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## SUMMARY OF CONCLUSIONS

### ***LEGISLATION REVIEW DIGEST* No. 6 of 2006**

### **9 May 2006**

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*Legislation Review Digest* No. 6 of 2006 contains the Legislation Review Committee's consideration of bills introduced into Parliament in the sitting week beginning 2 May 2006 and any reports on regulations since the previous *Digest*.

The Bills reported on include:

- **Appropriation (Budget Variations) Bill 2006**
- **Education Legislation Amendment (Staff) Bill 2006**
- **Electricity Supply Amendment (Protection of Electricity Works) Bill 2006**
- **Judicial Officers Amendment Bill 2006**
- **Local Government Amendment (Miscellaneous) Bill 2006**
- **Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006**

## SUMMARY OF CONCLUSIONS

### SECTION A: Comment on Bills

#### 1. **Appropriation (Budget Variations) Bill 2006**

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| 5. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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#### 2. **Education Legislation Amendment (Staff) Bill 2006**

**Procedural Fairness: Schedule 1.1 [11], proposed ss.93E, 93F & 93K; Schedule 1.2 [14], proposed ss.22G, 22K & 22T; & Schedule 1.3 [5], proposed ss. 31, 32 & 32C**

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| 18. The Committee notes that the right to be heard is a fundamental rule of procedural fairness, the content of which is to be determined by what is fair in the circumstances. |
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19. The Committee refers to Parliament the question of whether the Bill unduly trespasses on the right to be heard by limiting that right to a right to make a submission in defence of disciplinary action.

**Procedural fairness: Director-General's Procedural Guidelines: Schedule 1.1[11], proposed s. 93D(2); Schedule 1.2 [14], proposed s. 22F (2) & Schedule 1.3 [5], proposed s 30(2).**

24. The Committee notes the importance of adhering to the rules of natural justice for “protecting the individual from arbitrary government action and ensur[ing] the legitimacy and integrity of decision-making by administrators” and others. The Committee also notes that there may be circumstances in which it is appropriate to limit the extent to which the rules of natural justice are to apply.
25. The Committee notes that the equivalent provision in the *Public Sector Employment and Management Act 2002* (s. 45(1)) provides that procedural guidelines issued by the Director of Public Employment must be consistent with the rules for procedural fairness.
26. The Committee has written to the Minister for advice as to why proposed sections 93D(2) [and cognate clauses 22F(2) and 30(2)] do not include a provision equivalent to s. 45(1) of the *Public Sector Employment and Management Act 2002* expressly providing that the Director-General's procedural guidelines must be consistent with the rules for procedural fairness. The Committee has also written to the Minister for advice as to whether the Bill can be amended accordingly.

**Right to property, Forfeiture of withheld salary: Schedule 1.1[11], proposed s. 93L; Schedule 1.2[14], proposed s. 22L; & Schedule 1.3[5], proposed s. 32D**

32. The Committee is of the view that allowing for the forfeiture of salary of a person who is suspended pending determination of a disciplinary matter or a criminal charge is a trespass on the person's right to property.
33. The Committee notes the alternative formulation in section 49 of the *Public Sector Employment and Management Act 2002*, which makes forfeiture dependent on the outcome of the matter; either a finding of misconduct by the Director-General or a conviction of a serious offence after a criminal trial.
34. The Committee has written to the Minister for advice as to:
- (i) why the formulation under the *Public Sector Employment and Management Act 2002* was not followed in this Bill;
  - (ii) why the Bill requires the Director-General to make a decision **not** to forfeit salary rather than a decision to forfeit salary;
  - (iii) why such a decision is to be made before any final determination of the disciplinary action or criminal charge has been made;

- (iv) whether the Bill can be amended to ensure that any salary withheld can only be forfeited to the State if the suspended person concerned is actually convicted of a criminal offence or subjected to disciplinary action;
  - (v) whether the legislation provides for restoration of forfeited salary to a person who is subsequently found not guilty of the offence with which they were charged or the charge is dropped, or where no disciplinary action is taken against the person concerned, as the case may be; and
  - (vi) whether the legislation provides for restoration of forfeited salary in the case of a person who is convicted of a serious offence but whose conviction is overturned on appeal or quashed.
35. The Committee refers to Parliament the question as to whether the trespass on property rights under these sections is undue.

**Circular definition of “misconduct”: Schedule 1.1[11], proposed s 93C(1)(b); Schedule 1.2 [14], proposed s 22E(1)(b); & Schedule 1.3 [5], proposed s 29(1)(b)**

- 40. The Committee is of the view that the definition of “*misconduct*” under the Bill should be as clear and unambiguous as possible, given the potential adverse impact on an officer that an investigation into, or finding of, misconduct can have.
- 41. The Committee has written to the Minister for advice as to how the definition in proposed sections 93C(1)(b), 22E(1)(b) & 29(1)(b) can be amended to remove the circularity and provide clearer content.
- 42. The Committee refers to Parliament the question as to whether proposed sections 93C(1)(b), 22E(1)(b) & 29(1)(b) make rights, liberties or obligations unduly dependent on unclear administrative powers.

**Ouster clauses: Schedule 2.1 [2], proposed s 93ZA; Schedule 2.2[2], proposed s. 23ZA; & Schedule 2.3 [2], proposed s. 32R**

- 46. The Committee notes the effect of these provisions in removing the fundamental right of a person to seek review of an adverse decision.
- 47. The Committee further notes that the courts will limit the scope of privative clauses in certain circumstances and thus preserve judicial review rights.
- 48. The Committee refers to Parliament the question as to whether proposed sections 93ZA, 223ZA & 32R make rights, liberties or obligations unduly dependent upon non-reviewable decisions.

**Regulation making power: Schedule 1.1[11], proposed s. 93W; Schedule 1.2 [14], proposed s. 22W & Schedule 1.3 [5], proposed s 32N**

53. The Committee is of the view that entitlements relating to employment amount to personal property. The Committee notes that 93W(6) [and cognate clauses 22W & 32N] purport to give regulations made under the proposed sections primacy over other legislation in the field.
54. For these reasons the Committee is of the view that, to avoid an undue delegation of legislative power, such matters should be provided for in the primary legislation.
55. The Committee has written to the Minister for advice as to why such matters are not included in the primary legislation and whether the Bill can be amended to so include them.
56. The Committee refers to Parliament the question as to whether proposed subsections 93W(5), 23W(5) & 32N(5), as presently drafted are an undue delegation of legislative power.

**Procedural fairness: Director-General's Procedural Guidelines: Schedule 1.1[11], proposed s. 93D(2); Schedule 1.2 [14], proposed s. 22F (2) & Schedule 1.3 [5], proposed s 30(2).**

60. The Committee notes that proposed sections 93D(2), 22F(2) & 30(2) appear to delegate the task of determining the content of natural justice to the Director-General for the purposes of the legislation, subject only to the minimum requirements set out in clause 93D(2) (and cognate clauses) and no further oversight by the legislature.
61. Given the importance of these procedural guidelines and their potential to impact on a person's right to procedural fairness, the Committee has written to the Minister for advice as to why the Director-General's procedural guidelines are not disallowable by Parliament or otherwise subject to a measure of oversight by the legislature.
62. The Committee refers to Parliament the question as to whether these provisions insufficiently subject the exercise of legislative power to parliamentary scrutiny by allowing the Director-General to determine the content of the procedural guidelines and, therefore, the scope of natural justice to be applied under the legislation, subject only to clause 93D and cognate clauses.

### **3. Electricity Supply Amendment (Protection of Electricity Works) Bill 2006**

#### **Restrictions on actions: proposed s 53(2)**

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| 15. | The Committee notes that, pursuant to proposed s 53(2), no action by the owner or occupier of land lies against a network operator by reason of the operation or use of electricity works to which proposed s 53 applies. |
| 16. | The Committee notes that this constitutes a trespass on the common law right of a landowner or occupier to seek redress for the nuisance-making actions of a network operator.  |
| 17. | The Committee notes that s 53(2) applies to land on which the landowner at the relevant time consented to the construction of the electricity works.  |
| 18. | The Committee also notes that the retention of the right to sue for negligence in proposed s 53(3) preserves a landholder or occupier's right to sue for damage arising from the negligent acts of the network operator.  |
| 19. | The Committee refers to Parliament whether this limitation on the ability to seek judicial redress for nuisance is an undue trespass on the individual rights of landowners or occupiers.                                 |

### **4. Judicial Officers Amendment Bill 2006**

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| 5. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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### **5. Local Government Amendment (Miscellaneous) Bill 2006**

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| 5. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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### **6. Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006**

#### **III defined and wide powers**

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| 10. | The Committee notes that the Bill gives no criteria for the exercise of the Minister's power to approve or nominate persons under proposed sections 9A and 9B.  |
| 11. | The Committee notes that while the bill is designed to allow Tabcorp to integrate its New South Wales and Victorian administrative operations, in the longer term it has the potential to impact on other wagering operators. |

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| 12. | The Committee has written to the Minister, seeking advice as to the reasons for the Bill not including any criteria for the exercise of the powers to nominate and appoint persons under proposed sections 9A and 9B. |
| 13. | The Committee refers to parliament whether the unfettered Ministerial discretion provided under the Bill makes personal rights and liberties dependant on insufficiently defined administrative power.                |

The Legislation Review Committee reports on whether each bill introduced into Parliament:

- (i) trespasses unduly on personal rights and liberties, or
- (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
- (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
- (iv) inappropriately delegates legislative powers, or
- (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

Those bills marked with an \* are sponsored by Private Members.

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