Parliament of Western Australia

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

REPORT

ON THE

DEPARTMENT OF LAND ADMINISTRATION REGULATIONS

1992

Tenth Report
November 1992

Tenth Report by the Joint Standing Committee on Delegated Legislation

It is the function of the Joint Standing Committee on Delegated Legislation 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 and liberties;*
(c) *contains matter which ought properly to be dealt with by an Act of Parliament; or*
(d) *unduly makes rights dependent upon administrative, and not judicial, decisions. [Rule 5]*

The Committee is also empowered under Rule 7 of its Standing Rules to report to the House:

> *"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.*

Under Rule 5a of its Standing Rules, the Joint Standing Committee on Delegated Legislation presents the following report on regulations made under various Acts administered by the Department of Land Administration.

HON TOM HELM MLC

CHAIRMAN
November 1992

Report by the Joint Standing Committee on Delegated Legislation

on

Transfer of Land Regulations 1992

Strata Titles General Amendment Regulations 1992

Registration of Deeds Amendment Regulations 1992

Land Amendment Regulations 1992

PART I

Register 2000 Surcharge

The regulations were gazetted on July 10, 1992 and tabled on August 25, 1992. Following detailed examination by the Committee and correspondence with the Minister for Lands, the Committee resolved that notice of motion of disallowance be given in the Legislative Council on October 21.

Disallowance has consistently been used by the Committee as a last resort when the Committee is satisfied that one or more of its Terms of Reference have been breached and when discussions with the department and responsible Minister have failed to produce the necessary amendments.

The following report explains the background to the Committee's concerns and the reasons for the decision to move for disallowance.

BACKGROUND

In Part II of its Seventh Report[1], tabled in November 1991, your Committee outlined its concerns that the regulations examined by this report were *ultra vires* the enabling Legislation to the extent that a surcharge to cover the cost of the computerisation of the Department of Land Administration land titles information[2] had been included as a component of the fees for registration of documents and searches.

In Part I of the Report the Committee discussed the inclusion of a levy for the Courts Modernisation Fund in various court fees and concluded that the levy was both *ultra vires* and a tax for the

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[1] APPENDIX A - Seventh Report Part I - Various fees under the *Local Courts* and *Justices Acts*: Part II - Various fees under Department of Land Administration Legislation.

[2] Register 2000 Project

following reasons.

1. The levy was *ultra vires*

It was argued that a governing principle for assessing whether a regulation was *intra vires* was:-

> *"whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised..."*[3]

Members formed the opinion that the computerisation and modernisation of the Court System was neither *"incidental"* nor *"consequential upon"* the legislative authority to charge fees. The imposition of a levy was, in fact, consequential upon the *decision to computerise* the Court System and was designed to recover a capital cost and not the cost of providing certain administrative services.

2. The levy constituted a tax

Your Committee further argued that the levy fulfilled all of the attributes of a tax cited in the case of *Air Caledonie and Others v The Commonwealth*[4].

In finding for the plaintiff, the court stated that a levy could be classified as a tax if it were:-

(a) compulsory

(b) for public purposes

(c) enforceable by law

(d) not a payment for services rendered to the person required to make the payment

(e) not a penalty

(f) not arbitrary, and

(g) bore no *"discernible relationship"* to the value of what is acquired.

Having considered the Committee's arguments, the Attorney-General agreed to dismantle the Courts Modernisation Fund and the motions for disallowance of the regulations in question were withdrawn. The Fund was dismantled by the end of the 1991/92 financial year.

The Committee based its conclusion that the Register 2000 Surcharge was similarly *ultra vires* on the same arguments but as the time for disallowance of the regulations had elapsed, it recommended that:-

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[3] Attorney-General v Great Eastern Railway Company (1880) S App. Cas 473 at 478.

[4] 1989 63 ALJR 30; 82 ALR 385

"The Minister for Lands undertake an investigation of the matter and report to Parliament at the earliest opportunity."[5]

A copy of the Minister's response dated 26 May 1992 is appended to this report.[6]

3. THE MINISTER'S RESPONSE TO THE COMMITTEE'S SEVENTH REPORT

(i) *A tax by any other name*

In his letter dated 26 May 1992, the Minister states at page 1 -

"The Committee were wrong to approach the matter on the basis that the various relevant regulations imposed a separate identifiable thing called "the Register 2000 Surcharge". There was no separate "surcharge". The various fees were simply adjusted to incorporate a notional "surcharge". It is the entire fees themselves which require scrutiny and evaluation for legal purposes."

This view is incompatible with the statements in the Explanatory Memorandum which accompanied the 1990/91 fee review:

"The new fees specified in the regulations are administered by the Office of Titles within the Department of Land Administration and were determined by amalgamating the Annual Fee Review with the Register 2000 surcharge. Amalgamation became necessary when the Office realised that both fee submissions would be ready for implementation at the same time. Thus, by amalgamating the two submissions, it was felt the public would be spared the inconvenience of two fee increases very close together."

As indicated in this Explanatory Memorandum at page 2, the initial intention was to impose the $2 surcharge on Office of Titles fees for a limited time. However, it was finally decided to distribute the surcharge over the entire fee structure, thus *"minimising its impact on any one section of the Land Industry."* By incorporating the principle of standardisation, the $2 surcharge became a $6 surcharge on all fees. The proposal is due to be reviewed this year and sunsetted after 5 years.

The Minister's statement is also self-contradictory.

A surcharge which is "notional" is still a surcharge if it operates as such. What the charge is *called* does not determine the *nature* of the charge. The case cited in support of the

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5 See page 8 of the Committee's Seventh Report

6 See APPENDIX B

Minister's argument[7] merely established that the fee in question was *ultra vires*. The question of whether the fee was a *tax* did not arise.

By contrast, the judgement in the case of *Air Caledonie and Others v The Commonwealth*[8], dealt with the **nature** of the operation of a charge and offered the following definition:-

> *"...a compulsory and enforceable exaction of money by a public authority for public purposes will not necessarily be precluded from being properly seen as a tax merely because it is described as a "fee for services". If the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax."*

(ii) *A reasonable charge*

The Minister also quotes advice from the Crown Solicitor's Office in support of the view that the fee is *"reasonable and appropriate"* based on the views of Professor Dennis Pearce in his text book on *"Delegated Legislation"*.

The paragraph quoted - para 383 - discusses the invalidity of a fee based on its being judged **unreasonable** by the Courts. It does not consider the proposition that a fee was ***ultra vires*** on the grounds that there was no express authority to charge that fee in the parent Act.

> [para 383] *"**Determination of appropriate fee.** The approach of the courts involves them in the somewhat awkward exercise of having to determine what is a reasonable fee for the services being provided. As usual, however, the courts are prepared to undertake this task and, indeed, in most cases, it will be apparent whether the fee imposed does represent a fee for services or whether it is an attempt simply to raise revenue. For example,* Levingston v City of Hobart *(1931) 26 Tax LR 164 was concerned with fees for hoarding licences. The evidence showed that the administrative cost involved in licensing the plaintiff's hoardings would amount to approximately £10 whereas the licence fee being demanded was £114. The court had no*

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7 *Marsh v Shire of Serpentine-Jarrahdale* [1966] 120 CLR 572

8 See Committee's Seventh Report, page 5

difficulty in concluding that the fee bore no relationship to the administrative cost but was in fact a revenue raising device. At first sight the case of Wroblewski v McLaren *(1926) 29 WALR 24 appears to run counter to this decision. But there the court resolved that a fee of a somewhat similar size to that in Levingston's case did not constitute a prohibition and therefore was valid under a power to regulate hoardings. The revenue raising point was not considered. See also* Porter v The Mayor of Wellington *(1913) 32 NZLR 761 as explained in* In re a By-Law of the City of Auckland *[1924] NZLR at 911;* Bennett v Daniels, *[380]."*[9]

Whether or not the fees are *reasonable* was not part of the Committee's argument.
The paragraph pertinent to the Committee's argument is **378** where Professor Pearce cites the English case of *Attorney General v Wilts United Diaries*[10] and the judgement by Lord Wrenbury -

[para 378] *"**No fee permissible without authority**. A matter to which the courts pay close heed is that of the imposition by delegated legislation of fees for licences or other services. The courts approach the matter from the viewpoint that unless there is clear authority to do so, a body exercising delegated legislative authority has no right to impose a charge. The authority usually cited for this proposition is the English case of* Attorney-General v Wilts United Dairies *(1922) 91 LJKB 897. There the House of Lords ruled that a charge on milk producers imposed by regulation was in fact a tax and taxes could only be imposed by the parliament or by the clear authority of the parliament. Lord Wrenbury at 900 said:*

> "The Crown in my opinion cannot here succeed except by maintaining the proposition that when statutory authority has been given to the Executive to make regulations controlling acts to be done by His Majesty's subjects, or some of them, the Minister may, without express authority so to do, demand and receive money as the price of exercising his

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9 *Delegated Legislation in Australia and New Zealand:* Professor D.C. Pearce 1977, at page 167

10 (1922) 91 LJKB 897

> power of control in a particular way, such money to be applied to some public purpose to be determined by the Executive."
>
> *And this proposition was untenable. Earlier authority to the same effect in Australia is provided by the case of* Kluver v Woolloongabba Divisional Board *(1884) 2 QLJ 37. The power there was to make by-laws for regulating and licensing vehicles plying for hire. Pursuant to this power, the Board established a licensing scheme with the requirement that a fee be paid. The by-laws were held* ultra vires *because the fee amounted to a tax and there was no authority to impose it. Similarly, in* In re Hender; Hender v Smedley *[1916] SALR 158, it was held that a power to make regulations necessary or convenient for giving effect to the* Licensing Act *did not allow the making of a regulation imposing fees for applications to the Licensing Court. It pointed out that, under the* Act, *the salaries and expenses of members of the Licensing Court were a charge on public revenue. No other justification for the regulations other than to lessen the expense of general administration of the* Act *could be seen and the* Act *did not provide authority for the imposition of fees for this purpose."*[11]

The information given by DOLA in its 1990/91 Explanatory Memorandum clearly states that the Register 2000 levy is to fund the cost of services to be provided in the future. There does not appear to be any statutory authority[12] to impose charges as the price of a Ministerial decision to modernise the operation of the department and the Committee does not alter its opinion that the fees are *ultra vires* **to that extent**.

(iii) *The basis for the fees*

The Minister has provided information regarding the calculations on which the original

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[11] ibid 9 above at page 165

[12] Enabling sections in the relevant legislation refer to -
"...fees which may be charged" (s.181(c) Transfer of Land Act)
"...regulations that are necessary or convenient for giving effect to the purpose of this Act, and in particular...(a) providing for fees" (s.172 Acts Amendment (Land Administration Act)
"...the fees which may be charged" (s.22(b) Registration of Deeds Act)
"...the fees to be paid for any procedure or function required or permitted to be done under this Act" (s.130(b) Strata Titles Act)

costing of the fees was based and informed the Committee that an amount of $8.4m was allocated for contingencies, such as the costs of replacing and upgrading equipment. Of that $8.4m, $6.6m was allocated for the Register 2000 Project. The total cost of the implementing of the program was estimated at **$29.6m**[13] and the fees were set accordingly.

Following a review of these calculations, prompted by the Committee's Report, it was established that an estimate of $6.6m was inappropriate and that **$2.8m** would have been more appropriate, although no reasons were given. The "miscalculation" in conjunction with a recasting of the estimate for overheads resulted in a subsequent estimate of **$24.6m**. It should follow that the basis for calculating the fees should also be reassessed, with possibly some reduction in the level of fees charged.

On page 3 of his letter, the Minister also refers to a "price" for the replacement of assets and the need to "incorporate the business risk through an appropriate return on capital". This could be construed as meaning that if there is a decline in the number of lodgements or registrations, users of the system may be required to pay more.

(iv) ***The Minister's Conclusions***

(a) **In future fee reviews, the Office of Titles will have a more appropriate base on which to calculate costs of the land titles program.**

(b) **The gazetted fees are <u>not taxes</u> and are <u>authorised by the relevant Acts</u>.**

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[13] page 3 of the Minister's letter of 26 May 1992

4. THE COMMITTEE'S CONCLUSIONS

(a) The Committee has been presented with no convincing legal arguments by the Minister to refute its initial contention that the Register 2000 surcharge is not a valid component of a fee for service, is not expressly authorised by the enabling legislation, and is therefore *ultra vires*.

(b) Based on its legal advice, there appear to be no grounds for the Committee to change its original view that the surcharge component of the fees is *ultra vires* and to that extent, invalid.

(c) The propositions in the Committee's Seventh Report have been adopted by the Northern Territory Subordinate Legislation and Tabled Papers Committee in dealing with a similar levy imposed by *Registration Regulations* concerning certain land titles dealings.
Having considered the arguments put forward by that Committee, the Attorney-General introduced a Bill to amend the enabling legislation by providing the statutory authority for the imposition of such a levy.[14]

(d) The Seventh Report has also been used by the Canadian Standing Joint Committee for the Scrutiny of Regulations in its examination of regulations.

> *"We were also very interested in your Committee's Seventh Report. It reached us at a time when the Joint Committee was giving consideration to its Fourth Report and served to confirm the validity of our concern with respect to fees imposed under the Federal Divorce Act."*[15]

RECOMMENDATIONS

On the grounds that the imposition of the Register 2000 surcharge on fees under the administration of the Department of Lands Administration is *ultra vires* the current enabling legislation, your Committee makes the following recommendations:-

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[14] see APPENDIX - Hansard report May 21 1992 - Second Reading Speech of the *Registration Amendment Bill*

[15] Extract from a letter from the Joint Chairman of the Standing Joint Committee for the Scrutiny of Regulations, May 4 1992

1. **That the *Transfer of Land Regulations 1992*, *Strata Titles General Amendment Regulations 1992*, *Registration of Deeds Amendment Regulations 1992*, *Land Amendment Regulations 1992* be disallowed.**

2. **That the statutory authority to incorporate an amount to cover the cost of the Register 2000 computerisation program be included by amending the parent legislation.**

PART II

Abolition of the Transfer of Land Act Assurance Fund

Under Rule 7 of its Standing Rules, which empowers the Committee to report on any matter relating to any regulation which it believes should be brought to the attention of Parliament, your Committee presents the following report on Part 8 of the *Transfer of Land Regulations 1992* which were gazetted on July 10 and tabled on August 25.

Under Part 8 of the regulations -

> *"An Assurance Fund contribution is payable on first bringing freehold land under the operation of the Act, whether by application or Crown grant, and on the issue of a certificate of title to a proprietor by possession.*
> *For each dollar of the value of the land - 0.2 of a cent."*

In the Explanatory Memorandum[16] relating to the current amendment to the *Transfer of Land Regulations*, the Committee was informed as follows:-

> *"It is proposed to implement the recommendations contained in the **Land Titles Bill 1985** to abolish the Transfer of Land Act Assurance Fund; to transfer funds in the Assurance Fund to the Consolidated Revenue Fund and to provide that any claims against the Registrar of Titles are payable from the Consolidated Revenue Fund. In conjunction with the repeal of the Assurance Fund, it has been decided to reduce the administrative inefficiencies that presently exist in the collection of a separate fee as a contribution to the Assurance Fund. This requires the repeal of the provision requiring a separate contribution to the Assurance Fund. Instead of collection of a separate fee, the fee for lodgement of dealings will be slightly increased to recoup the fees lost by the repeal of separate contributions. The proposed fee for lodging dealings has been increased from $60 to $62. The $2 increase represents a 2.8% CPI increase and a 30 cents contribution to compensate for the repeal of separate contributions to the Assurance Fund. This proposal has been discussed with and approved by Treasury. It is expected that the legislation abolishing the Assurance Fund will be considered by Parliament before commencement of the new fees."*

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[16] dated 14 August 1992

Having considered the information, the Committee reached the following conclusions:-

(i) It would have been impossible for the *Transfer of Land Act* to have been amended as required **before** the regulations came into operation on August 10 as Parliament was not scheduled to return until **August 25**.

(ii) The amendments have not been introduced since Parliament returned on August 25.

(iii) As explained in the Explanatory Memorandum supplied to the Committee, it would appear that compensation for the *future* loss of contributions to the Assurance Fund has been incorporated in various lodgement fees. However as the regulations now stand, a contribution of 0.2 of a cent per dollar value of the land is still payable under Part 8 of the *Transfer of Land Regulations*.[17]

The Committee has sought clarification from the Minister and has received the following further information.

1. The Transfer of Land Act Assurance Fund

(i) The requirement for separate contributions to be made to the Assurance Fund had proved administratively inconvenient to DOLA and the abolition of the Fund was seen as an opportunity to dispense with an inefficient fee structure and to replace it with "a more effective system of an additional fee component per dealing".[18]

(ii) The amendments to the legislation will be considered by Parliament in the Autumn Session of **1993**.

2. The Additional Fee Component

(i) The information provided in the letter of 14 August was incorrect with regard to the inclusion of an amount of 30 cents in the lodgement fees to compensate for the loss of contributions from the Transfer of Land or Assurance Fund.

(ii) The fee was increased in line with a 2.8% increase in CPI which produced a fee of $61.68,

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[17] see above at page 9

[18] APPENDIX E Minister's letter 21 October 1992

and was rounded to $62 in accordance with the Department's policy of rounding to the nearest dollar. The Minister states:-

> *"As a consequence, regardless of the repeal of the Assurance Fund, DOLA's lodgement fee would have been set at $62.00 per dealing in its new fee schedule".*[19]

(iii) Following abolition of the Fund, and to make allowance for a possible shortfall in funds available for claims for compensation where a registered proprietor is deprived of land by some fraudulent action, Treasury was requested by DOLA to "earmark" the "round-up" figure of 32 cents per dealing *"for the specific purpose of providing sufficient funds in Treasury to cover the liability of Consolidated Revenue"*[20]

(iv) Having been informed that Treasury does not have the authority to hold funds in a trust for a particular purpose, an informal arrangement was suggested whereby the 32 cents "rounding up" amount could be held for *"internal accounting purposes" "as a contribution to a trust account in substitution for the Assurance Fund" and "the existing Assurance Fund contributions could be dispensed with without any further increase in fees".*

(v) If the repeal of the Assurance Fund does not proceed, DOLA would use the base fee of **$61.68** when determining the next fee increase.

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[19] ibid 18 above

[20] ibid 18 above

THE COMMITTEE'S CONCLUSIONS

(i) Although the Minister has argued that the 32 cents in excess of the 2.8% CPI increase was for rounding up purposes only, he has also demonstrated that DOLA had made a number of different requests to Treasury to allocate that figure for *Assurance Fund purposes*.

(ii) The Minister has conceded that -

> *"if the repeal of the Assurance Fund does not proceed in the Autumn Session 1993, then I expect that DOLA will use the base fee of $61.68 and not $62.00 when determining the next fee increase".*[21]

(iii) Part 8 of the regulations prescribing the contributions to the Assurance Fund has not been repealed.

(iv) The amendments to the *Transfer of Land Act* abolishing the Assurance Fund are not envisaged before the Autumn Session **1993**.

(v) The Committee remains of the view that contributions to the Assurance Fund appear to be levied under 2 separate provisions:-

(a) as a 32 cent component of the lodgement fees for various dealings;

(b) as prescribed under Part 8 of the *Transfer of Land Regulations*.

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[21] Minister's letter 21 October 1992

RECOMMENDATIONS

In its **Ninth Report on the *Fisheries Regulations***, your Committee has drawn to the attention of the House its concern at the imposition of fees in *anticipation* of statutory amendments which have not been introduced into Parliament.

In the case of the *Fisheries Regulations*, the initial intention was to introduce the legislation establishing an exclusive trust fund to hold monies from recreational fishing licences, some two years **after** the introduction of the licence fees although the recommendation for the introduction of the licences was *conditional* on the establishment of that Fund[22].

The Minister for Fisheries has now agreed to introduce the amendments to the *Fisheries Act* in the current session of Parliament to address the concerns highlighted in the Committee's Ninth Report.

In relation to the Transfer of Land Act Assurance Fund, the decision to introduce an additional fee component in anticipation of a statutory amendment which **could not** have been introduced before the regulations took effect, is equally unacceptable, particularly in view of the continuation in the regulations of Part 8 prescribing the contribution to the Assurance Fund.

Members are not convinced that the 32 cents over and above the increase for CPI purposes was purely for rounding up purposes and are concerned in general terms at the almost universal practice of "rounding" used by departments in review of fees. This concern becomes more serious when it becomes apparent that "rounding-up" sums may be used for other purposes eg. as an internal accounting arrangement by Treasury for a specific purpose.

Your Committee accordingly makes the following recommendations:

1. **That the regulations increasing the fees be disallowed.**

2. **That the legislative amendments to abolish the Assurance Fund be introduced without delay, if abolition of the Fund is still sought by the Department of Lands Administration.**

3. **That the practice of gazetting regulations in anticipation of, and dependent upon, statutory amendments which are not subsequently introduced, cease forthwith.**

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[22] See Ninth Report November 1992, page 11

PARLIAMENT OF WESTERN AUSTRALIA

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

PART I

VARIOUS FEES UNDER THE *LOCAL COURTS* AND *JUSTICES ACTS*

PART II

VARIOUS FEES UNDER DEPARTMENT OF LAND ADMINISTRATION LEGISLATION

NOVEMBER 1991
SEVENTH REPORT

Joint Standing Committee on Delegated Legislation

Membership

Hon Tom Helm MLC (Chairman)
Hon Margaret McAleer MLC (Deputy Chairman)
Hon Reg Davies MLC
Hon Beryl Jones MLC
Mr Bob Wiese MLA
Dr Judy Edwards MLA
Mr Phil Smith MLA
Mr Bob Bloffwitch MLA

Advisory/Research Officer

Mrs Jane Burn

Committee Clerk

Ms Jan Paniperis

Terms of Reference (extracts)

5. *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.

7. *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.*

PART I

Justices Act (Court of Petty Sessions Fees) Regulations
Justices (INREP) Amendment (No. 3) Regulations
Local Court Amendment Rules (No. 2)

As part of its responsibility under Standing Orders to scrutinize all gazetted regulations, rules and by-laws, your Committee has examined the above regulations and rules which were gazetted on September 27 and tabled on October 15.

In line with the annual review of fees and charges undertaken by all Departments, various court fees have been adjusted to incorporate an increase in the Consumer Price Index of around 7% since the last review.

The Committee also understands that a surcharge of $3.00 for the Courts Modernisation Fund Levy has been added to the increased originating fee in each section. This levy has been in place since 1989 and is increased from time to time. The *"Program Statements to Support the Consolidated Revenue Fund Estimates of Expenditure"* for the years 1990-91 describe the Law Courts and Court Services Modernisation Fund Program as follows:

> *"The* objective *of the Law Courts and Court Services Modernisation Fund Program is to develop and implement computerised information systems within Western Australian Courts to further facilitate the effective and efficient management and operation of Courts.*
>
> Program Description: *Provides funds through the Trust Fund Account for the development and implementation of computerised information systems within the Western Australian Courts.* ***The total amount charged to this program is covered by the additional revenue received via the levy included in the Court's fees structure....***
>
> *This program is only a funding mechanism for the* ***transfer of revenue received through the application of a levy included as a component of Court fees."*** [1]

(emphasis added)

The final sentence of the statement was repeated in the *"Program Statements"* for the current financial year. [2]

The levy is therefore clearly included in, and a component of, Court fees.

The courts have held that there must be clear authority in the enabling legislation, for a body to impose a charge. The principle that any other view was untenable was stated in

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1 Division 25 - Crown Law at page 206

2 Division 24 - Crown Law at page 159

the English case of *Attorney-General v Wiltshire United Dairies* where the House of Lords ruled:

> *"The Crown in my opinion cannot here succeed except by maintaining the proposition that when a statutory authority has been given to the Executive to make regulations controlling acts to be done by His Majesty's subjects, or some of them, the Minister may, without express authority so to do, demand and receive money as the price of exercising his power of control in a particular way, such money to be applied to some public purpose to be determined by the Executive."* [3]

Justices Act fees are prescribed by regulation pursuant to s. 96(1) which authorises the Governor to:

> *"..make regulations for carrying out this Act, including prescribing the forms to be used in and the fees to be taken in courts of petty sessions and appeals and providing for procedural matters relating thereto."*

A similar authority in the *Local Courts Act* provides:

> *"There shall be payable, in respect of every proceeding in a Local Court, such fees and bailiff's fees as the Governor may from time to time prescribe."*

The authority under which the general fee increase has been made is clearly given in the respective statutes and the regulations imposing those fees are, therefore, *intra vires*. The authority for the levy for the 'Courts Modernisation Fund' is not so clear, however, and presents a more difficult problem.

Given the statement in the annual Budget Papers that the levy is part of the Courts fees structure, your Committee has met with the Under-Secretary for Law and has taken legal advice. The nature of the levy has been examined using the following tests:

(1) *is the levy a fee and intra vires the enabling legislation?*

(2) *if the levy is deemed to be a fee and intra vires, should this type of fee be dealt with by primary legislation?*

(3) *is the levy a tax rather than a fee?*

1. is the levy a fee and intra vires the enabling legislation?

A levy or fee may serve a number of purposes. It may be classified as a fee for services rendered such as the provision of the inspection service under the *Health (Meat Inspection and Branding) Regulations* to ensure the standard of meat fit for public consumption. It may take the form of a licence fee in order to regulate a particular activity eg. the various licences under the *Road Traffic Act*. If it appears to be solely for the purposes of raising

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[3] Lord Wrenbury 1922 91 LJKB 897

revenue, it *may* be possible to challenge the levy on the grounds that it is a tax and therefore in contravention of the fundamental principle that taxation may not be levied without the express authority of Parliament.

In this instance it appears that the purpose of the fee is the funding of the computerisation and modernisation of the Courts system, or in other words, a capital cost to the Department. Your Committee is of the opinion that a levy of this nature is not a fee for the practical purposes and effects of the authority given in the parent *Acts.*[4] In the English case of *Attorney-General v. Great Eastern Railway Company*[5] a governing principle in assessing whether a regulation was *intra vires* was established as:

> *"..whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised..."*

The computerisation and modernisation of the Court system is neither *"incidental"* nor *"consequential upon"* the authority within the *Acts* to charge fees for various Court services. The levy is consequential upon the *decision to computerise* the Courts' system. For this reason, your Committee believes that the component of the Courts fees structure which has been identified as for the funding of the Courts Modernisation Program is *ultra vires* the authority in the enabling legislation.

2. *if the levy had been deemed to be a fee and* intra vires, *should this type of fee be dealt with by primary legislation?*

In this instance, the question is hypothetical, as members are of the opinion that the levy is not a fee within the purposes and intent of the *Acts.* However, as a matter of general principle, your Committee believes that a fee intended not to cover the actual costs of providing clearly defined services but rather to create a general fund to be applied to some further related "public purpose" should be dealt with by primary legislation and receive full Parliamentary scrutiny.

3. *is the levy a tax rather than a fee?*

Two recent cases have discussed the character of a fee. In the case of *Harper v Minister for Sea Fisheries*[6], professional abalone fishermen in Tasmania sought to challenge a substantial increase in licence fees on the grounds that the charge was a tax and not a fee. The High Court held that the fee payable was not a tax but a price paid for the right to

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4 see page 2 above

5 Attorney-General v Great Eastern Railway Company (1880) 5 App. Cas 473 at 478

6 1989 88 ALR 38

appropriate a public natural resource.

> *"Its basis lies in environmental and conservational considerations which require that exploitation of limited public natural resources be carefully monitored and legislatively curtailed if their existence is to be preserved."*

Justices Dawson, Toohey and McHugh, however, warned that the decision did not mean that what was otherwise a tax would be upheld merely because its purpose was conservation.

In contrast, in the case of *Air Caledonie International & Others v the Commonwealth*[7], the High Court was asked to rule on the validity of the imposition of a "fee" by the Commonwealth for the provision of immigration services on the grounds that it was a tax. After an objective analysis of the characteristics of the imposition and its practical purposes and effects, the court found for the plaintiff and suggested a number of principles which could be applied in determining whether an impost was a tax:

(i) a levy could be classified as a tax if it were *inter alia*:
   - (a) compulsory,
   - (b) for public purposes,
   - (c) enforceable by law,
   - (d) not a payment for services rendered to the person required to make the payment,
   - (e) not by way of a penalty, and
   - (f) not arbitrary.

(ii) the amount of the impost must bear a *"discernible relationship"* to the value of what is acquired.

Applying the tests suggested in these two cases, and taking into consideration the practical purposes and effects of the Courts Modernisation Fund levy, your Committee has reached the following conclusions:

(1) The Courts Modernisation Fund Levy is not a fee within the intents and purposes of the parent legislation.

(2) The Courts Modernisation Fund Levy appears to fulfill all of the attributes of a tax suggested in the case of *Air Caledonie* .

(3) It is not clear that an individual is certain to receive the benefit of the computerisation when lodging a complaint which attracts payment of a fee.

(4) The amount of the levy does not appear to bear any "discernible

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7 1989 63 ALJR 30; 82 ALR 385

relationship" to the value of what is received.

RECOMMENDATION

In summary, your Committee believes that the levy for the Courts Modernisation Fund applied under the *Justices Act (Courts of Petty Sessions) Regulations, the Justices Act (INREP) Amendment (No. 3) Regulations* and the *Local Courts Amendment Rules (No. 2)* is *ultra vires* the authority in the *Justices Act* and the *Local Courts Act* and **recommends that those regulations which purport to impose the levy as a component of the Courts fees structure should be disallowed.**

PART II

Transfer of Land Amendment Regulations 1991
Strata Titles General Amendment Regulations 1991
Registration of Deeds Amendment Regulations 1991

Your Committee first examined these regulations when the 1990 fee review was conducted by the Department of Land Administration. According to information received from the Department, fees were adjusted to reflect an increase in the Consumer Price Index and to incorporate the Register 2000 surcharge - an additional charge to cover the cost of the computerisation of the department's records which would allow users to order land information by personal computer and have it sent through by facsimile. The ultimate aim of the project is the automation of all document, title and plan searching services. The surcharge is applied to all Office of Titles fees to minimize its impact on any one section of the business community and equates to a $6.00 fee per dealing and a $1.00 fee per title search and will be in place for a period of 5 years with the requirement for ministerial review after 3 years. The increase based on an adjustment in the Consumer Price Index was applied after the application of the surcharge. The proposed computerisation and the associated new fee structure to offset the high establishment costs were announced in the media by the Minister for Lands and it seems that the business community was consulted before implementation.

Owing to time constraints on the Committee, further consideration was deferred until similar amendments were gazetted for the 1991/92 financial year.

The Committee met with officials from the Department to discuss the basis for the fee increases and in particular to express their concern at the imposition of a surcharge to cover the cost of the computerisation of the Department.

As is the case with the Court fees, the authority to charge fees is clearly given in the respective *Acts* -

Transfer of Land Act 1893

181. *The Commissioner may, with the approval of the Governor make regulations for or with respect to-*

(c) prescribing the fees which may be charged by the Registrar...

(e) all matters and things authorised to be prescribed or necessary or expedient to be prescribed to give effect to this Act.

Strata Titles Act 1985

130. *The Governor may make regulations prescribing all matters and things that by this Act are required or permitted to be prescribed or that are necessary or convenient to be prescribed for giving effect to this Act and in particular for and with respect to–*

(b) the fees to be paid for any procedure or function required or permitted to be done under this Act including fees to be payable in respect of applications to referees;

Registration of Deeds Act 1856

22. *That it shall be lawful for the Commissioner of Titles, appointed under the Transfer of Land Act, 1893, with the approval of the Governor, to make regulations for or with respect to–*

(b) the fees which may be charged by the Registrar of Deeds and Transfers; and

(c) all matters and things authorised to be prescribed or necessary or expedient to be prescribed to give effect to this Act.

As is also the case with the Court fees, the surcharge for the Register 2000 program appears to be neither *"...incidental to, nor consequential upon, those things which the legislature has authorised..."*[8]

After further consultation and the benefit of counsel's advice, and for the reasons stated above in relation to the fees under the *Justices and Local Courts Acts*, members are now of the opinion that the Register 2000 surcharge is:

(1) a tax and not a fee; and that

(2) the regulations purporting to impose the surcharge are *ultra vires* the authority given in the *Transfer of Land Act 1893* (s.181), the *Strata Titles Act 1985* (s.130(b)) and the *Registration of Deeds Act 1856* (s.22).

RECOMMENDATION

As the time in which disallowance of the pertinent regulations has elapsed, your Committee at this stage, draws the urgent attention of the House to the doubts surrounding the authority to impose the Register 2000 Surcharge under the current legislation and **recommends that the Minister for Lands undertake an investigation of the matter and report to Parliament at the earliest opportunity.**

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8 Attorney-General v Great Eastern Railway Company (1880) 5 App. Cas 473 at 478

APPENDIX B

WESTERN AUSTRALIA

MINISTER FOR LANDS

18135

HonT Helm MLC
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH 6000

Dear Tom

TRANSFER OF LAND AMENDMENT REGULATIONS 1991
STRATA TITLES AMENDMENT REGULATIONS 1991
REGISTRATION OF DEEDS AMENDMENT REGULATIONS 1991

Further to my letter dated March 13, 1992 I wish to respond in detail to Part II of the Seventh Report of the Joint Standing Committee.

In the Report tabled in the Legislative Council on November 28, 1991 the Committee reported that they were "of the opinion that the Register 2000 surcharge" is

1. A tax and not a fee; and that
2. The regulations purporting to impose the surcharge are ultra vires the authority given in the Transfer of Land Act 1893(s.181), the Strata Titles Act 1985(s.130(b)) and the Registration of Deeds Act 1856(s.22)."

The Committee recommended "that the Minister for Lands undertake an investigation of the matter and report to Parliament at the earliest opportunity".

In the words of the Crown Solicitor's Office "the legal analysis set out in the Report of the Joint Standing Committee dated November 1991 is questionable in its emphasis, reasoning and conclusions."

The Committee were wrong to approach the matter on the basis that the various relevant regulations imposed a separate identifiable thing called "the Register 2000 Surcharge". There was no separate "surcharge". The various fees were simply adjusted to incorporate a notional "surcharge". It is the entire fees themselves which require scrutiny and evaluation for legal purposes.

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It is clear that a person paying a registration fee receives the service of having the instrument he lodges registered. The same can be said for a person paying a search fee. There is a clear relationship between the payment of the fee and the value of having an entitlement registered or a search given.

The matter is more correctly evaluated from the point of view of reasonableness of the fee. In the regulations the standard document lodgment fee is $60 and search fee $7.50. By way of comparison, fees in other States and the Territories range for a standard document lodgment fee from $48.50 in New South Wales to $80 in Queensland and $85 in the Northern Territory. Search fees range from $3.80 in New South Wales to $10 in Tasmania and the Australian Capital Territory.

The tests applied by the Committee unnecessarily complicated the real issue. Although the issue of whether a tax or fee is involved is important, this question must be viewed in its proper context (See Marsh v Shire of Serpentine - Jarrahdale 1966 120 C.L.R. 572). The essential issue is whether or not the relevant statutes permit the imposition of the fees in question. As the Committee noted in Part I of their report "The authority under which the general fee increase has been made is clearly given in the respective statutes and the regulations imposing those fees are therefore, intra vires". The same analysis and conclusion applies in respect of the fees discussed in Part II of the Report.

The Crown Solicitor's Office noted the Committee's concern that the fees were set to cover a capital cost, but did not consider that this created difficulties. That Office advised that "In our view there can be no objection to the fixing of fees to reflect various relevant expenditures. If anything, such a consideration points to validity rather than invalidity."

The Crown Solicitor's Office also noted "As is apparent from the analysis at paragraph 383 of the text book by D.C. Pearce "Delegated Legislation in Australia and New Zealand" (Butterworths 1977), the approach of the Courts in matters such as this involves them in determining what is a reasonable fee for the relevant services being provided. They will be concerned with the question of whether the fee bears a relationship to the cost of administering the particular system under review or whether it is merely an attempt to raise revenue."

These fees are clearly designed to administer the system under review and are not designed for the purposes of gaining revenue.

The expenditures in relation to the Register 2000 project are clearly relevant to the cost of administration of the land titles system and in particular are relevant to the search and registration services provided by the Office of Titles.

As a result of the Committee's report, a review was undertaken by the Department, in conjunction with Treasury, as to the overhead costs properly attributable to the Land Titles program.

Treasury is of the view that in calculating overheads it is proper to allow an amount to cover all the costs, expenses and risks which a private sector supplier would be expected to cover through its pricing so as to remain in business. This would include the costs of replacing and upgrading equipment as it reached the end of its economic life rather than simply adopting historical cost depreciation. As a result the charge would cover direct and indirect costs, immediate and future outlays and opportunity costs. It would be necessary to price for the replacement of assets and to incorporate the business risk through an appropriate return on capital.

When originally setting the fees, the costs of the program were calculated on the basis of estimates as follows:

a)	Salaries	$11.2m
b)	Contingencies	$ 8.4m
c)	Overheads calculated at 1.9 x salaries	$10m
	Total	$29.6m

The contingencies item included $6.6m for Register 2000.

The 1.9 x salary costs has, it is understood, been generally accepted in the public sector since approximately 1982/83 as an appropriate basis for assessing overhead costs. It is understood that that factor was worked out by the Public Service Commission at that time.

In the absence of contrary advice, the Office of Titles, over a number of years used this calculation for the purpose of determining costs as part of its policy to reach full cost recovery. On the basis of the review by the Department and Treasury as to overhead costs, it has become apparent that this basis of calculating overheads is no longer appropriate.

For the purposes of calculating costs of the program for 1991/92 it is clear, as a result of the review that

a) it was inappropriate to include the full amount of $6.6 million allocated to the Register 2000 Project, $2.8m would have been more appropriate.
b) Calculation of overheads on the basis of 1.9 x salaries was no longer appropriate.

It has not been possible to accurately identify all depreciable expenditures on the systems currently in use. However, on the basis of the review it would have been more appropriate to have allocated $1.7 to contingencies, $8.8m to overheads and 11.3m to salaries.

That is, in comparison to the previous basis, the costs could be set out as follows:

Salaries	11.3m
Contingencies (general)	1.7m
Share of Costs of Register 2000 in 1991/92	2.8m
Overheads	8.8m
	24.6m

These are historical cost figures and understate the costs of maintaining the previous productive capacity.

The estimated revenue from fees for the year ending 30th June, 1992 was $24.4m. On the revised method of calculating costs, for the financial year ending 30th June 1992, costs would have been estimated to exceed revenue by approximately $0.2m.

The Committee's report, even though incorrect in its basis and conclusions, came at an opportune time. In future fee reviews, the Office of Titles will have a more appropriate basis on which to calculate costs of the land titles program.

I am satisfied that the gazetted fees are not taxes and are authorised by the relevant Acts.

David Smith LLB, JP, MLA
MINISTER FOR LANDS

26 MAY 1992

sdg110s4m/2

REGISTRATION AMENDMENT BILL
(Serial 150)

Bill presented and read a first time.

Mr MANZIE (Attorney-General): Mr Speaker, I move that the bill be now read a second time.

Mr Speaker, the fees imposed in the Registration Regulations, being regulations made under the Registration Act in relation to services provided by the Registrar-General concerning the registration of certain land titles dealings, contain a fee described as a '$5 levy'. Doubts have arisen as to whether there is a power to make regulations under the Registration Act that have the effect of imposing such a levy fee.

I understand that the Subordinate Legislation and Tabled Papers Committee has investigated the issue and has come to the conclusion that the amount described as a levy may not be a fee. In addition, the same doubts may exist regarding the additional fee of $5 imposed under the Real Property Regulations for the period 1 January 1991 to 31 December 1991. The government accepts that there are sufficient doubts concerning the collection of the levy fees that remedial legislation is required to settle the precise legal position as to what amounts should be being paid for the registration of land title documents.

There are various issues related to the levy. The first is that of whether there should be a levy fee at all. The option favoured by the government is that of introducing a bill that proposes that regulations can be made that provide for the imposition of a levy fee. Clause 3 of the bill provides this power.

The second issue is that of what to do about the levy fee that is in place now. Clause 4(2) provides that the Registration Regulations shall be interpreted as if they had been made under the Registration Act as proposed to be amended by this act. This provision has the effect of removing any doubts that may exist concerning the legality of the current levy fee.

The third issue is whether any remedial action is necessary in respect of the moneys collected under the regulations. The position adopted by the government is that the doubts concerning the levy fees should be removed. This is provided by clauses 2 and 4(1) of the bill. In reaching this decision, the government took into account a number of factors. Firstly, such amounts are not generally recoverable, even if collected under legislation that is, in fact, invalid. Secondly, the levy has only had, in respect of any particular individual, a relatively small impact. It would not be practical to attempt to identify all of those who have paid an amount when perhaps they could have avoided doing so. The third factor is that the reason for the extra $5 payment was well-publicised by the Registrar-General at the time it was initially imposed.

In closing, I wish to express my appreciation to the Subordinate Legislation and Tabled Papers Committee for the work done on this issue. I commend the bill to honourable members.

Debate adjourned.

Serial 150
Registration Amendment
Mr Manzie

NORTHERN TERRITORY OF AUSTRALIA

A BILL
for
AN ACT

to amend the *Registration Act* and to validate the collection of certain fees and levies by the Registrar-General

BE it enacted by the Legislative Assembly of the Northern Territory of Australia, with the assent as provided by the *Northern Territory (Self-Government) Act* 1978 of the Commonwealth, as follows:

1. SHORT TITLE

This Act may be cited as the *Registration Amendment Act 1992*.

2. COMMENCEMENT

This Act shall be deemed to have come into operation on 1 January 1992.

3. NEW SECTION

The *Registration Act* is amended by inserting after section 10 the following:

"10A. PAYMENT OF LEVY WITH PRESCRIBED FEES

"(1) The Regulations may prescribe, as a levy, an amount not exceeding $10 in relation to a matter, thing, or service in respect of which a fee referred to in section 11(2) is required to be paid to the Registrar-General.

"(2) A levy prescribed in pursuance of subsection (1) is payable in addition to, and in the same manner as, the relevant prescribed fee.".

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4. VALIDATION OF PAYMENTS, &c.

(1) Where before the day on which the Administrator's assent to this Act was declared a person had paid to the Registrar-General a levy or a fee described as an additional fee in pursuance of a purported statutory obligation to pay it, that levy or fee shall be deemed to have been as validly paid to and received by the Registrar-General as if it were duly prescribed in accordance with a power given by an Act.

(2) The Registration Regulations (Regulations 1991, No. 63) shall be deemed to be as validly made as if at the time they were made the *Registration Amendment Act 1991* had already been amended by section 3 of this Act.

APPENDIX D

STANDING JOINT COMMITTEE
FOR THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
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JOINT CHAIRMEN

SENATOR NORMAND GRIMARD, Q.C.
DEREK LEE, M.P.

VICE-CHAIRMAN

DOUG FEE, M.P.

CANADA

COMITÉ MIXTE PERMANENT
D'EXAMEN DE LA RÉGLEMENTATION

a/s LE SÉNAT, OTTAWA K1A 0A4
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SÉNATEUR NORMAND GRIMARD, C.R.
DEREK LEE, DÉPUTÉ

VICE-PRÉSIDENT

DOUG FEE, DÉPUTÉ

May 4, 1992

Honourable Tom Helm, MLC
Chairman,
Joint Standing Committee on
Delegated Legislation,
Parliament House,
Perth 6000,
Western Australia,
AUSTRALIA

Dear Mr. Helm:

We apologize for our delay in acknowledging your letter of January 21st last and thank you for the enclosed Report of the Third Conference of Australian Delegated Legislation Committees and Sixth and Seventh Reports of your Committee.

Judging from the Report, the Third Conference was clearly a success and we regret we were unable to attend. We were also very interested in your Committee's Seventh Report. It reached us at a time when the Joint Committee was giving consideration to its Fourth Report and served to confirm the validity of our concern with respect to fees imposed under the federal Divorce Act. We enclose, for your information, a copy of that Report.

In closing, we thank you again for sending us a copy of these Reports, which have been circulated to all members of the Committee, and we look forward to receiving a copy of future reports of your Committee.

Yours sincerely,

Senator Normand Grimard, Q.C.
Joint Chairman.

Derek Lee, M.P.
Joint Chairman.

Encl.

WESTERN AUSTRALIA

MINISTER FOR LANDS

The Honourable T. Helm MLC
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Mr Helm

VARIOUS DEPARTMENT OF LAND ADMINISTRATION REGULATIONS - FEES
TRANSFER OF LANDS AMENDMENT REGULATIONS 1992
STRATA TITLE GENERAL AMENDMENT REGULATIONS 1992
REGISTRATION OF DEEDS AMENDMENT REGULATIONS 1992
LAND AMENDMENT REGULATIONS 1992

I refer to your letter dated September 24, 1992 requesting particulars concerning the introduction of the above fee regulations to assist the Committee in its further examination of the regulations. In relation to the questions raised in your letter, I note as follows:

(i),(ii) **Register 2000 Project**
A component for cost recovery for implementation of the Register 2000 Project is included in registration and search fees provided in the above regulations. The component amount is $6.00 fee per document registration and $1.00 fee per search.

(iii) **Transfer of Land Act Assurance Fund**
The proposals for the abolition of the Assurance Fund have been incorporated in a Cabinet Minute proposing a number of changes to the Transfer of Land Act to reflect modern management and registration procedures adopted in the Department of Land Administration (DOLA). I have been unable to secure the necessary parliamentary priority to ensure consideration of the legislation during the Autumn or Budget Sessions 1992. I expect that the legislation will be considered by Parliament in the Autumn Session 1993.

(iv) **Repeal of separate Assurance Fund contributions**
Your letter queries whether the fees under the Transfer of Land Act regulations were increased to include a component as compensation for the repeal of separate contributions to the Assurance Fund.

The lodgment fee contained in the regulations prior to August 10, 1992 was $60.00 per dealing. When increased by 2.8% CPI, the fee would have risen to $61.68 per dealing. DOLA rounded off the fee to the nearest whole dollar to give a new fee of $62.00 per dealing. This is in accordance with DOLA's policy of avoiding part dollar lodgment fees because of the need to simplify lodgment procedures and fee calculations by staff and clients. As a consequence, regardless of the repeal of the Assurance Fund, DOLA's lodgment fee would have been set at $62.00 per dealing in its new fee schedule.

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Simultaneously with the preparation of DOLA's revised fee schedules, discussions were conducted between DOLA and Treasury staff concerning abolition of the Assurance Fund. DOLA's concern was that, if the Fund were abolished, no separate funds would be available to meet the liability of the Registrar of Titles for claims for compensation, particularly where a registered proprietor is deprived of land by some fraudulent action.

The compensation payment which would have been made from the Assurance Fund would, upon abolition of the Assurance Fund, become the responsibility of Treasury to be paid from Consolidated Revenue. DOLA therefore proposed to Treasury that the round-off figure of 32 cents per dealing be earmarked by Treasury for the specific purpose of providing sufficient funds in Treasury to cover the liability of Consolidated Revenue.

One further factor impacting on the repeal of the Assurance Fund was the existing *provisions of the Real Property Act requiring separate contributions to be made to the* Assurance Fund. The collection of fees for allocation to a separate fund is administratively inconvenient and DOLA saw the opportunity of dispensing with an inefficient fee structure and replacing it with a more effective system of an additional fee component per dealing.

The document forwarded to the Expenditure Review Committee, upon which the submission to your Committee was based, made reference to a slight increase in fees to cover the abolition of the Assurance Fund. I stress that no extra fees would be received by Consolidated Revenue because the lodgment fee was to be rounded up to $62 in any event. What DOLA envisaged was that some of the new fees would be offset in Treasury to justify the repeal of provisions in the Transfer of Land Act requiring separate contributions to the Assurance Fund without a corresponding further increase in the lodgment fee. At the time of preparation of the Expenditure Review Committee submission, DOLA managers believed that the Assurance Fund legislation would proceed and that the new $62.00 lodgment fee and the repeal of the Assurance Fund contribution would occur simultaneously. DOLA suggested that, if for internal accounting purposes, Treasury would treat the 32 cent round-off figure as a contribution to a trust account in substitution for the Assurance Fund, then the existing Assurance Fund contributions could be dispensed with without any further increase in fees.

Two problems impacting on the new fees arose after preparation of the submission to the Expenditure Review Committee. First, it became clear that Treasury had no appropriate facility to designate the 32 cents rounding up component into a trust for a particular purpose. In addition, the legislation abolishing the Assurance Fund was not enacted prior to gazettal of the new fees. Neither of these circumstances affected DOLA's commitment to a fee of $62.

I consider that the explanatory memorandum provided to your Committee should have been revised to make it clear that the $62 fee was determined simply by rounding up to the nearest dollar. It is clear from the above explanation that the new $62.00 lodgment fee reflects a rounding off factor only and was not an attempt by DOLA to obtain additional fees to accumulate monies into the Assurance Fund in addition to existing Assurance Fund contributions.

If the repeal of the Assurance Fund proceeds when Parliamentary priority is obtained, then I expect that the abolition of separate Assurance Fund contributions would not be offset by any future increase in fees. If the repeal of the Assurance Fund does not proceed in the Autumn Session 1993, then I expect that DOLA will use the base fee of $61.68 and not $62.00 when determining the next fee increase.

I trust this information is of assistance to the Committee in its evaluation of the fee regulations.

D L SMITH LLB MLA
MINISTER FOR LANDS

21 OCT 1992