



PARLIAMENT OF WESTERN AUSTRALIA

**JOINT STANDING COMMITTEE
ON
DELEGATED LEGISLATION**

TWENTY-SIXTH REPORT:

Road Traffic (Amendment to Fees) Regulations 1997

Presented by the Hon Robert Laurence Wiese MLA (Chairman)

**26
October 1997**

Joint Standing Committee on Delegated Legislation

Members

Hon Bob Wiese MLA (Chairman)
Hon Nick Griffiths MLC (Deputy Chairman)
Hon Simon O'Brien MLC
Hon Barbara Scott MLC
Hon Jim Scott MLC
Mr Ted Cunningham MLA
Mr Mark McGowan MLA
Mr Iain MacLean MLA

Advisory/Research Officer

Andrew Mason

Committee Clerk

Jan Paniperis

Terms of Reference

It is the function of the Committee to consider and report on any regulation that:

- (a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*
- (b) unduly trespasses on established rights, freedoms or liberties;*
- (c) contains matter which ought properly to be dealt with by an Act of Parliament;*
- (d) unduly makes rights dependent upon administrative, and not judicial, decisions.*

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

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Report of the Joint Standing Committee on Delegated Legislation

in relation to

Road Traffic (Amendment to Fees) Regulations 1997

1 The Committee's Duty

- 1.1 By its Rules the Joint Standing Committee on Delegated Legislation is charged by the Parliament with the performance of a scrutiny function in respect of legislative instruments that the Parliament has delegated the creation of to the Executive. This scrutiny role is delegated to the Committee by the Parliament and is the only practical avenue for Parliament to check that the Executive is acting in accordance with the power delegated to it, other than members each reading the hundreds of legislative instruments created each year. However, by its Rules the Committee is constrained in the performance of its scrutiny function to the examination of legislative instruments to determine whether they comply with certain legal principles and broader issues relating to rights, liberties and freedoms. In particular, pursuant to Rule 5(a) of the Committee's Rules it is the function of the Committee to consider and report on any regulation that appears not to be within power. This is usually the starting point for the Committee in the performance of its work for, if the regulation is beyond the power delegated to the Executive and capable of being struck down as such by a court, there is little point in examining the regulations in relation to any other matter.
- 1.2 Where the Committee is of the view that a regulation is beyond power or that there are other matters of concern it is the practice of the Committee to consult the relevant Minister to determine whether the matter can be resolved other than by disallowance of the offending regulation. This may take the form of a Ministerial undertaking to amend the legislation or regulations in issue.

2 The Previous Drivers' Licence and Recording Fee Increases

- 2.1 The Committee has had cause to consider increases in the fees for drivers' licences and the recording fee attached to vehicle licences in August. Drivers' licence fees were then increased from \$26 to \$29 for a one-year licence and from \$90 to \$92 for a five-year licence. The recording fee was increased from \$12.50 to \$14. The Committee on that occasion formed the view that the relevant regulations were beyond the power delegated to the Governor in Executive Council by the *Road Traffic Act 1974* and in its 25th Report recommended to the Parliament that they be disallowed. The Legislative

Council disallowed those regulations on 26 August 1997.

3 **The Further Drivers' Licence and Recording Fee Increases**

3.1 Drivers' Licence fees and the recording fee are again the subject of inquiry by the Committee as the result of further increases. These further increases took effect from 1 July 1997 before the Legislative Council had considered and disallowed the previous increases. The Committee has now had cause to consider regulations 5 (d), (e) and 7(e) of the *Road Traffic (Amendment to Fees) Regulations 1997*. These regulations are subject to a disallowance motion in the Legislative Council. Due to the impending expiry of the period in which the Committee could give notice of motion of disallowance, the Deputy Chairman gave notice of motion of disallowance of the regulations on 21 August 1997 because the Committee was concerned about certain aspects of the regulations and required more information from the Department of Transport.

3.2 Regulations 5(d) and (e) of the *Road Traffic (Amendment to Fees) Regulations 1997* increase the fees payable in respect of the issue of a drivers' licence from \$29 to \$30 for a one-year licence and from \$92 to \$95 in respect of a five-year licence. On the basis of information supplied by the Department of Transport to the Committee it has been determined that these increases relate to a CPI increase of 2.5% with rounding to the nearest whole number.

3.3 Regulation 7(e) of the *Road Traffic (Amendment to Fees) Regulations 1997* increases the recording fee payable in respect of vehicle licences from \$14 to \$14.70. On the basis of information supplied by the Department of Transport to the Committee it has been determined that 40 cents of this increase is to meet the cost incurred for the introduction of a credit card facility for licence payments with the balance being a CPI related increase with rounding to the nearest whole number. As at 1 July 1997, when the increased fee became effective, a credit card payment facility was not available. The latest information supplied by the Department is that the facility will be available in November 1997.

4 **The Committee's Concerns**

4.1 The Committee is particularly concerned that the Department continues to render the increased fees irrespective of the parliamentary disallowance of the earlier increases. The Department has advised the Committee that if an individual paid for a drivers' licence today they would be charged either \$30 or \$95 and a vehicle licence would include the recording fee set at \$14.70. A legal question arises as to the validity of an increase premised upon an earlier increase that has been disallowed. The Department have informed the Committee that they have legal advice that under the provisions of the *Interpretation Act 1984* the charging of the higher amounts is valid. The Committee has not examined this question in depth but has received legal advice that the charging of the higher amount is invalid.

4.2 Irrespective of the legal position, the charging of the higher amount undermines the

process of Parliamentary disallowance. The parliamentary intent of the previous disallowance is clearly frustrated by the Department charging the higher amounts that were introduced by subsequent regulations.

- 4.3 The other concern of the Committee rests with the increase in the recording fee under regulation 7(e) based on the provision of a credit card facility that is not yet available. The same concern that arose in respect of the previous increases arises with this increase as the impost appears to fulfill all the accepted attributes of a tax. The legal concepts in this respect were briefly discussed in the Committee's 25th Report on the previous increases. The essential points to be made are:
- 4.3.1 The credit card option was not available on 1 July 1997, when the increase started. It is still not available.
- 4.3.2 Even if the credit card option had been available, the 40 cent credit card fee would still be a tax because a licensee has to pay it, whether he or she wants to pay by credit card or not. The 40 cent component cannot be characterised as a payment for services (and thus an exception to the concept of a tax) where the paying licensee is not capable of paying by credit card, or does not wish to pay by credit card. The reasoning of the High Court in *Air Caledonie International v. The Commonwealth* (1988) 165 CLR 462 is directly applicable. For a charge otherwise meeting the qualifications of a tax, to be classified as a "fee for services", it is not enough to say that the person paying it is deriving some general benefits in return from the government or other body receiving the fee. That the fee is paid in return for public services in this general, impersonal sense, is not enough. What is required is a fee or charge exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment. To qualify as a fee for services, the benefit to the payer must be *direct and proportionate to the charge paid*. It may be said that the credit card option would be available to licensees as a class, and that there is thus a corresponding benefit. But like in *Air Caledonie*, this "class" really consists of two distinct sub-classes: those paying by credit card, and those not paying by credit card. The charge operates as a tax in relation to the latter sub-group.
- 4.4 In light of the above the Committee's legal advice is that in respect of regulation 7(e) of the *Road Traffic (Amendments to Fees) Regulations 1997*:
- 4.4.1 such an impost equates to a tax;
- 4.4.2 nothing in the *Road Traffic Act 1974* appears to authorise the imposition of a recording fee charge that amounts to a tax; and
- 4.4.3 for these reasons the impost in question is *ultra vires* or beyond the power contained in the Act to impose by way of regulation.

5 The Committee's Position

- 5.1 The Committee has addressed its concerns with the Department. Relevant officers of

the Department were called before the Committee to give evidence and the Department was given the opportunity to take legal advice on the issues that were raised by the Committee. The Department consulted D. R. Jackson, QC and a copy of his advice was provided to the Committee. At the completion of these investigations and after the Committee took its own independent legal advice from a barrister specialising in constitutional law, Dr J T Schoombee, it remains the Committee's opinion that regulation 7(e) is beyond the power delegated to the Governor in Executive Council by the *Road Traffic Act 1974*. The legal advice that Dr Schoombee provided to the Committee took into account the legal advice provided to the Department.

- 5.2 In respect of the drivers' licence fee increases the Committee remains concerned that these have been increased and the Department continues to charge the higher amount irrespective of the disallowance of the previous increases by the Legislative Council in August. The Committee is concerned that this amounts to a frustration of the parliamentary intent and may unduly trespass on the rights of potential licensees which are effectively being denied reliance on the earlier disallowance.
- 5.3 Despite the above concerns the Committee on this occasion does not recommend that these regulations be disallowed. The Committee has been in communication with the Minister who has advised the Committee that Cabinet approval has been obtained to amend the *Road Traffic Act 1974*. The Committee was advised of a cabinet decision dated 6 October 1997 to the effect that "Cabinet approves the amendments to the *Road Traffic Act* and the *WA Marine Act* to provide Transport with the power to levy fees and charges to cover the administration cost of vehicle, driver and boat registration and the associated costs of providing services and infrastructure". Annexed to this report is a letter from the Minister of Transport dated 8 October 1997 marked "Annexure A".
- 5.4 The Minister has indicated his intention to provide a legislative solution to the problem that will remove any ambiguity as to the power of the Department to set fees and charges. Therefore, the Committee has resolved to seek leave to withdraw the motion for disallowance.
- 5.5 It was reported on the last occasion that the Committee was intending more fully to report on the implications of this matter for public sector accounting in general. The Committee is working towards providing a full report in this regard. It is intended that the report will outline the legal problems that arise in respect of setting fees and charges in light of modern accounting principles. It is hoped that the report will provide some guidance to government when fees and charges are set.



ANNEXURE A.

MINISTER FOR TRANSPORT
WESTERN AUSTRALIA

- 8 OCT 1997

Hon Robert Wiese
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Bob

Further to our telephone conversation on Monday October 6, 1997 please find enclosed a copy of the Queen's Councils opinion in relation to the licensing fees. This opinion as you can see advises the Government that it has the power to set such fees as have been tabled via regulation in the Parliament.

As part of the process to clarify the current legislation I have also undertaken to obtain Cabinet approval to amend the Road Traffic Act. I have attached a copy of that approval which was granted on Monday October 5, 1997. The Road Traffic Act is scheduled to be introduced into Parliament on Tuesday October 14, 1997 for amendments to fines and penalties, it is my intention to use this opportunity to also amend the Act so as to clarify the setting of licence fees and charges.

Following Cabinet's approval I am currently liaising with Parliamentary Council to have the amendment drafted for introduction into Parliament. I am not in a position to make available that amendment but will do so as soon as it is completed. The Cabinet decision also relates to amendments for regulations relating to the setting of boating registration fees. I will seek to introduce amendments to the principal Act to clarify this area as well.

My view is that we have attempted to accommodate the findings of the Committee and have implemented a process of legislative change that will ensure that there is no ambiguity as far as the power to set fees and charges is concerned. With this in mind I seek your favourable decision to withdraw the Disallowance Motion in relation the regulations under the Road Traffic Act and the WA Marine Act.

If you require any further information please contact me.

Eric Charlton

Eric Charlton, MLC
MINISTER FOR TRANSPORT
Attach.