

Graffiti Prevention Act 2007

No. 59 of 2007

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Victoria

Graffiti Prevention Act 2007[†]

No. 59 of 2007

[Assented to 27 November 2007]

The Parliament of Victoria enacts:

PART 1—PRELIMINARY

1 Purpose

The purpose of this Act is to reduce the incidence of graffiti by—

- (a) creating graffiti-related offences; and
- (b) providing search and seizure powers for members of the police force; and
- (c) providing power for a Council to enter private property for the purpose of removing graffiti.

2 Commencement

- (1) Subject to subsection (2), this Act (except sections 10, 11(2) and 11(5)) comes into operation on a day or days to be proclaimed.
- (2) If a provision to which subsection (1) applies does not come into operation before 30 June 2008, it comes into operation on that day.
- (3) Subject to subsection (4), sections 10, 11(2) and 11(5) come into operation on a day to be proclaimed.
- (4) If a provision referred to in subsection (3) does not come into operation before 1 September 2008, it comes into operation on that day.

3 Definitions

In this Act—

adjacent public place means a public place that is referred to in paragraph (a), (b), (c), (d) or (j) of the definition of ***public place*** in section 3 of the **Summary Offences Act 1966** and that is near to and visible from—

- (a) trains operated on property of a transport company; or
- (b) railway stations or bus depots on property of a transport company; or
- (c) property of a transport company on any part of which trains or buses are operated—

whether or not the public place adjoins that property;

authorised officer means an authorised officer appointed under section 224 of the **Local Government Act 1989**;

authorised person means a person authorised under section 19;

Council has the same meaning as in the **Local Government Act 1989**;

graffiti implement means an implement or substance that is capable of being used to mark graffiti;

mark graffiti means write, draw, mark, scratch or otherwise deface property by any means so that the defacement is not readily removable by wiping with a dry cloth;

possession means—

- (a) actual physical possession; or
- (b) custody or control; or
- (c) having and exercising access, either solely or in common with others;

premises includes vehicle;

prescribed graffiti implement means—

- (a) an aerosol paint container; or
- (b) a graffiti implement, or an implement belonging to a class of graffiti implement, that is prescribed by the regulations;

property of a transport company includes—

- (a) any land, premises or other property owned or occupied by the transport company; and
- (b) any equipment installed by or on behalf of the transport company on any land or premises of the company; and

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- (c) any tram, train or bus that is owned by the transport company or operated by it, under contract to it or on its behalf; and
 - (d) any shelter provided for the use of passengers of any transport company that are owned by the transport company or operated by it, under contract to it or on its behalf;

public place has the same meaning as in the **Summary Offences Act 1966**;

transport company means—

- (a) a passenger transport company within the meaning of section 2(1) of the **Transport Act 1983**; or
- (b) a bus company within the meaning of section 2(1) of the **Transport Act 1983**;
- (c) a rail freight operator within the meaning of section 2(1) of the **Transport Act 1983**; or
- (d) a rail corporation within the meaning of section 3(1) of the **Rail Corporations Act 1996**.

4 Other laws not affected

This Act does not derogate from the **Crimes Act 1958**, the **Summary Offences Act 1966** or any other law.

PART 2—OFFENCES

5 Marking graffiti

A person must not mark graffiti on property if the graffiti is visible from a public place unless the person has first obtained the express consent of the owner, or an agent of the owner, of the property to do so.

Penalty: Level 7 imprisonment.

6 Marking offensive graffiti

(1) A person must not mark graffiti that is visible from a public place if the graffiti, or any part of the graffiti, would offend a reasonable person.

Penalty: Level 7 imprisonment.

(2) Subsection (1) does not apply to graffiti that is reasonable political comment.

7 Possessing a prescribed graffiti implement

(1) A person must not, without lawful excuse, possess a prescribed graffiti implement—

- (a) on property of a transport company; or
- (b) in an adjacent public place; or
- (c) in a place where the person is trespassing or has entered without invitation.

Penalty: 25 penalty units.

(2) It is a lawful excuse for the purposes of subsection (1) that the person is in possession of a prescribed graffiti implement in the course of engaging in, or carrying out any functions in relation to, his or her employment, occupation, business, trade or profession.

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- (3) If a member of the police force may exercise powers under Division 2 of Part IV of the **Drugs, Poisons and Controlled Substances Act 1981** in respect of a person under 18 years of age—
- (a) the member must deal with the person in the manner set out in that Division; and
 - (b) the person does not commit an offence against subsection (1).

8 Possessing a graffiti implement with intent to mark graffiti

A person must not possess a graffiti implement with the intention of using it to contravene section 5 or 6.

Penalty: 25 penalty units.

9 Advertising for sale a prescribed graffiti implement

- (1) A person must not advertise for sale a prescribed graffiti implement if the advertisement is likely to incite or promote unlawful graffiti and the person intends the advertisement to incite or promote unlawful graffiti.

Penalty: 50 penalty units.

- (2) In a proceeding for an offence against subsection (1), proof that the advertisement is published—
- (a) in a publication; or
 - (b) on an Internet site—

that contains images or documents which incite or promote unlawful graffiti is admissible in evidence for the purpose of establishing that the advertisement is likely to incite or promote unlawful graffiti and, in the absence of evidence to the contrary, is proof of that fact.

10 Sale of aerosol paint container to person under 18 years of age

- (1) In this section, *minor* means a person under 18 years of age.
- (2) A person must not sell an aerosol paint container to a minor unless the minor produces to the person a letter or statutory declaration from the employer of the minor stating that the minor requires an aerosol paint container for the purposes of his or her employment.

Penalty: 20 penalty units.

- (3) A person who is an employer or principal must take reasonable precautions to prevent an employee or agent of the person from contravening subsection (2) while performing his or her duties as employee or agent.

Penalty: 20 penalty units.

- (4) A prosecution for an offence against subsection (2) or (3) may only be commenced by an authorised officer.

11 Infringement notices, penalties and offences

- (1) A member of the police force may serve an infringement notice on a person who the member has reason to believe has committed an offence against section 7(1).
- (2) An authorised officer may serve an infringement notice on a person who the officer has reason to believe has committed an offence against section 10(2).
- (3) The offences referred to in subsections (1) and (2) for which an infringement notice may be served are infringement offences within the meaning of the **Infringements Act 2006**.

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Part 2—Offences

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- (4) The infringement penalty for an offence against section 7(1) is 5 penalty units.
 - (5) The infringement penalty for an offence against section 10(2) is 2 penalty units.
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PART 3—POWERS OF SEARCH AND SEIZURE

12 Issue of search warrant

- (1) A member of the police force may apply to a magistrate for the issue of a search warrant in relation to particular premises if the member believes on reasonable grounds that there is on the premises a particular thing that may be evidence of the commission of an offence against this Act.
- (2) If the magistrate to whom the application is made is satisfied by evidence on oath, whether oral or by affidavit, that there are reasonable grounds for believing that an offence against this Act has been or is being committed, the magistrate may issue a search warrant authorising the member named in the warrant and any assistants the member considers necessary—
 - (a) to enter the premises, or the part of the premises, named or described in the warrant; and
 - (b) to search for and seize any article, thing or material of a kind named or described in the warrant.
- (3) In addition to any other requirement, a search warrant issued under this section must state—
 - (a) the alleged offence; and
 - (b) the premises to be searched; and
 - (c) a description of the article, thing or material for which the search is to be made; and
 - (d) any conditions to which the warrant is subject; and

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- (e) whether entry is authorised to be made at any time or during stated hours; and
 - (f) a day, not later than 7 days after the issue of the warrant, on which the warrant ceases to have effect.
- (4) A search warrant must be issued in accordance with the **Magistrates' Court Act 1989** and in the form prescribed under that Act.
 - (5) The rules to be observed with respect to search warrants mentioned in the **Magistrates' Court Act 1989** extend and apply to warrants under this section.

13 Search without warrant

- (1) Subject to subsection (3), if a member of the police force has reasonable grounds for suspecting that—
 - (a) a person has in his or her possession a prescribed graffiti implement on property, or in a place, referred to in section 7(1); and
 - (b) relevant evidence is likely to be lost or destroyed if a search is delayed until a search warrant is obtained; and
 - (c) the person is 14 years of age or more—the member may, without warrant, search the person and any vehicle, package or thing in the possession of the person and seize any prescribed graffiti implement or other evidence of an offence against this Act found during the course of the search.

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- (2) For the purposes of subsection (1), the fact that a person is present in or near—
- (a) a location with a high incidence of graffiti;
or
 - (b) a location that appears to have been recently marked with graffiti—
- may be taken into account in determining whether there are reasonable grounds for suspecting that the person has a prescribed graffiti implement in his or her possession.
- (3) Before a member of the police force commences a search of a person under subsection (1), the member must—
- (a) inform the person of the member's name, rank and place of duty; and
 - (b) if requested by the person, provide the information referred to in paragraph (a) in writing; and
 - (c) produce the member's identification for inspection by the person unless the member is in uniform; and
 - (d) request the person to produce to the member any graffiti implement that is in the person's possession; and
 - (e) if the person is or appears to be under 18 years of age, comply with sections 14 and 15.
- (4) If, before or during the conduct of a search of a person under this section, a graffiti implement is produced by or found on the person, the member of the police force conducting the search must ask the person why he or she is in possession of that graffiti implement.
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14 Search of persons under 18 years of age

- (1) A person who is or appears to be under 14 years of age must not be searched under this Act.
- (2) A member of the police force who conducts a search under this Part of a person who is or appears to be 14 years of age or more and under 18 years of age must do so in one or more of the following ways—
 - (a) the member may run his or her hands over the person's outer clothing;
 - (b) the member may request the person to remove his or her outer clothing and gloves, shoes and headgear so that the member may—
 - (i) run the member's hands over the person's clothing that was immediately under his or her outer clothing; or
 - (ii) search the person's outer clothing and gloves, shoes and headgear.

15 Conduct of searches

- (1) A member of the police force must conduct a search under this Part of a person—
 - (a) in a manner that affords reasonable privacy to the person being searched; and
 - (b) as quickly as is reasonably practicable.
 - (2) A member of the police force who conducts a search under this Part of a vehicle, package or thing may examine the exterior and interior of the vehicle, package or thing.
 - (3) If, before or during the conduct of a search of a person under this Part, a member of the police force has reasonable grounds for suspecting that the person is—
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- (a) under 18 years of age; and
 - (b) has in his or her possession or under his or her control a volatile substance within the meaning of Part IV of the **Drugs, Poisons and Controlled Substances Act 1981** or an item used to inhale a volatile substance; and
 - (c) is inhaling or will inhale a volatile substance; and
 - (d) the member may exercise powers under Division 2 of Part IV of the **Drugs, Poisons and Controlled Substances Act 1981**—

the member must cease conducting the search and deal with the person in the manner set out in that Division.

16 Duty to make records concerning searches without warrant

- (1) A member of the police force who conducts a search under section 13 must make a written record of the search containing the following information—
 - (a) the member's name, rank and place of duty;
 - (b) the date of the search;
 - (c) the time of the search;
 - (d) the place where the search took place;
 - (e) the name of the person searched and, if applicable, a description of any clothing, vehicle, package or thing searched;
 - (f) the grounds relied on for conducting the search;
 - (g) a description of any item seized from the person searched.
- (2) The record must be made as soon as practicable after the completion of the search.

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- (3) A person subjected to a search under section 13 is entitled, on request and without charge, to a copy of the record of the search, if the request is made not later than one year after the date of the search.
- (4) A request under subsection (3) is made to the officer in charge of the place of duty, referred to in section 13(3)(a), of the member who conducted the search.

17 Chief Commissioner to report on searches without warrant

The Chief Commissioner of Police must provide to the Minister for inclusion in the annual report of operations under Part 7 of the **Financial Management Act 1994** a report containing—

- (a) the number of searches without warrant under section 13 conducted during that financial year; and
- (b) the number and type of graffiti implements found during the course of those searches; and
- (c) any other information requested by the Minister.
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PART 4—REMOVAL OR OBLITERATION OF GRAFFITI

18 Removal of graffiti from private property

- (1) A Council may, in accordance with this section, take any action necessary to remove or obliterate graffiti on private property if the graffiti is visible from a public place.
- (2) A Council may enter private property for the purposes of subsection (1) if—
 - (a) the Council has served a notice under this section on the owner or occupier of the property at least 28 days before the action to remove or obliterate the graffiti is proposed to be taken; and
 - (b) the owner or occupier of the property has given written consent to—
 - (i) the removal or obliteration of the graffiti; and
 - (ii) entry to the property for that purpose.
- (3) If entry to private property is not necessary for the purposes of subsection (1)—
 - (a) the Council must serve a notice under this section on the owner or occupier of the property at least 10 days before the action to remove or obliterate the graffiti is proposed to be taken; and
 - (b) the Council may take the action if the owner or occupier of the property—
 - (i) gives written consent to the removal or obliteration of the graffiti; or
 - (ii) does not object, in accordance with the notice, to the action being taken.

- (4) A notice referred to in subsection (2)(a) or (3)(a) must—
- (a) give particulars of the action proposed to remove or obliterate the graffiti; and
 - (b) specify the date on which the action is proposed to be taken; and
 - (c) specify the manner of objecting to the proposed action; and
 - (d) inform the owner or occupier of the terms of section 21.
- (5) A notice under this section may be addressed by the description of "the owner" or "the occupier" of the property (naming it) in respect of which the notice is given, without further name or description.
- (6) A notice under this section may be served—
- (a) by delivering it personally to the person to be served; or
 - (b) by leaving it at that person's usual or last known place of residence with a person apparently over the age of 16 years and apparently residing there; or
 - (c) by sending it by post addressed to that person's usual or last known place of residence; or
 - (d) if that person's name and address are not known to the server, by posting it up on a conspicuous part of the property in respect of which the notice is given.
- (7) The proposed action to remove or obliterate graffiti must not be taken if—
- (a) where entry to private property is necessary, the owner or occupier does not give written consent as required by subsection (2)(b); or
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- (b) where entry to private property is not necessary, the owner or occupier objects to the proposed action in the manner specified in the notice referred to in subsection (3)(a) at any time before the proposed action is taken.
- (8) In taking action to remove or obliterate graffiti under this section, a Council must—
- (a) take reasonable steps to consult with the owner or occupier of the property in relation to the manner in which the action is to be taken; and
 - (b) if entry to private property is necessary, ensure that the work is carried out by an authorised person; and
 - (c) ensure, as far as is practicable, that the work is carried out—
 - (i) expeditiously and in such a way as to avoid unnecessary inconvenience or disruption to the owner or occupier of the property; and
 - (ii) with reasonable care and to a reasonable standard.

19 Authorised persons

- (1) A Council may authorise a person in writing to carry out the Council's functions under section 18.
 - (2) In determining whether to authorise a person under subsection (1), a Council must consider whether the person—
 - (a) has the relevant knowledge and experience and is competent to exercise the functions conferred on an authorised person under this Part; and
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- (b) is of good repute, having regard to character, honesty and integrity; and
 - (c) has agreed in writing to exercise the functions and powers conferred on an authorised person under this Part in accordance with performance criteria determined from time to time by the Council.
- (3) An authorisation under this section is for the term, and subject to the conditions, specified in the authorisation.

20 Authorised persons to have identity card

- (1) A Council must issue an identity card to a person authorised under section 19.
- (2) An identity card under subsection (1) must—
 - (a) contain a photograph of the authorised person; and
 - (b) contain the signature of the authorised person; and
 - (c) be signed by a member of staff of the Council authorised by the Council to do so, either generally or in a particular case.
- (3) An authorised person who is exercising a power or performing a function under section 18 must produce his or her identity card on being requested to do so.
- (4) Any action taken or thing done by an authorised person is not invalidated by his or her failure to produce his or her identity card.

21 No compensation

No compensation is payable in respect of any loss, damage or injury to property resulting from or arising out of any act or omission done in good faith by any person in the exercise of a power or the performance of a function under this Part.

22 No duty to remove graffiti

Nothing in this Part imposes a duty on a Council to remove or obliterate graffiti from private property.

PART 5—MISCELLANEOUS

23 Payment of penalties

If an authorised officer appointed by a Council prosecutes an offence against section 10(2), all penalties recovered in relation to the offence must be paid into the municipal fund of that Council.

24 Forfeiture of graffiti implements

(1) If a court—

- (a) finds a person guilty of an offence against this Act; or
- (b) finds a person not guilty of an offence against this Act because of mental impairment—

the graffiti implement to which the offence relates is forfeited to the Crown and may be sold or destroyed, unless the court orders that it be returned to the person.

(2) If a person is served with an infringement notice for an offence against section 7(1) and—

- (a) the person pays the infringement penalty in full under the **Infringements Act 2006** or otherwise; or
- (b) the person commences to pay the infringement penalty by payment plan under section 48 of the **Infringements Act 2006**; or
- (c) the infringement notice is withdrawn under section 18 of the **Infringements Act 2006** and an official warning is served on the person in accordance with section 8 of that Act; or

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- (d) an enforcement order under section 59 of the **Infringements Act 2006** or under Schedule 3 to the **Children, Youth and Families Act 2005** is made in relation to the infringement offence and any action is taken to enforce that enforcement order—

the graffiti implement to which the offence relates is forfeited to the Crown and may be sold or destroyed.

- (3) A graffiti implement forfeited under subsection (1) must not be sold or destroyed until the period for an appeal has expired or, if an appeal has been lodged, the appeal has been dismissed.

25 Return of seized items when no proceedings brought etc.

- (1) An article, thing or material which has been seized in relation to an offence against this Act must be returned to the person from whom it was seized if—
- (a) proceedings for that offence are not commenced within the period of 3 months after the seizure; or
 - (b) a decision is made within that period not to bring proceedings for that offence; or
 - (c) the person is found not guilty of the offence (other than not guilty because of mental impairment); or
 - (d) in the case of an infringement notice served for an offence against section 7(1), the infringement notice—
 - (i) is withdrawn on the ground that no further action will be taken in relation to the offence; or

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- (ii) is cancelled under section 38 of the **Infringements Act 2006** or under clause 16 of Schedule 3 to the **Children, Youth and Families Act 2005** and the seized article, thing or material has not been sold or destroyed.
- (2) The member of the police force in charge of the police station at which the seized article, thing or material is kept must give notice to the person from whom it was seized of that person's right to have it returned.
- (3) A person to whom notice is given under subsection (2) may apply within 7 days after receipt of the notice for the return of the seized article, thing or material.
- (4) If an application is not made in accordance with subsection (3), the seized article, thing or material is forfeited to the Crown and may be sold or destroyed.
- (5) A person who applies in accordance with subsection (3) for the return of a seized article, thing or material must collect it from the police station at which it is kept.
- (6) If the person who applies for the return of a seized article, thing or material is under 18 years of age, the seized article, thing or material must not be returned to the person unless he or she is accompanied by his or her parent or guardian when collecting it.

26 Proceeds of sale of forfeited property to be paid into Consolidated Fund

The proceeds of the sale of any property forfeited to the Crown under this Act must be paid into the Consolidated Fund.

27 Regulations

- (1) The Governor in Council may make regulations for or with respect to—
 - (a) prescribing graffiti implements for the purposes of the definition of *prescribed graffiti implement*; and
 - (b) the manner in which searches and seizures under this Act are to be carried out; and
 - (c) prescribing forms; and
 - (d) generally prescribing any other matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.
- (2) The regulations—
 - (a) may be of general or limited application;
 - (b) may differ according to differences in time, place or circumstance;
 - (c) may confer a discretionary authority or impose a duty on a specified person or body or class of persons or bodies.

See:
Act No.
9921.
Reprint No. 12
as at
1 January
2007
and
amending
Act Nos
95/2005,
97/2005,
9/2006,
47/2006,
48/2006,
71/2006,
85/2006,
28/2007 and
30/2007.
LawToday:
www.
legislation.
vic.gov.au

28 Amendment of the Transport Act 1983

- (1) Sections 223A, 223B, 223C, 223D, 223E and 223F of the **Transport Act 1983** are **repealed**.
- (2) This section is **repealed** on 1 September 2009.

ENDNOTES

[†] *Minister's second reading speech—*

Legislative Assembly: 20 September 2007

Legislative Council: 11 October 2007

The long title for the Bill for this Act was "A Bill for an Act to provide measures for the minimisation of graffiti, to create graffiti-related offences, to provide for the removal of graffiti and for other purposes."

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