## BUSINESS NAMES AMENDMENT REGULATIONS (NO. 2) 2001

*Disallowance Motion*

Pursuant to Standing Order No 152(b), the following motion by Hon Simon O'Brien was moved pro forma on 20 December -

> That the Business Names Amendment Regulations (No 2) 2001 published in the *Gazette* on 2 November 2001 and tabled in the Legislative Council on 6 November 2001 under the Business Names Act 1962, be and are hereby disallowed.

**HON SIMON O'BRIEN** (South Metropolitan) [7.54 pm]: The House is considering the Business Names Amendment Regulations (No. 2) 2001, which were gazetted on 2 November 2001 and which came into operation on 1 January 2002. The regulations are very brief in terms of their operative parts. In regulation 3, an amendment is made to delete the word "nil" and substitute "$75". This provides that the prescribed fee for a business to renew its business name registration is to be $75. Some years ago, the fee set out in the schedule for this same purpose was $75. However, pursuant to the Business Names Amendment Regulations 2000, an amendment was made to delete the then fee of $75 and replace it with "nil". It was an action of the former coalition Government and announced on 30 November 2000 by the then Minister for Fair Trading, Hon Doug Shave. The abolition of the prescribed fee of $75 came into effect from 1 January 2001. At the time, the minister said that the change would reduce costs to Western Australian businesses by approximately $2.6 million - a significant sum.

The Business Names Amendment Regulations (No. 2) 2001 were published in the *Government Gazette* on 2 November 2001 and tabled in the House on 6 November 2001. They came into force on 1 January 2002. The change is fairly straightforward but it raises a few issues. The first is canvassed in report No 3 of the Joint Standing Committee on Delegated Legislation, which was tabled in this House only a few minutes ago. Members have now had the opportunity to examine the report and will have seen that the committee concerned itself with the legality of this fee sufficiently to conduct correspondence with the relevant department. It should be acknowledged that the relevant department, the Department of Consumer and Employment Protection, was very cooperative with the committee in providing answers. It did so through its executive director of consumer protection, Mr Patrick Walker.

The matter of concern is an old and recurrent question: when is a licence fee a fee and when is it a tax? Does a fee relate to the cost of the provision of a service or does it extend further than that and become a tax or a revenue-raising measure beyond the cost of providing the service? An increase from nil to $75 was enough to cause the Joint Standing Committee on Delegated Legislation to consider whether this was the case. I refer members to page 13 of the committee report, which sets out the correspondence that was received from the Department of Consumer and Employment Protection on 29 January. That provides some information in response to the committee's inquiries about this matter. The committee asked what was the total estimated fees to be raised annually from both business name renewals and new business name registrations, and what was the total estimated cost to the department of administering the system. Mr Walker's response states that the total estimated fees to be raised annually is as follows: 28 500 new business name registrations are anticipated, which at a fee of $103 each would produce $2.94 million in revenue; and 33 000 renewals of business names are anticipated at a fee of $75 each, which is, of course, what we are debating at the moment -

Hon Murray Criddle: That is the new fee.

Hon SIMON O'BRIEN: Yes. That will produce $2.475 million. These fees total $5.415 million, and the revenue will be remitted directly to consolidated revenue, as it should be.

Mr Walker went on to advise the committee that the estimated direct cost of delivering the services associated with both the new registration and renewal processes is $2.91 million. That figure is less than the total amount that is expected to be raised from new business name registrations alone. That begs the question: why do we need a renewal fee of $75 which will raise a further $2.475 million and which is not directly associated with the cost of administering this scheme?

I have mentioned in passing new business name registrations. I will give members a reference to where they can find the schedule of fees that applies to these matters if they want to refer to it. However, I will mention the appropriate fees to the House. Businesses in Western Australia are required to be registered. Therefore, there is a compulsion under the law for businesses to take out business name registration. The fee for this regulation is set out in the third schedule to the regulations. I will give members an idea of the sorts of fees that are set out in that schedule. The cost of lodging an application for a new business name is now $103. Until recently it was $93, but further recommendations were gazetted after the ones that we are debating now. The Business Names Amendment Regulations (No. 3) 2001, which presumably are going through the delegated legislation committee

process at this time, raised the fee for a new business name registration from $93 to $103, which probably accurately reflects the increase in costs due to inflation over the three years since the fee was last raised. Also, as we have seen from Mr Walker's letter, these regulations raise new business name registration collections to $2.94 million, which alone would be enough to cover the processes for both new registrations and triennial renewals.

The House also needs to be aware of some of the other fees that are set out in the schedule. For example, if documents are lodged within one month after the prescribed period for the lodgment of documents, a $12 fee applies to cover the further administrative costs involved in receiving a late lodgment. The fee for the issue of a certificate is $7. The fee for inquiries under section 9(1) of the Act, which involves searches of records and so on, is $10. The fee for the provision of statements is $2 for each page. Clearly these small amounts are related directly to the administrative costs of providing those services. As I have already indicated, and as is supported by Mr Walker's letter, the fee of $103 for an initial business name registration would seem to cover the entire cost of providing the service. Item 3 of the schedule relates to renewals. That is where the figure of nil has been replaced by a prescribed figure of $75. As the department has indicated, that will raise almost $2.5 million more than is strictly required to administer this service.

The Joint Standing Committee on Delegated Legislation and the House have considered similar matters in the past. The question of whether the extra fee is a tax is not always as simple as it may appear. The costs of this scheme must be estimated. The number of businesses registering or renewing in any calendar year varies widely. Anyone who has looked at this matter would be aware from published departmental records, annual reports and so on that those figures vary somewhat. Furthermore, the renewal fee is a triennial charge. Therefore, the effluxion of time also affects the costs that can be attributed to each individual service when one is extrapolating the entire cost of providing the service over a three-year period. It has a rollover effect. Although the Government is required to prescribe a fee that will apply from a finite time until it is reviewed at some time in the future, one size must fit all in the case of the charges for renewal of registration or any of the other services.

Section 45A of the Interpretation Act was enacted several years ago in an attempt to deal to some extent with the question of when is a fee a fee and when is it a tax. Paragraph 3.9 of the report states -

> Section 45A(2) places limitations on when licence fees may be imposed by providing the circumstances in which expenditure to be recovered by the licence fee will be relevant to the scheme or system under which the licence is issued. It will only be relevant (and lawful) where the expenditure to be recovered ". . . has been or is to be incurred -
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> (a) in the establishment or administration of the scheme or system under which the licence is issued; or -

This is the key point -

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

Other information about this issue is contained in the report. I draw the attention of members to the further correspondence contained in the report, including legal opinion provided by Halsey and Associates on this question. When members examine all the documents that have been provided, they will probably reach a conclusion similar to that which I think was reached by the joint standing committee; that is, there is certainly a case for asking the questions that have been asked. Whether the fee, or part of it, is a tax and therefore unlawful is a debateable proposition, and the House should consider it in its deliberations. I understand that other speakers will canvass that very point.

The Opposition raised another question about the disallowance motion. Why was it necessary, when one Government had removed a $75 renewal fee and reduced it to nil, for a subsequent Government to feel constrained to replace the nil with a triennial $75 fee, which will raise nearly $2.5 million of revenue every year? What will that mean to small business? Every small business must attend to this matter triennially by law. The regime instituted by the former Government that I described required the Department of Consumer and Employment Protection to send a renewal notice to registered business names and registered businesses requesting a response to whether the business was still operating and whether there had been a change in the business name, the owner's name, the address and any other details contained in the central register. It was deemed that if businesses paid up front, the registration fee, which until recently was $93 and is now $103, would be sufficient to cover the cost of administering the scheme. Although the cost of administering other initiatives of the department must be paid for, they are not connected directly to the business registration process. That is why the former Government chose to get this impost off the back of small business. The Opposition wants to know why this Government, which apparently will receive enough revenue from the new business registration regime, needs to reintroduce a further $75 triennial impost on 33 000 businesses a year, which is the

number of businesses expected to renew their registration. Our answer is that it is not necessary for an additional impost to be applied to small business. Small business is entitled to ask why the State Government needs to put this impost onto the back of small business when it had previously taken it off. I believe that Oliver Moon, the president of the Combined Small Business Associations of Western Australia, when asked about the new registration fee, said that it was just another kick in the guts to small business.

Examination of volume 2 of the 2001-02 *Budget Statements* indicates some interesting figures under "Consumer and Employment Protection". The amount of revenue to be raised from business names registrations was estimated to be $4.198 million in 2000-01. The estimate for the current year is $5.642 million. That is a significant jump of $1.444 million, if my arithmetic is correct. That figure is anticipated to continue in the out years at roughly the same level with obvious slight increases. That is again a significant jump in the current year, which reflects the impost contained in the regulations that are the subject of this motion for disallowance.

In the lead-up to the election, the Government did not indicate that it intended to reimpose this fee. It said in the executive summary of its small business policy that Labor was committed to policies which would have a direct financial benefit to small business. It also said that it wanted to tackle government red tape and paperwork by working with the small business sector to simplify dealings with government agencies. It is the view of the Opposition that these regulations are not warranted and that it is strongly arguable that they impose a tax rather than a fee for service. We note the findings of the committee that the charges could be accommodated, having regard to perhaps a generous interpretation of section 45A of the Interpretation Act, and appear to be lawful on that basis. However, on the question of whether they are necessary, the answer is different. In the Opposition's view, they are not necessary to service the system and they are not necessary to assist, as the Government claims it wants to, small business in working its way out of red tape and additional financial burdens. The policy of the Opposition when in government was clear when we took this financial burden off the shoulders of small business. We now disagree with the Gallop Labor Government's proposal to put it back on to the back of small business by these regulations. For those reasons, it is the Opposition's view that the regulations should be disallowed and we will vote accordingly.

**HON N.D. GRIFFITHS** (East Metropolitan - Minister for Racing and Gaming) [8.17 pm]: Hon Simon O'Brien has raised two issues; first, whether the fee can be regarded as a tax under the provisions of section 45A of the Interpretation Act; and, second, whether it is appropriate for such a fee to be levied in the event that it passes the section 45A test. The member has covered the section 45A issue and referred appropriately to the view of the Joint Standing Committee on Delegated Legislation. He would be familiar with the circumstances that gave rise to section 45A, as are Hon Murray Criddle and I, as we were members of the Delegated Legislation Committee at that time.

Section 45A was brought in to enable matters such as these regulations to be dealt with. The member referred to the committee's report. I shall make some brief observations and then deal with the second leg of the member's argument. The committee handled these matters in the way it did and, having served on that committee and noted the work of its staff, I know how diligently it pursues the work that it is required to do by the Parliament. Even if I were not a member of the Government and did not want to maintain revenue, I would be loath to second-guess the committee's opinion. However, having read its opinion and having been provided with the relevant information as set out in the correspondence that the committee had, I agree with its opinion. Section 45A is broad in its application and deals with the circumstances set out in the correspondence and in the committee's report.

The committee's report sets out the common law position, and makes the appropriate reference to section 45A of the Interpretation Act 1984. We are dealing with the administration of the scheme under which the licence is issued, and to which the licence relates. I turn the attention of members to the report's conclusion and paragraph 6.1, which states -

> The Committee has concluded that the $75.00 fee for renewal of a business name is not an unlawful tax. The *Business Names Amendment Regulations (No.2) 2001* are therefore authorised by section 32 of the *Business Names Act 1962* and section 45A of the *Interpretation Act 1984*.

Paragraph 6.2 of the conclusion states that -

> On March 13 2002, the Committee resolved to discharge the order of the day in respect to its disallowance motion.

The conclusion goes on to refer to the concerns raised by Hon Robin Chapple. The House must bear in mind the committee's strongly held view that the fee falls within section 45A. Hon Simon O'Brien's comments were directed more towards the question of whether a fee is appropriate. In that regard, I note that he referred to what I understand to be a 1996 coalition Government election promise.

Hon Murray Criddle: It was an election promise delivered by the National Party.

Hon N.D. GRIFFITHS: Yes, and further to that election promise the long-standing fee of $75 was reduced to zero in January 2001.

I now turn to the substantive issue. A business name renewal fee was put in place in 1962, shortly after the Act came into operation. A fee has remained - it has not always been the same amount - until it was removed by an amendment in January 2001. At that time, the fee was $75. Apart from the Northern Territory, all States and Territories have a renewal-fee requirement. Compared with other Australian jurisdictions, the Government believes that the $75 fee is very low. For example, over a three-year renewal term the charge is $162 in Queensland; $105 in Tasmania; $78 in South Australia; and, it is the lesser fee of $50 in Victoria. The Government decided to reinstate the fee at $75, and that was the amount that had been in place since 1996. It has reinstated the fee at that amount to minimise the cost to businesses, and it was set at a lower rate than the similar fees in all the States and Territories, except Victoria.

When the fee was reduced to zero, the business names register incurred many difficulties. It is argued that the integrity of the register was undermined because a fee did not exist. During 2001, there was a notable increase in the proportion of businesses that renewed their names. Between 1997 and January 2001, the incidence of renewal was consistently 59 per cent. During 2001, the rate rose to 72 per cent. I am advised that for every year in which a renewal fee did not exist, approximately 4 300 additional businesses re-registered, and that over time this would result in a significant increase in the number of registered businesses.

Hon Murray Criddle interjected.

Hon N.D. GRIFFITHS: I ask that the member listen to what I have to say.

The majority of businesses that renewed their names were not operating. This undermined the accuracy of the register, and prevented operating businesses from using such names. The issue was exacerbated because it was not only identical names that could not be registered, but also names that were similar, and which may have caused public confusion.

Hon Murray Criddle: Will the minister explain what he means? He stated that 72 per cent of businesses were renewing their names, but he then stated that renewed names belonged to businesses that were not operating.

Hon N.D. GRIFFITHS: The increase in the number of businesses renewing their names is explained, to a significant extent, by the fact that such businesses were not operating at the time they renewed their names.

Hon Murray Criddle: Why would such businesses renew their names if they were not operating?

Hon N.D. GRIFFITHS: People renew business names so that they have the potential to use them, or to prevent other businesses from using them. In this case, there is no disincentive to renew what would otherwise be an unnecessary business name. The Government believes that that lack of disincentive is undermining the integrity of the register. The register must be accepted by the business community. The Minister for Consumer and Employment Protection believes that there is high level of acceptance of renewal fees by the business community.

Hon Murray Criddle: Do you know the number of businesses renewing their business names? A huge rise would mean that a large number were renewing just for the sake of renewing.

Hon N.D. GRIFFITHS: Yes, and that is partly why the Government believes that there should be a fee. When the fee was removed in January 2001, it received little attention. However, I am advised that when it was removed, the Australian Labor Party's great ally, the Chamber of Commerce and Industry of Western Australia, suggested that such a measure would serve to increase the number of frivolous business names that would be registered. As I have already relayed to the House, it has been correct in its forecast.

The Minister for Employment and Consumer Protection has advised me that he was not made aware of any negative reaction to the reintroduction of the fee in January 2002. However, a few moments ago, Hon Simon O'Brien mentioned a critic of the move. The minister also advised me that no approaches from industry to him or the department have been recorded that indicate that the fee is unreasonable. I am aware that other members might wish to speak on this matter and I am conscious of other business of the House to be dealt with in due course.

I refer now to the value of the fee revenue compared with the value of the service. I will not dwell on this too much because the section 45A arguments have been dealt with by the Joint Standing Committee on Delegated Legislation. As the report of the standing committee points out, the revenue is received and goes into the consolidated fund, which then provides money to the Department of Employment and Consumer Protection. The minister advised that the aggregate of all fees collected by the consumer protection division of the department is far less than the total cost of delivering consumer protection services; that, in part, new staff have been put on, which has caused increased expenditure; and that the total net increase to consumer protection will

amount to an additional $7.2 million over four years and, in the first year, an additional amount of $4.4 million will be expended. I am referring to overall departmental expenditure. However, I note the $2.7 million referred to in the fee and I note the figures to which Hon Simon O'Brien referred when he was discussing the matter set out in the report of the joint standing committee.

It is important to note that, in addition to matters dealing directly with the register, the department undertakes a number of services to businesses, which indirectly relate to the register, to meet the needs of businesses that are registered. The department has engaged in enhance-compliant initiatives and on-line systems development. Other services provided by government to maintain the system and associated services are set out in the correspondence that was tabled as part of the committee's report.

In response to the second point made by Hon Simon O'Brien, a longstanding fee of $75 was removed in January 2001. We have a department that provides services to business that, it is argued, amount to well in excess of the amount of money raised and a system, the integrity of which is said by the department to have been undermined as a result of the Australian Labor Party's ally, the Chamber of Commerce and Industry prophesying that it would be undermined, following the lowering of the fee from $75 to nil. The Department of Employment and Consumer Protection is carrying out significant work for the benefit of business. To affect the revenue by disallowing this regulation would be doing the good government of Western Australia a great disservice.

**HON ROBIN CHAPPLE** (Mining and Pastoral) [8.34 pm]: The Joint Standing Committee on Delegated Legislation met on 14 February, 13 March and again today to deal with this matter. On 14 February, the committee raised a number of concerns and information was sought from the relevant departments. On 13 March the committee received that information.

New and renewal business registration fees raise $5.415 million. The estimated direct cost of delivering the service of business names licences is $2.91 million. There are two components to raising of the $5.415 million: the initial registration fee of $93, which has been increased to $103, and a renewal fee of $75, which this regulation seeks to impose. That would result in $2.5 million being raised in renewal and registration fees in excess of the cost recovery. The committee was concerned about this and, therefore, sought more clarification. I raised within the committee process whether it would be a tax or in some way a fee for administering the regulations. The committee was concerned about the regulations as the amount of recovery fees from new registrations and renewal of business-name registrations far exceeds the department's cost of $2.5 million for administering the licence scheme.

The department acknowledged that all the moneys received from business names licence fees were deposited in consolidated revenue and none of the fees is appropriated to the department to administer the scheme. The department provided the committee with legal advice that it sought on whether the $75 fee was to any extent a tax. To the extent the fee is a tax, that is not authorised by the Business Names Act 1962, or the limited exceptions granted by Parliament in section 45A of the Interpretation Act 1984 to impose a fee that would otherwise be taxation, the licence fee will be unlawful. Only the Parliament can authorise taxation. Other than limited exceptions in section 45A of the Interpretation Act, or otherwise authorised by Parliament passing a taxing Act, taxes cannot be imposed by Governments by subsidiary legislation. This was established as far back as 1689 with the Bill of Rights. It was made clear to the committee that, despite the ifs and buts that are always in legal opinions, the conclusion of the advice to the department was that the licence fee should be treated as a tax because it was not authorised by section 45A of the Interpretation Act. Fiona Halsey clearly said -

> It is my view, however, that the better view is that the licence fees are restricted to the amounts actually spent on a scheme, although this can also include future expenditure. A licence fee where the money is provided to consolidated or general revenue is, in my view, beyond the scope of section 45A. The position is not, however, entirely clear and there is certainly room for an argument that this is not the case.

In my view, the fact that 50 per cent of revenue from fees will be allocated to general revenue is not an arguable case.

Independent of the department's advice, the committee's officers also formed a similar view of the legality of licence fees in accordance with past practice in these matters and recommended to the committee that the amendment regulations be disallowed by this House. The Business Names Amendments Regulations (No. 3) 2001 have subsequently been introduced to increase the initial registration fee from $93 to $103. This is in line with the consumer price index. The previous fee had no relevance to the CPI; it did not exist. We believe the Government needs to review its Business Names Amendments Regulations (No. 2) 2001 and Business Names Amendments Regulations (No. 3) 2001 to establish that, whatever happens, no impost - taxation - is to be placed on business registrations and therefore on the small business community. We believe the Government should either retain the initial registration fees, now $103, and not charge for renewals, or modify both fees and have

fees on a sliding scale between new and renewal, bringing the fees down to, say, $50 for an initial application and $40 for renewals.

As a result of concerns raised by me, the Joint standing Committee on Delegated Legislation has agreed to make public all material we see here this evening. The Greens firmly believe this to be a taxation issue, and we will be supporting the disallowance.

**HON GEORGE CASH** (North Metropolitan) [8.41 pm]: We are currently dealing with a disallowance motion for a regulation tabled in this House in respect of the Business Names Act 1962. Section 32 of the Business Names Act 1962, under the heading "Regulations", sets out what the regulations may prescribe. For instance, it sets out -

(a) the fees to be paid to the Commissioner under this Act;

(b) the conditions under and subject to which fees may be waived by the Commissioner or the Minister;

(c) the imposition of additional fees on the late lodgment of documents;

Various other provisions are provided in that regulation. At all times it refers to fees, and there is obviously a reason for that, because it is important to distinguish a levy as being either a fee or a tax. If it is held to be a fee, then so long as it is within the primary legislation, it is likely to be supportable; if it is a tax, it will be ultra vires. The question that must be determined is whether this fee is in fact a tax.

I am obliged to Hon Robin Chapple for raising the issue and requiring certain documentation to be tabled in this House. It is important that all members are privy to at least some of the information that his committee was able to consider. This is an important constitutional point - that is to say, either the proposed regulation is within power or it is not. If the House voted for it and it was later shown to be a tax, it would be an unconstitutional receipt of revenue by the Government.

The question of whether a levy is a fee or a tax has been considered on a number of occasions in the past 10 years by the Standing Committee on Delegated Legislation. Reports Nos 7, 10, 20 and 25, and the report tabled today - report No. 3 of 2002 - contain significant discussion on the question of whether a levy is a fee or a tax. In my view, the committee has had considerable experience over a period to consider that question. On most occasions the committee relates to a number of cases that have been heard and determined in Australia over the past 50 or so years and it relies on the decisions of those cases to make its determination. In the *Australian Constitutional Law, Materials and Commentary*, fifth edition, by Peter Hanks, at page 480, the principal case that is often cited is Matthews v Chicory Marketing Board, 1938, in which Chief Justice Latham is quoted as saying -

> . . . 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 . . .

I emphasise the last point: it is not a payment for services rendered. I then move to the High Court of Australia case, Air Caledonie International v Commonwealth, 1998, whereby the various comments that were made in Matthews v Chicory Marketing Board were considered and extended upon. That case runs for several pages, but I wish to recite a number of passages from the case because they are relevant to the question of whether this levy is a fee or a tax. Paragraph 5 states -

> In Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ld. (1933) AC 168, at page 175, the Privy Council identified three features which sufficed to impart to the levies involved in that case the character of a "tax". Those features were that the levies: were compulsory; were for public purposes; and were enforceable by law. In Matthews v. Chicory Marketing Board (Vict.) (1938) 60 CLR 263, at page 276, Latham C.J. adopted those three features as the basis of what has subsequently been recognised in this Court as an acceptable general statement of positive and negative attributes which, if they all be present, will suffice to stamp an exaction of money with the character of a tax:
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> > "a compulsory exaction of money by a public authority for public purposes, enforceable by law, and . . . not a payment for services rendered"

Further on, it states in paragraph 11-

> In one sense, all taxes exacted by a national government and paid into national revenue can be described as "fees for services". They are the fees which the resident or visitor is required to pay as the quid pro quo for the totality of benefits and services which he receives from governmental sources. It is, however, clear that the phrase "fees for services" in s.53 of the Constitution -

This case relates to the Commonwealth Constitution -

> cannot be read in that general impersonal sense. Read in context, the reference to "fees for services" in s.53 should, like the reference to "payment for services rendered" in the above-quoted extract from the judgment of Latham C.J. in Matthews v. Chicory Marketing Board, be read as referring to 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.

It is not for me to summarise, because it is said in fairly clear terms. If it is a levy for services rendered, it is likely to be a fee. If, however, it is not and it is primarily designed for the purposes of raising revenue, then it will most likely be open to challenge as being a tax. If we look at the report that has just been tabled, particularly the comments of Halsey and Associates, the solicitors acting for the Department of Consumer and Employer Protection, it is interesting to see what is said about this issue. As has been stated, the advice from the solicitors indicates that the total revenue is expected to be $5.415 million. That was confirmed in the letter to the Joint Standing Committee on Delegated Legislation from the Chief Executive Officer of the Department of Consumer and Employment Protection, Patrick Walker. By his own admission he says that is how much will be raised, and that only $2.91 million of that money will be used for the services that are being rendered on this issue. The reason I raise that issue is that a huge amount of additional revenue is being raised by this levy, which has all the characteristics of a tax rather than a fee for service.

Some comments were made about the 1997 amendment to the Interpretation Act, in which new section 45A was included. Members will recall that as a result of a number of inquiries from the Delegated Legislation Committee, the Government at that time decided that it should expand the ability of departments to raise fees, but it was clear in the wording of section 45A that those fees were to relate to the matters to which the particular licence referred. The word "relate" was very important, because it qualified just how far a department could go in seeking to recover its costs for providing a service. If it over-recovered, there was a good chance that the courts would strike down that over-recovery and call it a tax, and the question of refunds might even have to be considered. In 1997, section 45A was discussed at length in the Legislative Assembly and, indeed, in the Legislative Council. Fiona Halsey referred in her advice to the fact that Hon Helen Hodgson, then a member of the Legislative Council, moved an amendment to restrict the use of section 45A. Ms Halsey's advice states -

> This amendment was drafted in a more restrictive manner, and it was noted during the debates that the example of a licence fee being able to be used for road funding would not be allowed under the newly drafted provision.

What was being emphasised then is that it was not good enough to suggest that a fee was being levied and then just decide that various other areas might in fact benefit from that funding. In that legislation the issue of drivers licence fees was discussed. They were quite properly discussed because the drivers licence fees issue was one of the issues that the Delegated Legislation Committee had considered prior to the 1997 amendment to the Interpretation Act. It is important to note that in providing this advice, Ms Halsey was acting for the Department of Consumer and Employment Protection. She provides in her advice the arguments that might be considered both for and against the proposition that a levy could be a fee or, indeed, a tax. The bottom line of her advice on the fifth page states -

> The more likely view based upon the decided case law is that the licence fee -

She is referring to the business names licence fee to which this regulation relates -

> is a tax.

That was the advice to the department. On page 6, under the heading "Conclusion", she states -

> The major difficulty in this case relates to the intention of the legislature when enacting section 45A. It seems clear from the debates that it was intended that the ability of the administrative arm of government should be constrained in relation to regulating for fees, and would be restricted to the scheme itself.

I agree with that proposition. Clearly there was an intent in 1997 to restrict the raising of fees to the particular scheme to which it related. She goes on to say -

> Importantly, however, the intention of parliament is of less importance than the actual words of the statute. Arguably, the use of the words "includes" and "relates" have the effect of broadening the application of section 45A.
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> It is my view, however, that the better view is that the licence fees are restricted to the amounts actually spent on the scheme, although this can also include future expenditure. A licence fee where the money is provided to consolidated or general revenue is, in my view, beyond the scope of section 45A.

I agree with her advice in those terms as well. The levy of $75, which the Government wants this House to characterise as a fee is, in fact, a tax. As has been stated in other cases, it does not matter about the words that

are used; it is the characterisation or the absolute definition of the words that counts. It is not what is said, but what the legislation intended at the time.

I argue that this House should clearly disallow this regulation. Not doing so would, in the Opposition's view, cause us to have an unconstitutional levy - something that would be able to be challenged in the community. It was suggested that perhaps the Government would go away and rewrite the figures - that is, the costs of recovering funds for the business names licences - which would equal what it will raise, so that nothing would go into consolidated revenue in excess of the recovered amount that directly relates to the business names licences. That would clearly be a case of acting after the Government had been caught out. There is no doubt that the levy proposed to be instituted by this regulation is a tax. It is unconstitutional and it should be disallowed. That does not mean that the Government necessarily suffers any revenue loss. We all know that if the Government wishes, it could institute tomorrow morning a new regulation for this or some other area to raise in excess of the $5 million that it anticipates raising by this business names regulation.

I support my colleague Hon Simon O'Brien, and I certainly support Hon Robin Chapple in his comments. Again, I am glad that the committee has been able to benefit from some of the information that was provided to the Delegated Legislation Committee. I have been in this place long enough to see both Liberal and Labor Governments not suffer from, but be subject to, the determination and decisions of the Delegated Legislation Committee. In fact, I remember when Hon Tom Helm was the chairman and also the deputy chairman of the committee. When he was chairman, he moved to disallow then Labor Government regulations; when he was deputy chairman, he moved to disallow Liberal Government regulations. Now Hon Ray Halligan, an opposition member and deputy chairman of the Joint Standing Committee on Delegated Legislation, gives notice to disallow Labor Government regulations. The point is that in all the time I have watched the Joint Standing Committee on Delegated Legislation operate, it has operated in an absolutely nonpartisan way. We have always enjoyed professional advice from our professional officers.

More than a decade ago, the Labor Government did not like some of the decisions that the Delegated Legislation Committee made - not because they were wrong, but because they were right and the Government of the day had overstepped the mark. The Liberal Government, of which I was a member, was also subject to those same decisions from the Delegated Legislation Committee. However, the good news is that this House was prepared to stand up and be counted and support the view that was proper at the time, no matter what was the colour of the Government in office at that stage of the game. As I said, I support Hon Simon O'Brien and Hon Robin Chapple in the disallowance of this regulation.

**HON MURRAY CRIDDLE** (Agricultural) [9.01 pm]: I thank the committee for the clear and concise way in which the report has been put together. It is easy to follow, and I was able to go through it in a short space of time. Obviously, I am concerned about the imposition of this levy or fee - whatever it is called - that is an impost on business. Businesses nowadays pay an enormous amount in fees in the running of their operations. I have talked to some proprietors, and they have said that they must pay a number of fees just so that they can run their operations. Of course, part of the National Party's commitment in the 1996 pre-election statements was overturned. My mind turns to the fuel franchise levy that was put in place, and the High Court of Australia ruled in 1997 that it was illegal. Therefore, a safety net provision had to be put in place by the federal Government so that those funds could be recouped. Unfortunately, the funds now come back to the State in a package with the goods and services tax funding, and the funds are no longer designated to roads, which is an issue in itself.

In this case, there does not seem to be any justifiable reason that fees from renewal of business names should raise a further $2.475 million when the estimated cost of delivery is $2.91 million and the fees from new business name registrations is estimated to be $2.94 million. Attempts have been made to justify that. However, it must be borne in mind that there has already been an increase in the amount charged for registrations from $95 to $103. That increase is already in place, and there is another imposition on businesses for renewal of business names.

I was interested in the minister's remarks. Some members commented that more business names were being renewed as a result of the fee not being in place. Why that has happened mystifies me somewhat. In the report, the reasons given by the executive director for why that is the case do not seem to make sense. If people have a business and it is registered, they would know exactly where they stand regarding the running of businesses.

I was also interested in the explanation by Fiona Halsey of the way in which the decision was made. In the legal analysis, the words that Hon Robin Chapple pointed out were somewhat ambiguous. That reflects on the fact that this fee may well contravene the Act that is in place. I will not support the imposition of this fee. I thank Hon Simon O'Brien for bringing this matter to our attention. I will support the motion.

**HON SIMON O'BRIEN** (South Metropolitan) [9.05 pm]: The matters at issue have been well and truly covered. I will respond to a couple of points that have been made. It is true that this matter has been the subject of a previous report to the House. I alluded to that earlier, as did other speakers. Hon George Cash referred to

the twenty-fifth report of the Joint Standing Committee on Delegated Legislation in 1997. I was a member of that committee at that time, as indeed was Hon Nick Griffiths. Therefore, both of us have a fairly good understanding of these matters. Section 45A of the Interpretation Act is not the most thrilling of subjects, though its history has some intellectual interest. Because of his previous experience, the minister would understand the way in which the joint standing committee works, and that it is possible for the committee to allow a matter to go before the House for resolution, in which case the committee often provides a report, and that is appreciated by the House. That is not quite what happened in this situation. In this case, the joint standing committee decided that it had not been proved to the committee's satisfaction - this is at paragraph 6.1 - that the regulations were unlawful. At the same time, the committee provided a report because it understood that this matter would be debated, as it is being debated now, in a political context as well. However, even though there is a political element to this debate, a few other points that should be noted were also teased out through the agency of Hon George Cash and others.

Hon Murray Criddle referred by interjection to this being a National Party policy. Back in 1996, it was a Liberal Party and National Party policy, because at that time we had a joint approach, possibly not unlike the Labor-Green coalition that exists on certain matters of policy now.

Hon Murray Criddle: I am quite prepared to concede that I was just reading from the report.

Hon SIMON O'BRIEN: Okay. Hon Robin Chapple indicated that all the money raised was deposited to consolidated revenue. As he knows and understands, that is proper. However, obviously consolidated revenue in turn is appropriated to pay for the various services that are provided. In view of the member's comments tonight, if he had his time again, he might even lodge a minority report. As all current and former members of this committee would understand, sometimes the need to finalise deliberations on these complex matters can come along a bit quickly. However, the member made his position clear tonight.

I thank Hon George Cash for his contribution, in which he also referred to the twenty-fifth report. Dozens of reports have been produced by the committee since then. That is a tribute not only to the committee members, but also to the staff. They have done a very good job over the years and have been coping with a huge workload. The advisory-research staff and the committee clerk should be congratulated by the House. I am sure members will join me in thanking them.

Hon George Cash opined strongly that it could be demonstrated that this fee is substantially a tax. That takes me back to my concession that that is arguable. It is sometimes hard to state definitively that a fee relates to service provision or that it is a tax. I did concede that it was arguable and that opinions vary. However, I have put my name to this report as a member of the committee. It was my view that this fee could be deemed lawful, and I reached that view in consultation with the committee. I recognise that members might put the other argument.

I again refer members to the schedules that are imposed on businesses registering or renewing their registration in Western Australia as per the fees set out in schedule 3. Hon George Cash pointed out some of the options that would be available to the Government should it choose to review all the fees in schedule 3 rather than rely on the $103 new business registration fee and the new $75 renewal fee. The approach set out in these regulations could produce absurdities. If the Government were to decide to charge everyone $103 or $120 to cover the cost of renewals and to fund the scheme, it would confront the problem mentioned by the minister; that is, businesses might take the option to remain registered at no cost. They might elect to keep a business name even though it is not being used. Perhaps there should be greater balance.

I will provide an example of the absurdities in the schedule. The up-front registration fee is $103. If ownership or business address details need to be changed - which requires database access and incurs administration costs - that can be done at no cost to the business. If these regulations are enacted, businesspeople will receive a letter from the department asking whether they wish to keep their registration. If they do, and all the relevant details are the same, that re-registration will cost $75. Clearly, that is an imbalance. A business will be able to get a copy of a certificate of registration for $7 and a new certificate will cost $103. That regulation must be revisited. Hon George Cash was correct when he made that point.

The Opposition believes that the $75 fee for the renewal of business registrations imposed by these regulations raises excessive amounts from the small business community. It is certainly out of proportion to the service provided, and arguably beyond the scope of that service and related services. It is unreasonable to increase a service fee from nothing to $75 in one hit. Small business should not be forced to wear it.

Question put and a division taken with the following result -

Ayes (18)

| | | | |
|---|---|---|---|
| Hon George Cash | Hon Peter Foss | Hon Simon O'Brien | Hon Derrick Tomlinson |
| Hon Robin Chapple | Hon Frank Hough | Hon Barbara Scott | Hon Giz Watson |
| Hon Murray Criddle | Hon Robyn McSweeney | Hon J.A. Scott | Hon Bruce Donaldson *(Teller)* |
| Hon Paddy Embry | Hon Dee Margetts | Hon Christine Sharp | |
| Hon John Fischer | Hon Norman Moore | Hon Bill Stretch | |

Noes (9)

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|---|---|---|---|
| Hon Kim Chance | Hon Jon Ford | Hon Ljiljanna Ravlich | Hon E.R.J. Dermer |
| Hon Sue Ellery | Hon N.D. Griffiths | Hon Tom Stephens | |
| Hon Adele Farina | Hon Louise Pratt | | |

Pairs

| | |
|---|---|
| Hon Barry House | Hon Ken Travers |
| Hon Alan Cadby | Hon Kate Doust |
| Hon Ray Halligan | Hon Graham Giffard |

Question thus passed.