules series and legislative instruments series were considered in 2011 and the early part of 2012. Accordingly ministerial correspondence relating to the scrutiny of the statutory rules and the instruments from 2011 and the early part of 2012 is also incorporated into this report.

months prior to the event was implemented. In addition, the Road Safety Act 1986 itself does not lay down a timeline for such an application and may therefore not be enforceable.

If you require further information, Timothy Lunn, Manager Legal Services, VicRoads (Tel: 9854 1968) would be pleased to assist.

Once again, I thank you for your comments and trust that the response above will satisfy the Regulation Review Subcommittee.

It is not surprising that in the first year of the operation of a new piece of legislation there have been initial 'teething' issues as departmental officers come to grips with what is required under the Act. The scrutiny of legislative instruments is in its infancy. There may still be other matters. The Committee will continue to monitor the operation of the legislation closely. However, the Committee appreciates the practical manner with which the issue has been dealt. The Committee thanks the Minister for his response. The Committee recommends that all material in relation to the scrutiny of legislative instruments be sent to it in a timely manner so that it can fulfil its statutory obligations. Please see note concerning 'legislative instruments' in the Committee Practice Notes in Appendix 6.

APPENDIX 1 — REGULATIONS 2011⁵⁸

ALPHABETICAL LISTING

SR No. 38	Agricultural Industry Development (Polls) Regulations 2011
SR No. 17	Alpine Resorts (Management) Amendment Regulations 2011
SR No. 92	Building Amendment (Bushfire Construction) Regulations 2011
SR No. 73	Building Amendment (Community Fire Refuge Construction) Interim Regulations 2011
SR No. 48	Building Amendment (Fees) Regulations 2011
SR No. 22	Building Amendment (Private Bushfire Shelter Construction) Regulations 2011
SR No. 20	Building Amendment Regulations 2011
SR No. 166	Chattel Securities (Continued Register) Regulations 2011
SR No. 152	Children, Youth and Families Amendment Regulations 2011
SR No. 93	Children's Court (Family Violence Protection)(Amendment No. 1) Rules 2011
SR No. 94	Children's Court (Personal Safety Intervention Orders) Rules 2011
SR No. 162	Children's Services Amendment Regulations 2011
SR No. 128	Climate Change Regulations 2011
SR No. 86	Conservation, Forests and Lands (Infringement Notice) Amendment Regulations 2011
SR No. 50	Control of Weapons Amendment Regulations 2011
SR No. 140	Control of Weapons Regulations 2011
SR No. 117	Coroners Court (Amendment No. 1) Rules 2011
SR No. 34	Corporations (Ancillary Provisions) Regulations 2011
SR No. 60	Country Fire Authority Amendment Regulations 2011
SR No. 82	County Court (Chapter I Amendment No. 3) Rules 2011
SR No. 107	County Court (Chapter I Amendment No. 4) Rules 2011
SR No. 81	County Court (Chapter I Scale of Costs Amendment) Rules 2011
SR No. 156	County Court (Chapter I Scale of Costs Increase Amendment) Rules 2011
SR No. 101	Courts (Case Transfer) Rules 2011
SR No. 4	Crimes (Mental Impairment and Unfitness to be Tried) Amendment Regulations 2011

⁵⁸ This Appendix lists all regulations made during 2011. Appendix 2 categorises regulations according to whether they were made with a Regulation Impact Statement or whether they were exempted from those requirements. The Committee did not move for disallowance of any of the regulations made in 2011, however the Regulation Review Subcommittee did correspond with responsible Ministers concerning some regulations.

SR No. 1	Criminal Procedure Amendment (Recorded Evidence-in-Chief) Regulations 2011
SR No. 41	Crown Land (Reserves)(Tour Operator Licence Fee) Regulations 2011
SR No. 151	Crown Proceedings Regulations 2011
SR No. 37	Dangerous Goods (Explosives) Regulations 2011
SR No. 134	Dangerous Goods (Storage and Handling) Interim Regulations 2011
SR No. 88	Drugs, Poisons and Controlled Substances (Commonwealth Standard) Regulations 2011
SR No. 122	Drugs, Poisons and Controlled Substances (Drugs of Dependence - Synthetic Cannabinoids) Regulations 2011
SR No. 161	Education and Care Services National Law (Excluded Services and Other Transitional Matters) Regulations 2011
SR No. 165	Education and Training Reform (School Safety) Regulations 2011
SR No. 109	Education and Training Reform Amendment Regulations 2011
SR No. 85	Electrical Safety (Installations) Amendment (Fee) Regulations 2011
SR No. 110	Electricity Safety Amendment (Bushfire Mitigation) Regulations 2011
SR No. 45	Environment Protection (Distribution of Landfill Levy) Amendment Regulations 2011
SR No. 155	Essential Services Commission Regulations 2011
SR No. 163	Estate Agents (Contracts) Amendment Regulations 2011
SR No. 84	Estate Agents (Education) Amendment Regulations 2011
SR No. 32	Estate Agents (General, Accounts and Audit) Amendment (Infringements) Regulations 2011
SR No. 100	Estate Agents (General, Accounts and Audit) Amendment Regulations 2011
SR No. 28	Evidence (Examination of Witnesses Outside the State) Regulations 2011
SR No. 80	Fair Trading Amendment Regulations 2011
SR No. 25	First Home Owner Grant Regulations 2011
SR No. 12	Fisheries (Fees, Royalties and Levies) Amendment Regulations 2011
SR No. 147	Flora and Fauna Guarantee Regulations 2011
SR No. 42	Forests (Tour Operator Licence Fee) Regulations 2011
SR No. 71	Funerals (Infringement) Regulations 2011
SR No. 138	Gambling Regulation (Pre-commitment) Interim Regulations 2011
SR No. 3	Gambling Regulation (Premium Customer) Regulations 2011
SR No. 121	Gambling Regulations Amendment Regulations 2011
SR No. 91	Gene Technology Regulations 2011
SR No. 108	Health Practitioner Regulation National Law Amendment (Midwife Insurance Exemption) Regulations 2011
SR No. 160	Infringements (General) Amendment (Further Lodgeable Infringement Offences) Regulations 2011

SR No. 16	Infringements (General) Amendment (Lodgeable Infringement Offences) Regulations 2011
SR No. 39	Infringements (General) Amendment Regulations 2011
SR No. 67	Infringements (General) Further Amendment (Lodgeable Infringements Offences) Regulations 2011
SR No. 135	Infringements (General) Further Amendment Regulations 2011
SR No. 69	Juries (Fees) Interim Regulations 2011
SR No. 68	Juries Regulations 2011
SR No. 40	Land (Tour Operator Licence Fee) Regulations 2011
SR No. 70	Liquor Control Reform Amendment Regulations 2011
SR No. 158	Livestock Management Regulations 2011
SR No. 103	Local Government (Finance and Reporting) Amendment Regulations 2011
SR No. 19	Local Government (General) Amendment Regulations 2011
SR No. 99	Magistrates' Court (Arbitration)(Professional Costs) Amendment Regulations 2011
SR No. 95	Magistrates' Court (Family Violence Protection Rules)(Amendment No.1) Rules 2011
SR No. 90	Magistrates' Court (Fees, Costs and Charges) Interim Amendment Regulations 2011
SR No. 54	Magistrates' Court (Fees, Costs and Charges) Interim Regulations 2011
SR No. 124	Magistrates' Court (Miscellaneous Civil Proceedings)(Amendment No. 1) Rules 2011
SR No. 96	Magistrates' Court (Personal Safety Intervention Orders) Rules 2011
SR No. 123	Magistrates' Court (Reference Amendment) Rules 2011
SR No. 58	Magistrates' Court Authentication Rules 2011
SR No. 18	Magistrates' Court Criminal Procedure (Amendment No. 1) Rules 2011
SR No. 59	Magistrates' Court Criminal Procedure (Amendment No. 2 Rules 2011
SR No. 36	Magistrates' Court General Civil Procedure (Amendment No.2) Rules 2011
SR No. 149	Magistrates' Court General Civil Procedure (Scale of Costs and Fees Amendment) Rules 2011
SR No. 55	Magistrates' Court General Regulations 2011
SR No. 150	Magistrates' Court Miscellaneous Amendment Rules 2011
SR No. 125	Marine Further Amendment Regulations 2011
SR No. 61	Metropolitan Fire Brigades (General) Amendment Regulations 2011
SR No. 154	Mineral Resources Development Amendment Regulations 2011
SR No. 148	National Parks (Park) Amendment Regulations 2011
SR No. 43	National Parks (Tour Operator Licence Fee) Regulations 2011
SR No. 153	Offshore Petroleum and Greenhouse Gas Storage Regulations 2011
SR No. 33	Owners Corporations Amendment (Infringements) Regulations 2011
SR No. 89	Personal Safety Intervention Orders Regulations 2011

SR No. 30	Petroleum Regulations 2011
SR No. 63	Planning and Environment (Fees) Interim Regulations 2011
SR No. 49	Plumbing Amendment (Fees) Regulations 2011
SR No. 14	Plumbing Amendment Regulations 2011
SR No. 21	Plumbing Further Amendment Regulations 2011
SR No. 130	Police Amendment (Powers of Protective Services Officers) Regulations 2011
SR No. 157	Prevention of Cruelty to Animals Amendment Regulations 2011
SR No. 57	Public Health and Wellbeing Amendment Regulations 2011
SR No. 72	Public Health and Wellbeing Further Amendment Regulations 2011
SR No. 104	Rail Safety Amendment Regulations 2011
SR No. 113	Rail Safety Further Amendment Regulations 2011
SR No. 141	Regional Growth Fund Amendment Regulations 2011
SR No. 65	Regional Growth Fund Regulations 2011
SR No. 23	Residential Tenancies (Caravan Parks and Movable Dwellings Registration and Standards) Amendment Regulations 2011
SR No. 164	Residential Tenancies Amendment (Infringements) Regulations 2011
SR No. 83	Residential Tenancies Amendment Regulations 2011
SR No. 129	Residential Tenancies Miscellaneous Amendment Regulations 2011
SR No. 51	Road Safety (Driver) and (Vehicles) Amendment (Fees) Regulations 2011
SR No. 127	Road Safety (Drivers) Amendment (Fatigue Management) Regulations 2011
SR No. 126	Road Safety (General) Amendment (Preliminary Breath Test Device) Regulations 2011
SR No. 62	Road Safety (General) Amendment Regulations 2011
SR No. 66	Road Safety (Traffic Management and (Drivers) Amendment Regulations 2011
SR No. 10	Second-Hand Dealers and Pawnbrokers (Exemption) Amendment Regulations 2011
SR No. 2	Sentencing Amendment Regulations 2011
SR No. 159	Sentencing Regulations 2011
SR No. 5	Severe Substance Dependence Treatment Regulations 2011
SR No. 64	Subdivision (Fees) Interim Regulations 2011
SR No. 112	Subdivision (Procedures) Regulations 2011
SR No. 111	Subdivision (Registrar's Requirements) Regulations 2011
SR No. 11	Subordinate Legislation (Accident Compensation Regulations 2001 - Extension of Operation) Regulations 2011
SR No. 27	Subordinate Legislation (City of Melbourne (Elections) Regulations 2001) Extension Regulations 2011
SR No. 143	Subordinate Legislation (County Court (Court Fees) Order 2001) Extension Regulations 2011

SR No. 116	Subordinate Legislation (Environment Protection (Fees) Regulations 2001) Extension Regulations 2011
SR No. 137	Subordinate Legislation (Health Services (Supported Residential Services) Regulations 2001) Extension Regulations 2011
SR No. 52	Subordinate Legislation (Legislative Instruments) Regulations 2011
SR No. 142	Subordinate Legislation (Supreme Court (Fees) Regulations 2001) Extension Regulations 2011
SR No. 144	Subordinate Legislation (Victorian Civil and Administrative Tribunal (Fees) Regulations 2001) Extension Regulations 2011
SR No. 139	Subordinate Legislation (Whistleblowers Protection Regulations 2001) Extension Regulations 2011
SR No. 98	Subordinate Legislation (Wildlife (Game) Regulations 2001) Extension Regulations 2011
SR No. 7	Supreme Court (Chapter I Amendment No. 23) Rules 2011
SR No. 8	Supreme Court (Chapter I Amendment No. 24) Rules 2011
SR No. 15	Supreme Court (Chapter I Amendment No. 25) Rules 2011
SR No. 26	Supreme Court (Chapter I Amendment No. 26) Rules 2011
SR No. 53	Supreme Court (Chapter I Amendment No. 27) Rules 2011
SR No. 77	Supreme Court (Chapter I Amendment No. 28) Rules 2011
SR No. 78	Supreme Court (Chapter I Amendment No. 29) Rules 2011
SR No. 118	Supreme Court (Chapter I Amendment No. 30) Rules 2011
SR No. 133	Supreme Court (Chapter I Amendment No. 31) Rules 2011
SR No. 132	Supreme Court (Chapter I Scale of Costs Amendment) Rules 2011
SR No. 6	Supreme Court (Chapter VI Amendment No. 6) Rules 2011
SR No. 120	Supreme Court (Chapter VI Amendment No. 7) Rules 2011
SR No. 119	Supreme Court (Judicial Registrars Medication Amendment) Rules 2011
SR No. 47	Tobacco (Victorian Health Promotion Foundations) Regulations 2011
SR No. 87	Tobacco Amendment Regulations 2011
SR No. 102	Tourist and Heritage Railways Regulations 2011
SR No. 35	Transfer of Land (Fees) Amendment Regulations 2011
SR No. 76	Transport (Compliance and Miscellaneous)(Infringements) Amendment Regulations 2011
SR No. 75	Transport (Compliance and Miscellaneous)(Passenger Vehicles) Amendment Regulations 2011
SR No. 74	Transport (Compliance and Miscellaneous)(Taxi-Cabs) Amendment Regulations 2011
SR No. 114	Transport (Compliance and Miscellaneous)(Ticketing) Amendment Regulations 2011
SR No. 105	Transport (Conduct) and (Infringements) Amendment Regulations 2011
SR No. 131	Transport (Conduct) and (Ticketing) Amendment (Protective Services Officers) Regulations 2011

SR No. 24	Transport (Infringements) Amendment (Port Safety Infringements) Regulations 2011
SR No. 106	Transport (Taxi-Cabs) Amendment Regulations 2011
SR No. 29	Transport Accident (Administration of Charges) Regulations 2011
SR No. 115	Transport Accident Amendment Regulations 2011
SR No. 9	Travel Agents Amendment (Infringements) Regulations 2011
SR No. 145	Victims of Crime Assistance (Special Financial Assistance) Regulations 2011
SR No. 97	Victorian Civil and Administrative Tribunal (Anti Discrimination List Amendment) Rules 2011
SR No. 136	Victorian Civil and Administrative Tribunal (Fees) Regulations 2011
SR No. 56	Victorian Energy Efficiency Target Amendment (Ductwork and Standby Power Controllers) Regulations 2011
SR No. 146	Victorian Energy Efficiency Target Amendment (Prescribed Activities) Regulations 2011
SR No. 31	Victorian Energy Efficiency Target Amendment (Scheme Target) Regulations 2011
SR No. 79	Water (Long Service Leave) Regulations 2011
SR No. 13	Water (Subdivisional Easements and Reserves) Regulations 2011
SR No. 44	Wildlife (Tour Operator Licence Fee) Regulations 2011
SR No. 46	Zoological Parks and Gardens (Fees) Amendment Regulations 2011

APPENDIX 2 — REGULATIONS 2011

REGULATION IMPACT STATEMENTS

SR No. 13	Water (Subdivisional Easements and Reserves) Regulations 2011
SR No. 30	Petroleum Regulations 2011
SR No. 31	Victorian Energy Efficiency Target Amendment (Scheme Target) Regulations 2011
SR No. 37	Dangerous Goods (Explosives) Regulations 2011
SR No. 40	Land (Tour Operator Licence Fee) Regulations 2011
SR No. 41	Crown Land (Reserves)(Tour Operator Licence Fee) Regulations 2011
SR No. 42	Forests (Tour Operator Licence Fee) Regulations 2011
SR No. 43	National Parks (Tour Operator Licence Fee) Regulations 2011
SR No. 44	Wildlife (Tour Operator Licence Fee) Regulations 2011
SR No. 52	Subordinate Legislation (Legislative Instruments) Regulations 2011
SR No. 110	Electricity Safety Amendment (Bushfire Mitigation) Regulations 2011
SR No. 140	Control of Weapons Regulations 2011

EXEMPTIONS UNDER SECTION 8

S. 8(1)(a) — Would not Impose Significant Economic or Social Burden

SR No. 3	Gambling Regulation (Premium Customer) Regulations 2011
SR No. 10	Second-Hand Dealers and Pawnbrokers (Exemption) Amendment Regulations 2011
SR No. 14	Plumbing Amendment Regulations 2011
SR No. 16	Infringements (General) Amendment (Lodgeable Infringement Offences) Regulations 2011
SR No. 22	Building Amendment (Private Bushfire Shelter Construction) Regulations 2011
SR No. 23	Residential Tenancies (Caravan Parks and Movable Dwellings Registration and Standards) Amendment Regulations 2011
SR No. 25	First Home Owner Grant Regulations 2011
SR No. 34	Corporations (Ancillary Provisions) Regulations 2011
SR No. 39	Infringements (General) Amendment Regulations 2011
SR No. 45	Environment Protection (Distribution of Landfill Levy) Amendment Regulations 2011
SR No. 50	Control of Weapons Amendment Regulations 2011

SR No. 56	Victorian Energy Efficiency Target Amendment (Ductwork and Standby Power Controllers) Regulations 2011
SR No. 65	Regional Growth Fund Regulations 2011
SR No. 67	Infringements (General) Further Amendment (Lodgeable Infringements Offences) Regulations 2011
SR No. 70	Liquor Control Reform Amendment Regulations 2011
SR No. 79	Water (Long Service Leave) Regulations 2011
SR No. 92	Building Amendment (Bushfire Construction) Regulations 2011
SR No. 102	Tourist and Heritage Railways Regulations 2011
SR No. 111	Subdivision (Registrar's Requirements) Regulations 2011
SR No. 113	Rail Safety Further Amendment Regulations 2011
SR No. 130	Police Amendment (Powers of Protective Services Officers) Regulations 2011
SR No. 131	Transport (Conduct) and (Ticketing) Amendment (Protective Services Officers) Regulations 2011
SR No. 135	Infringements (General) Further Amendment Regulations 2011
SR No. 136	Victorian Civil and Administrative Tribunal (Fees) Amendment Regulations 2011
SR No. 141	Regional Growth Fund Amendment Regulations 2011
SR No. 146	Victorian Energy Efficiency Target Amendment (Prescribed Activities) Regulations 2011
SR No. 148	National Parks (Park) Amendment Regulations 2011
SR No. 152	Children, Youth and Families Amendment Regulations 2011
SR No. 153	Offshore Petroleum and Greenhouse Gas Storage Regulations 2011
SR No. 154	Mineral Resources Development Amendment Regulations 2011
SR No. 155	Essential Services Commission Regulations 2011
SR No. 160	Infringements (General) Amendment (Further Lodgeable Infringement Offences) Regulations 2011
SR No. 165	Education and Training Reform (School Safety) Regulations 2011

S. 8(1)(a) and (c) – No Appreciable Economic or Social Burden and Fundamentally Declaratory Nature

SR No. 2	Sentencing Amendment Regulations 2011
SR No. 12	Fisheries (Fees, Royalties and Levies) Amendment Regulations 2011
SR No. 29	Transport Accident (Administration of Charges) Regulations 2011
SR No. 62	Road Safety (General) Amendment Regulations 2011
SR No. 83	Residential Tenancies Amendment Regulations 2011
SR No. 86	Conservation, Forests and Lands (Infringement Notice) Amendment Regulations 2011
SR No. 112	Subdivision (Procedures) Regulations 2011
SR No. 115	Transport Accident Amendment Regulations 2011

SR No. 157	Prevention of Cruelty to Animals Amendment Regulations 2011
SR No. 159	Sentencing Regulations 2011
SR No. 166	Chattel Securities (Continued Register) Regulations 2011

S. 8(1)(a) and (d) – No Appreciable Economic or Social Burden and Fee Increase of 2.25 percent – Treasurer’s Rate

SR No. 46	Zoological Parks and Gardens (Fees) Amendment Regulations 2011
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S. 8(1)(b) – Is a Rule which relates only to a Court or Tribunal

SR No. 1	Criminal Procedure Amendment (Recorded Evidence-In-Chief) Regulations 2011
SR No. 6	Supreme Court (Chapter VI Amendment No.6) Rules 2011
SR No. 7	Supreme Court (Chapter 1 Amendment No 23) Rules 2011
SR No. 8	Supreme Court (Chapter 1 Amendment No.24) Rules 2011
SR No. 15	Supreme Court (Chapter 1 Amendment No.25) Rules 2011
SR No. 18	Magistrates’ Court Criminal Procedure (Amendment No 1) Rules 2011
SR No. 26	Supreme Court (Chapter 1 Amendment No.26) Rules 2011
SR No. 28	Evidence (Examination of Witnesses Outside the State) Regulations 2011
SR No. 36	Magistrates’ Court General Civil Procedure (Amendment No.2) Rules 2011
SR No. 53	Supreme Court (Chapter I Amendment No. 27) Rules 2011
SR No. 55	Magistrates’ Court General Regulations 2011
SR No. 58	Magistrates’ Court Authentication Rules 2011
SR No. 59	Magistrates’ Court Criminal Procedure (Amendment No.2) Rules 2011
SR No. 68	Juries Regulations 2011
SR No. 77	Supreme Court (Chapter I Amendment No. 28) Rules 2011
SR No. 78	Supreme Court (Chapter I Amendment No. 29) Rules 2011
SR No. 81	County Court (Chapter 1 Scale of Costs Amendment) Rules 2011
SR No. 82	County Court (Chapter I Amendment No. 3) Rules 2011
SR No. 93	Children’s Court (Family Violence Protection) (Amendment No 1) Rules 2011
SR No. 94	Children’s Court (Personal Safety Intervention Orders) Rules 2011
SR No. 95	Magistrates’ Court (Family Violence Protection Rules)(Amendment No 1) Rules 2011
SR No. 96	Magistrates’ Court (Personal Safety Intervention Orders) Rules 2011
SR No. 97	Victorian Civil and Administrative Tribunal (Anti Discrimination List Amendment) Rules 2011
SR No. 99	Magistrates’ Court (Arbitration)(Professional Costs) Amendment Regulations 2011
SR No. 101	Courts (Case Transfer) Rules 2011
SR No. 107	County Court (Chapter 1 Amendment No.4) Rules 2011
SR No. 117	Coroners Court (Amendment No 1) Rules 2011
SR No. 118	Supreme Court (Chapter 1 Amendment No. 30) Rules 2011

SR No. 119	Supreme Court (Judicial Registrars Mediation Amendment) Rules 2011
SR No. 120	Supreme Court (Chapter VI Amendment No. 7) Rules 2011
SR No. 123	Magistrates' Court (Reference Amendment) Rules 2011
SR No. 124	Magistrates' Court (Miscellaneous Civil Proceedings) (Amendment No.1) Rules 2011
SR No. 132	Supreme Court (Chapter 1 Scale of Costs Amendment) Rules 2011
SR No. 133	Supreme Court (Chapter 1 Amendment No. 31) Rules 2011
SR No. 149	Magistrates' Court General Civil Procedure (Scale of Costs and Fees Amendment) Rules 2011
SR No. 150	Magistrates' Court Miscellaneous Amendment Rules 2011
SR No. 151	Crown Proceedings Regulations 2011
SR No. 156	County Court (Chapter 1 Scale of Costs Increase Amendment) Rules 2011

S. 8(1)(b) and (c) – Is a Rule which relates only to a Court or Tribunal and Fundamentally Declaratory Nature

SR No. 90	Magistrates' Court (Fees, Costs and Charges) Interim Amendment Regulations 2011
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S. 8(1)(c) — Fundamentally Declaratory or Machinery Nature

SR No. 4	Crimes (Mental Impairment and Unfitness to be Tried) Amendment Regulations 2011
SR No. 5	Severe Substance Dependence Treatment Regulations 2011
SR No. 9	Travel Agents Amendment (Infringements) Regulations 2011
SR No. 19	Local Government (General) Amendment Regulations 2011
SR No. 24	Transport (Infringements) Amendment (Port Safety Infringements) Regulations 2011
SR No. 32	Estate Agents (General, Accounts and Audit) Amendment (Infringements) Regulations 2011
SR No. 33	Owners Corporations Amendment (Infringements) Regulations 2011
SR No. 38	Agricultural Development (Polls) Regulations 2011
SR No. 47	Tobacco (Victorian Health Promotion Foundation) Regulations 2011
SR No. 57	Public Health and Wellbeing Amendment Regulations 2011
SR No. 71	Funerals (Infringements) Regulations 2011
SR No. 66	Road Safety (Traffic Management) and (Drivers) Amendment Regulations 2011
SR No. 72	Public Health and Wellbeing Further Amendment Regulations 2011
SR No. 74	Transport (Compliance and Miscellaneous)(Taxi Cabs) Amendment Regulations 2011
SR No. 75	Transport (Compliance and Miscellaneous) (Passenger Vehicles) Amendment Regulations 2011
SR No. 76	Transport (Compliance and Miscellaneous)(Infringements) Amendment Regulations 2011
SR No. 80	Fair Trading Amendment Regulations 2011

SR No. 84	Estate Agents (Education) Amendment Regulations 2011
SR No. 87	Tobacco Amendment Regulations 2011
SR No. 88	Drugs, Poisons and Controlled Substances (Commonwealth Standard) Regulations 2011
SR No. 89	Personal Safety Intervention Orders Regulations 2011
SR No. 100	Estate Agents (General, Accounts and Audit) Amendment Regulations 2011
SR No. 103	Local Government (Finance and Reporting) Amendment Regulations 2011
SR No. 104	Rail Safety Amendment Regulations 2011
SR No. 105	Transport (Conduct) and (Infringements) Amendment Regulations 2011
SR No. 106	Transport (Taxi-Cabs) Amendment Regulations 2011
SR No. 109	Education and Training Reform Amendment Regulations 2011
SR No. 114	Transport (Compliance and Miscellaneous)(Ticketing) Amendment Regulations 2011
SR No. 121	Gambling Regulation Amendment Regulations 2011
SR No. 122	Drugs, Poisons and Controlled Substances (Drugs of Dependence – Synthetic Cannabinoids) Regulations 2011
SR No. 125	Marine Further Amendment Regulations 2011
SR No. 126	Road Safety (General) Amendment (Preliminary Breath Test Device) Regulations 2011
SR No. 129	Residential Tenancies Miscellaneous Amendment Regulations 2011
SR No. 145	Victims of Crime Assistance (Special Financial Assistance) Regulations 2011
SR No. 147	Flora and Fauna Guarantee Regulations 2011
SR No. 161	Education and Care Services National Law (Excluded Services and Other Transitional Matters) Regulations 2011
SR No. 162	Children's Services Amendment Regulations 2011
SR No. 163	Estate Agents (Contracts) Amendment Regulations 2011
SR No. 164	Residential Tenancies Amendment (Infringements) Regulations 2011

S. 8(1)(c) and (d) – Fundamentally Declaratory Nature and Fee Increase of 2.25 percent – Treasurer's Rate

SR No. 51	Road Safety (Drivers) and (Vehicles) Amendment (Fees) Regulations 2011
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S. 8(1)(c) and (g) – Fundamentally Declaratory or Machinery Nature and Administration or Procedures within Departments Respectively

SR No. 128	Climate Change Regulations 2011
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S. 8(1)(d) — Fee Increase of 2.25 percent – Treasurer's Rate

SR No. 17	Alpine Resorts (Management) Amendment Regulations 2011
SR No. 35	Transfer of Land (Fees) Amendment Regulations 2011
SR No. 48	Building Amendment (Fees) Regulations 2011

SR No. 49	Plumbing Amendment (Fees) Regulations 2011
SR No. 60	Country Fire Authority Amendment Regulations 2011
SR No. 61	Metropolitan Fire Brigades (General) Amendment Regulations 2011
SR No. 85	Electricity Safety (Installations) Amendment (Fee) Regulations 2011

S. 8(1)(e)(iii) — Extension of time – Section 5A(3) Premier’s Certificate

SR No. 11	Subordinate Legislation (Accident Compensation Regulations 2001 – Extension of Operation) Regulations 2011
SR No. 27	Subordinate Legislation (City of Melbourne (Elections) Regulations 2011) Extension Regulations 2011
SR No. 98	Subordinate Legislation (Wildlife (Game) Regulations 2001) Extension Regulations 2011
SR No. 116	Subordinate Legislation (Environment Protection (Fees) Regulations 2011) Extension Regulations 2011
SR No. 137	Subordinate Legislation (Health Services (Supported Residential Services) Regulations 2001) Extension Regulations 2011
SR No. 139	Subordinate Legislation (Whistleblowers Protection Regulations 2001) Extension Regulations 2011
SR No. 142	Subordinate Legislation (Supreme Court (Fees) Regulations 2001) Extension Regulations 2011
SR No. 143	Subordinate Legislation (County Court (Court Fees) Order 2001) Extension Regulations 2011
SR No. 144	Subordinate Legislation (Victorian Civil and Administrative Tribunal (Fees) Regulations 2001) Extension Regulations 2011

S. 8(1)(f) — National Uniform Legislation Scheme

SR No. 20	Building Amendment Regulations 2011
SR No. 21	Plumbing Further Amendment Regulations 2011
SR No. 91	Gene Technology Regulations 2011
SR No. 127	Road Safety (Drivers) Amendment (Fatigue Management) Regulations 2011
SR No. 158	Livestock Management Regulations 2011

S. 9(3) – Premier’s Certificate – Special Circumstances

SR No. 54	Magistrates’ Court (Fees, Costs and Charges) Interim Regulations 2011
SR No. 63	Planning and Environment (Fees) Interim Regulations 2011
SR No. 64	Subdivision (Fees) Interim Regulations 2011
SR No. 69	Juries (Fees) Interim Regulations 2011
SR No. 73	Building Amendment (Community Fire Refuge Construction) Interim Regulations 2011
SR No. 134	Dangerous Goods (Storage and Handling) Interim Regulations 2011
SR No. 138	Gambling Regulation (Pre-Commitment) Interim Regulations 2011

National Law

SR No 108	Health Practitioner Regulation National Law Amendment (Midwife Insurance Exemption) Regulation 2011
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APPENDIX 3

LEGISLATIVE INSTRUMENTS 2011/2012 –
ALPHABETICAL LISTING

2012 Fares Amendment Conditions - Victorian Fares and Ticketing Manual - General
2012 Fares Amendment Conditions General, 2012 Fares Amending Conditions - Myki
Amendment to the Keno Technical Standard
Approval of Sports Betting Event (International Rules Series)
Declaration of a Discount Factor
Declaration of Declared Scheme Capacity Day
Determination that Specifies Areas are Designated Bushfire Prone Areas
Exemption from Section 65A(1) - For Persons Participating in a Victorian Heat of the Australian national Circle Work Championships at the Tatura Racecourse
Exemption from Section 65A(1) of the Road Safety Act 1986 for Persons Participating in the Australian National Circle Work Championships at the Pakenham Racecourse
Instrument of Revocation - Directions about Fees
Instrument of Revocation - Schedule 4 - Directions about Higher Education Courses and Awards
Ministerial Direction – Board of TAFE Institutes
Ministerial Order 514 - Fixing of Fees Administered By The Victorian Registration and Qualifications Authority
Ministerial Order No. 560 – Extension of Review Period for Orders in Council Constituting TAFE Boards
Notice of Determination - Premises Not Constituting Retail Premises
Notice of the Making of a Standard - Keno Technical Standard
Order Approving Compliance Codes under the Accident Compensation Act 1985
Order in Council – Contaminated Stock Order
Order in Council – Partial Revocation of Crown Reserve in Docklands
Revocation of Code for the Accepted Farming Practice for the Welfare of Pigs (Revision 2)
Revocation of Code of Practice for the Welfare of Rodeo and Rodeo School Livestock in Victoria (Revision 1)
Technical Equipment and Systems for a Monitoring System in Victoria
Valvoline Shepparton Springnats 2011 at Shepparton Showgrounds
Variation to Permanent Water Saving Plan - All Victorian Regions

APPENDIX 4

LEGISLATIVE INSTRUMENTS 2011/2012

S. 12C – Consultation

Variation to Permanent Water Saving Plan - All Victorian Regions
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S. 12C and 12F(1)(a) – Consultation and Exemption Certificate – Does not impose a Significant Economic or Social Burden

Ministerial Order No. 560 – Extension of Review Period for Orders in Council Constituting TAFE Boards

S.12F(1)(a) – Exemption certificate – Does not impose a Significant Economic or Social Burden

Amendment to the Keno Technical Standard
--

Approval of Sports Betting Event (International Rules Series)

Declaration of a Discount Factor – VEET Target
--

Determination that Specifies Areas are Designated Bushfire Prone Areas
--

Exemption from Section 65A(1) - For Persons Participating in a Victorian Heat of the Australian national Circle Work Championships at the Tatura Racecourse

Exemption from Section 65A(1) of the Road Safety Act 1986 for Persons Participating in the Australian National Circle Work Championships at the Pakenham Racecourse

Ministerial Direction – Board of TAFE Institutes
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Notice of Determination - Premises Not Constituting Retail Premises

Notice of the Making of a Standard - Keno Technical Standard
--

Order in Council – Contaminated Stock Order

Revocation of Code of Practice for the Welfare of Rodeo and Rodeo School Livestock in Victoria (Revision 1)

Technical Equipment and Systems for a Monitoring System in Victoria

Valvoline Shepparton Springnats 2011 at Shepparton Showgrounds
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S. 12F(1)(a) and (b) – Exemption certificate – Does not impose a Significant Economic or Social Burden and Fundamentally Declaratory or Machinery in Nature

Declaration of Declared Scheme Capacity Day

Order in Council – Partial Revocation of Crown Reserve in Docklands

Revocation of Code for the Accepted Farming Practice for the Welfare of Pigs (Revision 2)

S. 12F(1)(b) – Exemption certificate – Fundamentally Declaratory or Machinery in Nature

Instrument of Revocation - Schedule 4 - Directions about Higher Education Courses and Awards
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Instrument of Revocation - Directions about Fees
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S. 12G – Premier’s Exemption Certificate

2012 Fares Amendment Conditions General, 2012 Fares Amending Conditions – Myki
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2012 Fares Amendment Conditions - Victorian Fares and Ticketing Manual – General
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Ministerial Order 514 - Fixing of Fees Administered By The Victorian Registration and Qualifications Authority
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Others

Order Approving Compliance Codes under the Accident Compensation Act 1985

APPENDIX 5

MINISTERIAL CORRESPONDENCE

This Appendix contains a list of correspondence sent to responsible Ministers by the Subcommittee regarding regulations and legislative instruments made in 2011. The Appendix categorises correspondence in accordance with the nature of the issue raised by the Subcommittee.

Regulation	Minister	Issue	Date of Committee's Letter / Minister's response
SR No. 71 – Funerals (Infringement) Regulations 2011	Minister for Consumer Affairs	Sought further explanation from the Minister as to how the regulations will be monitored to ensure compliance.	15-08-11 02-09-11
SR No. 108 – Health Practitioner National Law Regulation Amendment (Midwife Insurance Exemption) Regulations	Minister for Health	Sought further explanation about the National Practitioner Health Scheme.	16-11-12 02-12-11
SR No. 79 – Water (Long Service Leave) Regulations 2011	Minister for Water	Sought advice from the Minister in relation to whether army reserve work is still counted as long service leave under these regulations.	12-09-11 24-10-11
LI – Approval of Sports Betting Event (International Rule Series)	Executive Commissioner – Victorian Commission for Gambling Regulation	Sought advice from the Commissioner in relation to the Subcommittee scrutinizing the legislative instrument after event had taken place.	07-12-11 20-12-11 and 08-02-12
LI – Melbourne College of Divinity	Minister for Education	Sought advice from the Minister in relation to whether there ought to be a legislative amendment to the ETR Act 2006 to ensure that Parts 3 and 3A are applied where appropriate.	08-02-12 01-03-12
SR No. 153 – Offshore Petroleum and Greenhouse Gas Storage Regulations 2011	Minister for Energy and Resources	Sought advice from the Minister in relation to the details supplied in the human rights certificate.	05-03-12 30-03-12

<p>LI – Exemption from Section 65(A) of the Road Safety Act 1986 for persons participating in the Valvoline Shepparton SpringNats 2011 in Shepparton Showgrounds</p>	<p>Minister for Roads</p>	<p>Sought advice from the Minister to the timing of the release of the relevant documentation in relation to when the actual event is held.</p>	<p>05-03-12 25-03-12</p>
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APPENDIX 6

COMMITTEE PRACTICE NOTES

EXEMPTIONS

- **Dating Certificates.** The Subcommittee has occasionally been presented with undated exemption 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 8(3) 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)(e)(iii) and 5A(1) 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 5A(1) certificate itself as required by the *Subordinate Legislation Act 1994*. Please see additional general comments below.
- **Using Appropriate Exemption Categories.** Department and agency officers need to be careful when determining which category to use when exempting regulations from the Regulation Impact Statement process. The Subcommittee has occasionally received regulations which are incorrectly exempted.
- **Typographical Errors.** Department and agency officers need to be careful when preparing certificates to ensure that they do not contain typographical errors.

EXTENSION OF TIME

The Subcommittee is often presented with regulations which require an extension of time for a period of twelve months. Such regulations are accompanied by a section 5A(1) certificate of special circumstances which outlines the particular reasons for the extension. It is difficult for the Subcommittee to know whether any particular regulation has been accompanied by a previous extension of time certificate. Ongoing extensions of time in respect of a particular regulation are clearly matters upon which the Subcommittee would make adverse comment.

The Subcommittee expects that in the event that a second or subsequent extensions of time are sought for a regulation (in addition to an initial request), the Minister inform it that this is the case.

EXPLANATORY MEMORANDA

The Subcommittee expects Explanatory Memoranda 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)(D) AND 8(2)

Regulations governing fee increases are made under section 8(1)(d) of the *Subordinate Legislation Act 1994* (Vic). 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)⁵⁹ 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 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

⁵⁹ The Premier's Guidelines were made in 2004 before the amendments to the *Subordinate Legislation Act* in 2010, the correct section is 8(1)(d).

increase, the monetary amount and what the fee is for. Each Regulation will be examined on its merits and in context.

The Subcommittee will continue to carefully scrutinise the Regulations and the 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, Regulation Impact Statements and comments and submissions made in relation to Regulation Impact Statements within 10 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 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).⁶⁰

⁶⁰ The Premier's Guidelines were made in 2004 before the amendments to the *Subordinate Legislation Act* in 2010, the correct period is found in s. 15A(2) - within 10 working days of the making of a statutory rule or the establishing of the Committee (SARC).

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. The Subcommittee would appreciate receiving copies of all recommendations.

LEGISLATIVE INSTRUMENTS – RECOMMENDATIONS

(1) Scrutiny – Timing Provision of Documents

The Committee made comments in Chapter 3 in relation to the provision of material to it in respect of the scrutiny of legislative instruments. The Committee agrees with the Minister⁶¹. It is important that the Committee receives the material in sufficient time to scrutinise it prior to the relevant event. The Committee is supportive of initiatives by VicRoads to inform applicants for exemptions of the necessary lead time to process such applications. The Committee notes that a time period of three months prior to an event, in line with other government agency website may be appropriate. The Committee therefore recommends that all material be forwarded to it in sufficient time so that it can perform its scrutiny role in accordance with the Act.

(2) Explanatory Memoranda

The Premier's Guidelines require the provision of an explanatory memorandum in respect of regulations.⁶² However, the guidelines appear to be silent on the matter in relation to legislative instruments. The Committee is of the view that the provision of an explanatory memorandum to it in respect of legislative instruments would be of assistance to it in its scrutiny role. Accordingly, the Committee recommends the preparation of explanatory memoranda in relation to legislative instruments. The Committee recommends that any explanatory memorandum be forwarded to it with the other accompanying documentation in respect of legislative instruments.

⁶¹ Ibid, Chapter 3, p. 38.

⁶² Paragraph 8.09, *Premier's Guidelines*, 2004

APPENDIX 7
SARC REGULATIONS CHECKLISTS

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

EXEMPTION CERTIFICATES

CHECKLIST:

S. 8(1)(a),
S. 8(1)(c),
S. 8(1)(d),
S. 8(1)(f),
S. 8(1)(g),
S. 8(1)(h)

- Recommendation to make Regulations (Letter signed by Minister) *(Optional)*
- Explanatory Memorandum
- Section 6 Certificate (Consultation)(Optional)
- Section 8 (Exemption Certificate)
- Section 12A Human Rights Certificate
- Section 13 Certificate (Parliamentary Counsel) ****
- Copy of draft regulations *(Optional)*

Court Rules –
S. 8(1)(b)

- Explanatory Memorandum
- Section 8 (Exemption Certificate)
- Section 12A(3)(a) Human Rights Exemption Certificate

Extension of Time
S. 8(1)(e)(iii)

- Recommendation to make Regulations (Letter signed by Minister) *(Optional)*
- Explanatory Memorandum
- Section 8(1)(d)(iii) Exemption Certificate
- Section 5(3) Certificate (Minister certifies insufficient time to make new regulations)
- Section 12A(3)(b) Human Rights Exemption Certificate
- Section 13 Certificate (Parliamentary Counsel) ****
- Copy of draft regulations *(Optional)*

Premier's Certificate
– Special
Circumstances
S. 9

- Recommendation to make Regulations (Letter signed by Minister) *(Optional)*
- Explanatory Memorandum
- Section 6 Certificate (Consultation) *(Optional)*
- Section 9 Exemption Certificate
- Section 12A Human Rights Certificate
- Section 13 Certificate (Parliamentary Counsel) ****
- Copy of draft regulations *(Optional)*

****Note Section 13 certificates are not required for court rules or for regulations which are not made by Governor-in-Council. For example the Regulations may be exempt under section 9(1)(a) and made by the Council of Legal Education. No s. 13 certificate is required in these circumstances.

Please forward all relevant documents to:
 Executive Officer,
 Scrutiny of Acts and Regulations Committee,
 Parliament House, Spring Street
 MELBOURNE VIC 3000

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

REGULATION IMPACT STATEMENTS

CHECKLIST:

- Explanatory Memorandum
- Section 6 Certificate (Consultation)
- Section 10(4) Certificate (Compliance with requirements of SLA)
- Section 10(3) Certificate (Letter of Independent Assessment) (*Optional*)
- Section 12A Human Rights Certificate
- Section 13 Certificate (Parliamentary Counsel)
- Recommendation to make Regulations (Letter signed by Minister) (*Optional*)
- Regulation Impact Statement
- Copy of all submissions
- Summary of all submissions
- Copy of letters sent to those who made submissions
- Copy of draft regulations (usually part of RIS)
- Copy of RIS newspaper advertisement - invitation for public comment*
- Copy of Government Gazette advertisement - invitation for public comment*
- Copy of RIS newspaper advertisement – Notice of Decision*
- Copy of RIS Government Gazette advertisement – Notice of Decision*

Please forward all relevant documents to:
Executive Officer,
Scrutiny of Acts and Regulations Committee,
Parliament House, Spring Street
MELBOURNE VIC 3000

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

LEGISLATIVE INSTRUMENTS

CHECKLIST:

Section 16C of Subordinate Legislation Act 1994

- Legislative Instrument
- Explanatory Memorandum
- Section 12C Consultation
- Section 12D Human Rights Certificate
- Section 12E Regulatory Impact Statement
- Section 12F Exemption Certificate
- Section 12G Premier's exemption
- Section 12H Content of Regulatory Impact Statement
- Section 12I Comments and Submissions

Please forward all relevant documents to:
Executive Officer,
Scrutiny of Acts and Regulations Committee,
Parliament House, Spring Street
MELBOURNE VIC 3000