



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."*<sup>1</sup>

(emphasis added)

The final sentence of the statement was repeated in the "*Program Statements*" for the current financial year.<sup>2</sup>

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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<sup>1</sup> Division 25 - Crown Law at page 206

<sup>2</sup> 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."* <sup>3</sup>

*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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<sup>3</sup> 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*.<sup>4</sup> In the English case of *Attorney-General v. Great Eastern Railway Company*<sup>5</sup> 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*<sup>6</sup>, 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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<sup>4</sup> see page 2 above

<sup>5</sup> *Attorney-General v Great Eastern Railway Company* (1880) 5 App. Cas 473 at 478

<sup>6</sup> 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*<sup>7</sup>, 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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<sup>7</sup> 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...*"<sup>8</sup>

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.