



THIRTY-SEVENTH PARLIAMENT

REPORT 13

**JOINT STANDING COMMITTEE ON
DELEGATED LEGISLATION**

***ROAD TRAFFIC (FEES FOR VEHICLE LICENCES)
REGULATIONS (No.2) 2004; ROAD TRAFFIC
(LICENSING) AMENDMENT REGULATIONS (No.4)
2004***

Presented by Mr Peter Watson MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

November 2005

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

June 28 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“3. Joint Standing Committee on Delegated Legislation

- 3.1 A *Joint Delegated Legislation Committee* is established.
- 3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a member of the Committee who supports the Government.
- 3.3 A quorum is 4 Members of whom at least 1 is a Member of the Council and 1 a Member of the Assembly.
- 3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.
- 3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –
- (a) is authorized or contemplated by the empowering enactment;
 - (b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
 - (c) ousts or modifies the rules of fairness;
 - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
 - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 3.7 In this clause –
- “adverse effect” includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;
- “instrument” means –
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
 - (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- “subsidiary legislation” has the meaning given to it by section 5 of the *Interpretation Act 1984*.”

Members as at the time of this inquiry:

Mr Peter Watson MLA (Chairman)

Mr Tony Simpson MLA

Hon Ray Halligan MLC (Deputy Chairman)

Ms Judy Hughes MLA

Hon Barbara Scott MLC

Hon Shelley Archer MLC

Dr Graham Jacobs MLA

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

ROAD TRAFFIC (FEES FOR VEHICLE LICENCES) REGULATIONS (NO.2) 2004; ROAD TRAFFIC (LICENSING) AMENDMENT REGULATIONS (NO.4) 2004

1 BACKGROUND

1.1 In his *Third Public Sector Performance Report 2004*¹ the Auditor General examined 14 separate fees raising a total of over \$80 million per annum set by six sampled agencies, including the Department for Planning and Infrastructure (DPI). In his report, the Auditor General observed:

*“Fees should reasonably reflect the cost of providing services unless there is some overriding economic or social policy objective. If the fee significantly exceeds cost then it may amount to a tax, and as such, the agency may lack the necessary legal authority. For this reason, agencies need to have reasonably accurate estimates of the cost of their services.”*²

1.2 Amongst a number of findings, the Auditor General established that DPI’s motor vehicle recording fee involved an estimated over recovery of costs of 125 per cent.³

1.3 DPI’s response to the Auditor General’s report was to enact the following two sets of regulations (which were both published in the *Government Gazette* on December 24 2004):⁴

- the *Road Traffic (Fees for Vehicle Licences) Regulations (No.2) 2004*; and
- the *Road Traffic (Licensing) Amendment Regulations (No.4) 2004*.

1.4 The Committee initially scrutinized these two instruments at meetings held in May 2005. The Committee resolved to seek further information in relation to the instruments from DPI. Due to the impending expiry of the period in which the Committee could give notice of motion of disallowance, the Deputy Chairman gave

¹ Auditor General for Western Australia, *Third Public Sector Performance Report 2004*, Report 6, September 22 2004; at website: http://www.audit.wa.gov.au/reports/report2004_06.html (current at October 27 2005).

² *Ibid*, p11.

³ *Ibid*, p11.

⁴ *Western Australian Government Gazette*, No. 229 (Special), pp6255-6257.

notice of motion of disallowance of the two instruments in the Legislative Council on Wednesday, May 18 2005.⁵

- 1.5 The Committee conducted a brief inquiry into the two instruments.
- 1.6 The two notices of motion of disallowance were subsequently withdrawn by the Deputy Chairman, on the authorization of the Committee, on June 29 2005. In withdrawing the motions, the Deputy Chairman stated:

*“As the Joint Standing Committee on Delegated Legislation believes that certain aspects of the regulations relating to cost recovery require clarification, I advise that, in the near future, the committee will present a report to the house that will enable debate on the issue and provide the government with the opportunity to respond.”*⁶

2 MOTOR VEHICLE LICENCE FEES UNDER THE ROAD TRAFFIC ACT 1974

- 2.1 Sections 18 and 19 of the *Road Traffic Act 1974* provide for the licensing of motor vehicles and the imposition of a licence fee (the amount of which is prescribed in the Second Schedule of the Act). These sections also permit the imposition of an additional “*recording fee*” upon the grant or renewal of a licence.
- 2.2 Section 22 of the *Road Traffic Act 1974* provides that the Director General of DPI may retain all recording fees. However, payments received by the Director General for the issue or renewal of motor vehicle licences (apart from the recording fees) are to be credited to the Consolidated Fund. An equivalent amount then stands automatically appropriated from the Consolidated Fund to the Main Roads Trust Fund by virtue of s 22(5) of the *Road Traffic Act 1974*.
- 2.3 The Committee was advised that, in practice, the Director General does not retain the recording fees and that both the licence fees and recording fees go to the Consolidated Fund.⁷
- 2.4 The Main Roads Trust Fund is established under s 31 of the *Main Roads Act 1930*. This Main Roads Trust Fund receives payments from various sources, including those amounts credited to the Main Roads Trust Fund from the Consolidated Fund pursuant to s 22(5) of the *Road Traffic Act 1974*. Funds may be appropriated from the Main Roads Trust Fund for the following purposes as specified in s 32 of the *Main Roads Act 1930*:

⁵ Hon Ray Halligan MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, May 18 2005, p1638.

⁶ Hon Ray Halligan MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, June 29 2005, p3561.

⁷ Mr Trevor Maughan, Manager, Policy and Standards, Department for Planning and Infrastructure, *Transcript of Evidence*, June 29 2005, p1.

- firstly, in meeting the costs of the administration of, and the exercise by the Commissioner of his functions under, the *Main Roads Act 1930*;
- secondly, in payment of any amount specified or determined by the Treasurer to be credited to the Consolidated Fund as a contribution towards the payment of interest and sinking fund contributions payable on loan moneys that have, from time to time, been appropriated by Parliament for expenditure on road construction;
- thirdly, in payment to local governments of the moneys payable pursuant to the succeeding provisions of this section;
- fourthly, in expenditure, by the Commissioner, in such manner and proportions as the Minister may, on the recommendation of the Commissioner, from time to time determine, on road construction and other works, on making payments to local governments or boards for road construction, on lights and signs for the direction of traffic and on the construction, erection and maintenance of lights for the lighting of any road or bridge; and
- finally, for any other purpose that the Minister may, on the recommendation of the Commissioner, from time to time determine.

2.5 It can therefore be seen that an amount equivalent to that paid to the Director General of DPI by motorists for motor vehicle licence fees may subsequently be appropriated for various purposes under the *Main Roads Act 1930*, including for road construction.

3 ROAD TRAFFIC (FEES FOR VEHICLE LICENCES) REGULATIONS (NO.2) 2004

3.1 The *Road Traffic (Fees for Vehicle Licences) Regulations (No.2) 2004* amended reg 8A and Schedule 2 of the *Road Traffic (Licensing) Regulations 1975* so as to reduce the recording fee component on motor vehicle registration fees (and thereby address the over charging identified by the Auditor General). The explanatory memorandum states:

*“The direct costs associated with the recording fee were reviewed in accordance with government policy and guidelines and these amendment regulations reduce the recording fee for vehicle licences by \$6.60 from \$16.20 to \$9.60 to eliminate the over charging situation.”*⁸

⁸ Department for Planning and Infrastructure, *Explanatory Memorandum for the Road Traffic (Fees for Vehicle Licences) Regulations (No.2) 2004*, undated, p1.

- 3.2 It is noted, however, that the reduction in recording fee only applies to motor vehicles other than heavy vehicles. The recording fee for heavy vehicles remains at \$16.20. Previously there was no distinction between the recording fee payable for the two types of vehicle.
- 3.3 A 'protective' disallowance motion was authorised by the Committee until further information could be obtained from DPI as to why the recording fee imposed for heavy vehicle licences had not been reduced at the same time as the recording fee for standard vehicle licences.
- 3.4 Another important matter noted by the Committee was that the amount by which the recording fee was reduced for standard motor vehicle licences by these regulations was to be simultaneously recovered by DPI by way of a corresponding increase in motor vehicle licence fees pursuant to the *Road Traffic (Licensing) Amendment Regulations (No.4) 2004*

4 ROAD TRAFFIC (LICENSING) AMENDMENT REGULATIONS (NO.4) 2004

- 4.1 These amendment regulations amended the Second Schedule of the *Road Traffic Act 1974* so as to increase the annual licence fee for a standard motor vehicle by \$13.20. A discount of \$6.60 was put in place for people who choose to pay for a 12 month licence rather than a six month licence.
- 4.2 The only explanation given for this fee increase in the explanatory memorandum accompanying these amendment regulations was the following:

“To address the concerns raised by the Auditor General, the Government has reduced the recording fee with a consequential increase in licensing fees to maintain the overall revenue from vehicle licensing.

These regulations increase the motor vehicle licence fee by \$13.20 and provide a discount to people who pay for 12 months, equal to half the increase. This is intended to offset a reduction of \$6.60 in the recording fee from \$16.20 to \$9.60 as provided by the Road Traffic (Licensing) Amendment Regulations (No.4) 2004.”⁹

- 4.3 Accordingly, the only justification given for the fee increase was to offset the reduction in the amount of the recording fee that DPI had been obliged to reduce because of the over-charging identified by the Auditor General. Not only was the rationale for this fee increase of concern to the Committee, but the Committee also noted that the fee increase could possibly result in the recovery of more funds than had

⁹ Department for Planning and Infrastructure, *Explanatory Memorandum for the Road Traffic (Licensing) Amendment Regulations (No.4) 2004*, undated, p1.

previously been the case by the Department (as not all people would be in a position to pay for a 12 month licence and benefit from the discount). To that extent the Committee queried the comment in the explanatory memorandum that:

*“Since the amendments have been calculated in such a way that there will be no increase to the public in overall licensing fees, these amendments are considered not to be controversial.”*¹⁰

- 4.4 A ‘protective’ disallowance motion was authorised by the Committee until further information could be obtained from DPI as to why the increase in motor vehicle licence fees was required.

5 THE COMMITTEE’S EXAMINATION OF THE INSTRUMENTS

- 5.1 The use of disallowance motions as a holding or protective measure in relation to both of these instruments provided the Committee with more time to scrutinise the instruments and an opportunity to obtain additional information before deciding whether to proceed with a recommendation to the Legislative Council to disallow the instruments.
- 5.2 The Committee obtained further information both in writing from DPI and by way of a hearing held with Mr Trevor Maughan, Manager, Policy and Standards, DPI, on June 29 2005.
- 5.3 In response to a written request from the Committee dated May 4 2005 for further justification for the increase in the motor vehicle licence fee and an explanation as to why the recording fee for heavy vehicles had not been decreased along with the recording fee for standard vehicles, the Director General of DPI advised the Committee in a letter dated May 16 2005 that:

“In considering the Auditor General’s report, government determined that the recording fee was to be reduced to reflect service costs in such a way as to ensure there was no loss to the public purse. This was to be achieved by adjusting the licence fee in such a way as to ensure the overall cost of licensing a vehicle did not increase.

In line with the intergovernmental agreement in respect to road transport reform, Heavy Vehicle Charges are determined by the Australian Transport Council and applied uniformly by all jurisdictions. A costing of the Recording Fee at the time indicated that due to the manual processes involved in registering a Heavy Vehicle the costs are higher than applies to the light vehicle fleet. On

¹⁰ Department for Planning and Infrastructure, *Explanatory Memorandum for the Road Traffic (Licensing) Amendment Regulations (No.4) 2004*, undated, p2.

that basis it was determined to maintain the Recording Fee for Heavy Vehicles at the existing level that is close to actual cost.”¹¹

Public hearing

- 5.4 At the public hearing on June 29 2005, Mr Trevor Maughan, Manager, Policy and Standards, DPI, summarised the effect of the two instruments as follows:

“In his third public sector review, the Auditor General identified that the level of a number of agencies’ fees were over-recovering the cost of the provision of services. One of those fees was the vehicle licence recording fee, which is provided under section 19 of the Road Traffic Act. The amount of over-recovery was indicated at a sum of about 125 per cent. Government took the view that this was not appropriate, and that the fee should be reduced to reflect the actual cost of the provision of service. However, at the same time, although section 22 of the Act enables that fee to be retained by the Director General of the Department for Planning and Infrastructure, the practice is that the whole of the fee is remitted to the consolidated fund for use by government. The department is then funded for the provision of the licensing services from the consolidated fund. It was a requirement that in reducing the recording fee, there be no change to the bottom line of government. The \$3.9 million, I think, that was to result from the reduction was not to be removed from the bottom line. Therefore, it was determined the most appropriate and fairest way to do that was to decrease the recording fee and to provide a similar increase in the vehicle licensing fee. That was the government’s decision, and it was the way it was progressed. That is the thrust of the amendments before the committee this morning.”¹²

- 5.5 Whilst the recording fee is calculated based on the administrative costs of DPI, Mr Maughan advised the Committee that the motor vehicle licence fee is calculated by Main Roads WA, based on the weight of the type of vehicle concerned. However, the increase in the motor vehicle licence fee on this occasion was calculated by DPI based on a direction from the Department of Treasury and Finance that *“the overall bottom line was not to be affected”*.¹³

- 5.6 The following exchange took place between Mr Maughan and Committee members during the hearing:

¹¹ Letter from Mr Greg Martin, Director General, Department for Planning and Infrastructure, May 15 2005, p1.

¹² Mr Trevor Maughan, Manager, Policy and Standards, Department for Planning and Infrastructure, *Transcript of Evidence*, June 29 2005, p1.

¹³ *Ibid*, p4.

“Dr GRAHAM JACOBS: *In your introductory comments, you talked about over-recovery of the recording fee. You talked about reducing one fee and increasing another. If the motor vehicle licence recording fee and the annual motor vehicle licence fee are two separately calculated fees, why did the annual fee increase as soon as the recording fee was decreased?*

Mr Maughan: *I am sorry; I do not get the thrust of the question. We did it simultaneously so that the government’s bottom line would not change. That was the government’s requirement in changing the fee structures; namely, the bottom line of government was not to change.*

Dr GRAHAM JACOBS: *Although you recognised there was an over-recovery in one component, you decreased that, but you also increased the other component. Of course, if there was over-recovery in one component, you reduced that aspect. You then increased the other component. It could be said that that then was an over-recovery.*

Mr Maughan: *In fact, no. Although the Road Traffic Act empowers vehicle licence fees to be paid to the Main Roads trust fund for the construction and maintenance of the road network, the amounts recovered from licence fees are far less than the cost of the provision of the road infrastructure. In other words, at all stages the vehicle licence fee was under-recovering the cost of the road infrastructure. By increasing it, it was only narrowing the gap of under-recovery.*

Hon RAY HALLIGAN: *That is an extremely interesting argument. I will look into that further. That gives you enormous flexibility, does it not? I understand what you say about the cost of the road infrastructure, which is enormous. Therefore, you could charge anything you like at any point in time. I am not sure that that was the original intent of cost recovery in this instance. You mentioned the surplus and that it went to the consolidated fund. Funds that normally go to the consolidated fund are taxes. If the department has recovered more than its costs and has surpluses to provide to government to place in the consolidated fund, to my mind, that is a tax. That being the case, that type of increase through regulation is inappropriate.*

Mr Maughan: *There is no doubt that there is an element of taxation in the vehicle licensing fee. It is a fee that is hypothecated to the Main Roads trust fund. It is very clear in an earlier Hansard that the purpose of that licensing fee was to recover the cost of the provision of road infrastructure. With the effluxion of time, those fees have simply never been able to keep up with the actual cost to government.*

The Road Traffic Amendment Act of, I think 2001, has a taxing act associated with it, which clarifies that any fee for vehicle licences was in fact a tax. That has been well and truly appreciated.

Hon RAY HALLIGAN: *That is fine in itself if it is in the primary legislation. It is government policy and it is debated in the house.*

Mr Maughan: *That taxing act went through Parliament in 2001.*¹⁴

5.7 The status of the “taxing Act” referred to by Mr Maughan and the motor vehicle licence fee’s status as a tax is discussed further below.

6 THE DIFFERENCE BETWEEN A TAX AND A FEE FOR SERVICE

6.1 The Committee has maintained a close interest in subsidiary legislation that imposes a fee purportedly to recover costs for an associated service. The Committee noted in its 10th Report that:

“The Committee’s scrutiny of fees generally involves identifying whether the prescription of the fee in the instrument is expressly or impliedly authorized by the primary Act. If so, the Committee attempts to identify whether the quantum of the fee:

- *(where the fee is to be paid for a service) bears a reasonable relationship to the costs of providing that service; or*
- *(where the fee is to be paid for a licence) bears a reasonable relationship to the costs incurred in establishing or administering the scheme or system under which the licence is issued, or is incurred in respect of matters to which the licence relates.*

*Where the Committee receives evidence that the quantum of the fee does not satisfy the above criteria, it views the fee as being in the nature of a tax. The Committee will recommend disallowance of an instrument if it prescribes a fee which, in reality, is a tax, without the authority of an Act of Parliament.*¹⁵

6.2 Similarly, in its 6th Report the Committee stated:

¹⁴ *Ibid*, pp3-4.

¹⁵ Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 10, *Report of the Joint Standing Committee on Delegated Legislation in relation to the Overview of the Committee’s Operations: Second Session of the Thirty-Sixth Parliament (August 2002 to November 2004)*, November 19 2004, p7.

*“Previous Committees have, on many occasions during the past decade, scrutinised instruments to determine whether the quantum of what is described in regulations as a fee is in reality a tax. Fees may be lawfully imposed to recover the cost of services or in relation to specific matters where this is expressly provided for in primary legislation. Taxes on the other hand can only be authorised by the Parliament. Any imposition via regulation of what is in reality a tax without the authority of Parliament is therefore unlawful.”*¹⁶

6.3 See also generally the Committee’s 3rd Report.¹⁷

What is a tax?

6.4 The traditional definition of a tax is *“a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered”*: *Matthews v Chicory Marketing Board* (1938) 60 CLR at 270 per Latham CJ. This, however, is not an exhaustive definition of a tax: *Air Caledonie International v The Commonwealth* (1988) 165 CLR at 467.

6.5 The *“usual description of a tax”* has been further explained by the High Court of Australia as follows:¹⁸

- the exaction in question is compulsory;
- the exaction in question is to raise money for governmental purposes;
- the exaction in question does not constitute payment for services rendered;
- the exaction is not a penalty (that is, the liability to pay the exaction does not arise from any failure to discharge antecedent obligations on the part of the persons upon whom the exaction falls); and
- the exaction is not arbitrary (that is, liability is imposed by reference to criteria which are sufficiently general in their application and which mark out the objects and subject matter of the tax).

¹⁶ Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 6, *Sessional Report - June 28 2001 to August 9 2002*, March 20 2003, p34.

¹⁷ Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 3, *Business Names Amendment Regulations (No 2) 2001*, March 20 2002.

¹⁸ *MacCormick v Federal Commissioner of Taxation; Camad Investments Pty Ltd v Federal Commissioner of Taxation* (1984) 158 CLR 622, per Gibbs CJ, Wilson, Deane and Dawson JJ at para 28.

- 6.6 Generally, a tax is levied not merely to raise revenue but also to control the allocation of a community's resources amongst various objects of investment and consumption, to regulate the level of economic activity and to redistribute income and capital.¹⁹
- 6.7 A demand for the payment of money in return for the exercise of a statutory discretion constitutes taxation and, unless the demand is authorized by legislation, is unlawful.²⁰
- 6.8 The common law and s 46 of the *Constitution Acts Amendment Act 1899* impose strict legislative requirements in relation to taxes. A tax may only be imposed by an Act of Parliament, and such an Act must deal solely with the tax and no other matter.

What is a fee?

- 6.9 In *Airservices Australia v Canadian Airlines International Ltd*²¹ Gleeson CJ and Kirby J, in a joint judgment, set out the following *indicia* for identifying as to whether a fee raised by a government instrumentality should not be characterised as a tax.²²
- a) the charges were not imposed to **raise revenue**;
 - b) the charges were undoubtedly charges for the **provision of services and facilities**;
 - c) the charges were imposed to **recover the cost of providing such services and facilities** across the entire range of users;
 - d) the charges for categories of services were **reasonably related to the expenses** incurred in relation to the matters to which the charges related;
 - e) the services and facilities were, of their nature, part of an activity which must be highly integrated in order to be effective; and
 - f) there was a rational basis for such discrimination between users as existed.
- 6.10 *Airservices Australia v Canadian Airlines International Ltd* was followed recently in *Qureshi v Minister for Immigration and Multicultural and Indigenous Affairs and Commonwealth of Australia*.²³ In his judgment, Kenny J, of the Federal Court of

¹⁹ Hanks P & Cass D, *Australian Constitutional Law: Materials and Commentary*, Butterworths, Sydney, 1999, para 9.2.16.

²⁰ *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd (The Wool Tops Case)* (1922) 31 CLR 421; 29 ALR 138 per Isaacs J; *Congreve v Home Office* [1976] QB 629 at 662; [1976] 1 All ER 697 per Geoffrey Lane LJ, CA.

²¹ (2000) 202 CLR 133.

²² *Ibid.*, at para 92.

²³ Unreported judgment of the Federal Court of Australia, BC200500068 (January 17 2005).

Australia, conveniently summarised some key points to take into account when characterising an impost as either a ‘tax’ or a ‘fee’:

“Harper v Minister for Sea Fisheries [(1989) 168 CLR 314] demonstrates that it is not possible to state exhaustively what exactions are not taxes although they resemble taxes. In each case, the character of an exaction will depend on the operation of the statute that created it, including the statutory context in which it is imposed. ...

*The question of the character of an impost has arisen in a variety of statutory settings; and the authorities indicate that there are a number of matters to be borne in mind in answering it. First, cases such as *Airservices* illustrate that, if a charge has a close relationship to **the cost to the provider** of providing a service, or granting a valuable right or privilege, or supplying some such other thing, this relationship is indicative of the fact that the charge is not a tax: see *Airservices*²⁴ at [90] per Gleeson CJ and Kirby J; and [291]-[298] per McHugh J. Equally, if the charge has some discernible relationship to **the value of a service** or grant of a right or privilege to the person on whom the impost falls, this relationship is also indicative of the fact that the charge is not a tax. For example, in *Harper v Minister for Sea Fisheries* at 336, Dawson, Toohey and McHugh JJ commented, that "the fact that it is possible to discern a relationship between the amount paid and the value of the privilege conferred by the licence, namely, the right to acquire abalone for commercial purposes in specified quantities" was "[m]ost important".*

*Conversely, the absence of a relationship between the amount to be paid and the value to the person on whom the impost is laid or the cost to the provider is indicative of a tax: see, for example, *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 ("*Northern Suburbs*") at 568 per Mason CJ, Deane, Toohey, and Gaudron JJ and 588 per Dawson J. Thus, in *Air Caledonie* at 467, the Court said:*

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.

²⁴ *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133.

*In summary, a discernible relationship between a charge and any benefit to which it is referable, measured by reference to either the cost to the provider or the value to the user, indicates that the charge is not a tax. The authorities do not, however, require that there be a direct relationship between a charge and a benefit, whether or not expressed by reference to cost or value. The authorities leave open the possibility that there may be a relationship sufficient to support such a characterization where there is a close relationship between the exaction and the cost to the provider, which is directly referable to the person on whom the exaction falls, even though the person does not receive a benefit of any value or any value commensurate with the cost to the provider (compare *Harper v Victoria*).*

*Further, if the absence of a discernible relationship between the charge and the cost to the provider or value to the user is indicative of a tax, so too is evidence of a revenue-raising purpose. In *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, for example, a fee for a licence to operate an oil pipeline was held to be a tax. It was "an enormous impost laid directly by the legislature on three specified pipelines" and was a means of raising revenue from the production of oil (at 647 per Wilson J)."²⁵*

- 6.11 In the recent Queensland case of *Douglas Shire Council v Queensland Ombudsman*,²⁶ Moynihan J held that a local government's statutory authorisation to impose a fare for a ferry service did not extend to a "conservation component which is used for conservation measures and infrastructure to support conservation values not "for" the provision of the ferry service".²⁷
- 6.12 In his evidence to the Committee, Mr Maughan stated that the DPI had previously obtained legal advice as to whether the Department's recording fee on motor vehicle licences was, in fact, a tax.²⁸ He noted that the advice was to the effect that the recording fee was not a tax.
- 6.13 The position with respect to the motor vehicle licence fee appears less clear, and that fee has been the subject of a number of parliamentary committee reports and of legislative reform over the past decade. Mr Maughan's evidence to the Committee indicated that the motor vehicle licence fee has a clear tax component, as indicated by

²⁵ *Qureshi v Minister for Immigration and Multicultural and Indigenous Affairs and Commonwealth of Australia*, unreported judgment of the Federal Court of Australia, BC200500068, (January 17 2005), at paras 68-72.

²⁶ [2005] QSC 207 (July 26 2005).

²⁷ *Ibid*, at para 37.

²⁸ Mr Trevor Maughan, Manager, Policy and Standards, Department for Planning and Infrastructure, *Transcript of Evidence*, June 29 2005, p2.

the statutory scheme set out in ss 18 to 22 of the *Road Traffic Act 1974* involving a standing appropriation from the Consolidated Fund to the Main Roads Trust Fund for, amongst other things, road construction.²⁹

7 PAST CONCERNS REGARDING THE STATUS OF MOTOR VEHICLE LICENCE FEES

7.1 The Committee's immediate predecessor committee considered increases to both the recording fee and the motor vehicle licence fee under the *Road Traffic Act 1974* in two reports in 1997.³⁰

7.2 The former Committee's 25th Report expressed the view that the particular increases in both the recording fee and the motor vehicle licence fee then scrutinised were not "fees for services", but were rather in the nature of taxes levied to defray the general administrative costs of the Department.³¹ The former Committee also received legal advice to the effect that the licence increases were a tax. The former Committee noted:

*"This is not the first occasion that the Committee has addressed this issue. Numerous other subordinate legislative instruments have forced the Committee to ask what costs are recoverable under a legislative provision which authorises a fee for service or a fee for licence. The Committee has reported on a number of regulations in the past (see the Committee's 7th, 10th and 20th Reports) and concluded that they amount to taxes that are not authorised by the relevant legislation. The Committee has taken legal advice from Queen's Counsel and experts in constitutional law who have consistently advised the Committee that only costs that are related to the provision of a specific direct benefit to the individual required to pay the fee are recoverable under a general legislative provision which authorises the rendering of fees for services or licences. The legal advice that the Committee has been provided with on this occasion is consistent with the advice the Committee has received in the past."*³²

²⁹ *Ibid*, pp3-4.

³⁰ Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 25, *Road Traffic (Drivers' Licences) Amendment Regulations (No. 2) 1997* and *Road Traffic (Licensing) Amendment Regulations (No. 2) 1997*, August 26 1997; Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 26, *Road Traffic (Amendment to Fees) Regulations 1997*, October 14 1997.

³¹ Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 25, *Road Traffic (Drivers' Licences) Amendment Regulations (No. 2) 1997* and *Road Traffic (Licensing) Amendment Regulations (No. 2) 1997*, August 26 1997, p3.

³² *Ibid*, p4.

7.3 The two sets of amendment regulations dealt with in the former Committee's 25th Report were subsequently disallowed by the Legislative Council on August 26 1997.³³ Shortly thereafter, however, the former Committee was faced with further increases to both the motor vehicle licence fee and the recording fee (which were, in fact, premised upon a Consumer Price Index increase on top of the earlier, disallowed, increases).³⁴ Apart from the legal question as to whether regulations based on a set of circumstances established by previous, but subsequently disallowed, regulations were valid, the former Committee's concerns centred on the justification of increasing the recording fee based on the administrative costs of a yet to be introduced new credit card payment facility. The former Committee noted:

“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,³⁵ 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.”³⁶

³³ Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 26, *Road Traffic (Amendment to Fees) Regulations 1997*, October 14 1997, p2.

³⁴ *Ibid*, p2.

³⁵ *Air Caledonie International v The Commonwealth* (1988) 165 CLR 467.

³⁶ Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 26, *Road Traffic (Amendment to Fees) Regulations 1997*, October 14 1997, p 3.

- 7.4 Despite the former Committee's view that this second set of fee increases were also taxes, the former Committee did not recommend disallowance. Its reason for not recommending disallowance was a letter from the then Minister for Transport advising of a Cabinet decision dated October 6 1997 to amend both the *Road Traffic Act 1974* and the *Western Australian Marine Act 1982* to provide the then Department of 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".³⁷
- 7.5 The Committee notes that the amendments foreshadowed by the Minister for Transport in October 1997 resulted in the insertion of s 45A into the *Interpretation Act 1984* in November 1997. Section 45A states:

"45A. Fees for licences

(1) A power conferred by a written law to prescribe or impose a fee for a licence includes power to prescribe or impose a fee that will allow recovery of expenditure that is relevant to the scheme or system under which the licence is issued.

(2) Expenditure is not relevant for the purposes of subsection (1) unless it has been or is to be incurred —

(a) in the establishment or administration of the scheme or system under which the licence is issued; or

(b) in respect of matters to which the licence relates.

(3) The reference in subsection (1) to a fee for a licence includes reference to a fee for, or in relation to, the issue of a licence and a fee payable on an application for the issue of a licence.

(4) In this section —

"fee" includes charge;

"issue" includes grant, give or renew;

"licence" includes registration, right, permit, authority, approval or exemption."

- 7.6 In the Second Reading Speech for the *Interpretation Amendment Bill 1997*, the then Deputy Premier noted that the proposed new s 45A was drafted in response to the 25th Report of the former Committee and the subsequent disallowance by the Legislative

³⁷ *Ibid*, pp4-5.

Council of the first increases in the motor vehicle licence and recording fees. He stated:

“The parliamentary joint standing committee formed the view that the fees were ultra vires the regulation making power in the Act because, according to the committee, the relevant sections of the Act did not authorise the making of regulations which go beyond “fees for services” and the licence fees therefore amounted to the imposition of taxation.

...

The proposed amendment will clarify the position by confirming that where a written law confers the power to prescribe or impose a fee for a licence, the power includes power to prescribe or impose a fee that takes into account any expenditure - including future expenditure - that is reasonably related to the scheme or system under which such licences are issued. Any fee that goes beyond that reasonable relationship so as to impose taxation, or raise revenue, in a general way will still be invalid unless it can be shown to be authorised by Statute in its particular circumstances. I commend the Bill to the House.”³⁸

7.7 There was lengthy debate on the proposed s 45A and on the very broad intent contained within its original wording. The following comments of Hon Helen Hodgson MLC at the time are of particular relevance:

“My problems with the drafting of this Bill relate to its imprecision and the fact that it allows a very broad consideration of what is included in expenditure. The reason it is so broad is that it is not limited in any way. We will be allowing the imposition of a fee which will take into account any expenditure, including future expenditure, with no limitations at all. It means basically that an authority can put up a case to say that an expenditure is related in some way to a licence. For example, there were recent suggestions that the Minister for Transport wanted to impose a \$50 charge on licences to go into funding road construction. It would be arguable that, because the expenditure and the licences are connected to the roads, the charge is validly part of the licensing system. That is drawing a long bow, and I

³⁸ Hon Hendy Cowan MLA, Deputy Premier, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, October 16 1997, p6980.

hope the Government will never try to argue that; however, the possibility is there."³⁹

- 7.8 The wording of the proposed s 45A was amended by the Legislative Council on the motion of Hon Helen Hodgson MLC, ostensibly to restrict the types of expenditure that may be recovered by way of a licence fee. Nevertheless, the section's possible application remains very broad, due essentially to the use of potentially expansive words such as "includes" and "relates".⁴⁰ In supporting the amendment of Hon Helen Hodgson MLC (and, in effect, the final wording of s 45A), Hon Peter Foss MLC, then Attorney General, stated:

*"I accept the amendment, and I should highlight why it solves the problem. First, it retains in the clause the provision dealing with expenditure and includes future expenditure. It keeps the idea that the expenditure is related to a scheme rather than a particular licence. That is important because it gets away from the argument that it must deal purely with the marginal cost of issuing a licence. Secondly, it deals with both aspects of a licence. The first element of a licence is purely permissive; that is, it is an act that does not necessarily involve any consumption of public assets or expenditure on the part of the public because of that usage. The second element is in respect of matters to which the licence relates. A licence may be issued for the use of a wharf and, quite reasonably, that licence can include the expenditure incurred as a result of the use of the wharf. It can relate to any other form of licence where an asset or something of the nature of a public property is consumed, used, damaged, worn or requires maintenance. That would be picked up as well, and that type of licence is better known in private transactions."*⁴¹

- 7.9 It is therefore arguable as to whether s 45A of the *Interpretation Act 1984* could authorize a significant increase in the amount of a motor vehicle licence fee so as to seek to partly recover general road infrastructure costs.

³⁹ Hon Helen Hodgson MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, November 25 1997, p8425.

⁴⁰ See the legal opinion provided to the Department of Consumer and Employment Protection by Halsey & Associates, Barristers and Solicitors, at Appendix 5 of Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 3, *Business Names Amendment Regulations (No.2) 2001*, March 2002, pp27-35.

⁴¹ Hon Peter Foss MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, November 25 1997, p8427.

8 ROAD TRAFFIC AMENDMENT (VEHICLE LICENSING) (TAXING) ACT 2001

8.1 In 2001 it appeared that the status of the motor vehicle licence fee was to be finally resolved by the *Road Traffic Amendment (Vehicle Licensing) (Taxing) Act 2001*. Section 3 of that Act, as passed by the Parliament, states:

“3. Imposition of tax

To the extent that any charge that the regulations prescribe under section 19(3) of the Road Traffic Act 1974 may be a tax, this Act imposes the charge.”

8.2 As noted above, s 19(3) of the *Road Traffic Act 1974* deals with fees for granting or renewing any licence for a vehicle.

8.3 The *Road Traffic Amendment (Vehicle Licensing) (Taxing) Act 2001* satisfies the constitutional requirements of a valid taxing Act under s 46(7) of the *Constitution Acts Amendment Act 1899*.

8.4 The Committee notes, however, that s 3 of the *Road Traffic Amendment (Vehicle Licensing) (Taxing) Act 2001* has yet to come into operation. This section is to come into operation on the day on which the *Road Traffic Amendment (Vehicle Licensing) Act 2001* comes into operation. The *Road Traffic Amendment (Vehicle Licensing) Act 2001* has been assented to (on December 21 2001), but has also yet to come into operation, in this case, by proclamation.

8.5 When these two Acts come into full operation, if ever, motor vehicle licence fees will be referred to as a “charge” and may be imposed as a tax. The charge for motor vehicle licences will also be contained within regulations, in contrast to the current ‘Henry VIII clause’ arrangement by which motor vehicle licence fees are contained within a Schedule to the *Road Traffic Act 1974* and are amended by way of regulations.⁴²

8.6 The Committee therefore notes that currently DPI must rely on s 45A of the *Interpretation Act 1984* (as read with the scheme established by ss 18 to 22 of the *Road Traffic Act 1974*) to justify any increase in motor vehicle licence fees which will result in those fees exceeding the actual administrative costs of processing and issuing the licences.

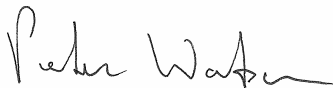
9 CONCLUSION

9.1 Although the Committee is concerned generally by the manner in which DPI has addressed the Auditor General’s findings of over-recovery of costs in this case, the

⁴² *Road Traffic Amendment (Vehicle Licensing) Act 2001*, ss 4 and 10.

Committee has found no element of unlawfulness or unfairness in the way that the Department has proceeded.

- 9.2 Due to the possibly broad interpretation of the provisions of s 45A of the *Interpretation Act 1984* and the relatively small increase in the motor vehicle licence fee on this occasion, the Committee did not undertake an in-depth analysis of either the costs incurred by DPI in administering its licensing system or the overall cost of the State's road infrastructure as maintained by Main Roads Western Australia.
- 9.3 Based on its inquiries, the Committee resolved not to recommend the disallowance of either the *Road Traffic (Fees for Vehicle Licences) Regulations (No.2) 2004* or the *Road Traffic (Licensing) Amendment Regulations (No.4) 2004*.
- 9.4 The Committee did, however, in accordance with its long-standing keen interest in the setting of licence fees, wish to bring the unusual circumstances surrounding this particular increase in the motor vehicle licence fee to the Parliament's attention. The Committee also wishes to use this opportunity to indicate to the Parliament that the Committee will continue within its terms of reference to look very closely at those instruments of subsidiary legislation which purport to involve cost recovery by way of licence fees.



Mr Peter Watson MLA

Chairman

November 24 2005