

# ***Road Traffic Amendment (Impounding and Confiscation of Vehicles) Bill 2004***

## **Explanatory Notes**

### **Clause 1 – Short Title**

A formal clause titling the Act

### **Clause 2 – Commencement**

To enable administrative arrangements to be put in place by the WA Police Service including the engagement of contractors for the towage and storage of impounded vehicles, the Bill will come into operation on a date to be fixed by proclamation.

### **Clause 3 – The Act amended**

Identifies that, with the exception of clauses 14 and 15, the Bill amends the *Road Traffic Act 1974*.

Clauses 14 and 15 amend the *Unclaimed Money Act 1990* and the *Road Traffic (Drivers' Licences) Regulations 1975*.

### **Clause 4 – Section 5 amended**

The proposed sections 79 and 79A in clause 12, require a member of the Police Service to form a reasonable suspicion before he or she will be empowered to impound an offender's motor vehicle. This provision requires the suspicion to be reasonable, be formed personally by the member of the Police Service and made in good faith.

### **Clause 5 – Section 48 amended**

This amendment is required as a consequence of the amendments contained in clause 12 which repeal section 78B. It continues the current arrangements that enable the Director General and the Commissioner for Police to be represented by departmental officers in appeals against decisions to refuse the issue, cancel or suspend a person's motor drivers' licence.

### **Clause 6 – Division heading inserted in Part V**

For drafting purposes, Part V of the Act will be divided into four Divisions with four subdivisions.

The first division deals with general driving offences and includes the current sections 49 to 62 together with the proposed section 62A "causing excessive noise, smoke" (clause 9).

### **Clause 7 – Section 51 amended**

Section 51 provides that where a person who is the holder of a drivers' licence issued on probation is convicted of certain offences, their licence is cancelled and they are disqualified from holding or obtaining a licence for a period of not less than three months. A person whose licence has been cancelled by the operation of this provision must reapply and sit the required tests before they can be reissued a licence.

The new offence of “causing excessive noise, smoke” (clause 9) will be an offence to which this section applies.

### **Clause 8 – Section 60 amended**

The current offence of reckless driving is to be expanded to include any offence where a person drives a motor vehicle at a speed of 45 km/h above the limit that applies in the area.

This amendment will not obviate a driver's responsibility to drive in a manner that is not inherently dangerous in the circumstances. It will remain open for a person to be charged with the offence of reckless driving where their speed may be just over the limit or even under the limit in circumstances that are dangerous.

The clause provides for exemptions from the 45 km/h limit for the driver's of emergency vehicles. However, they will continue to come within the ambit of the more general offence of reckless driving, as is the current situation.

### **Clause 9 – Section 62A and Division 2 heading inserted in Part V**

A new offence will be created for willfully driving a motor vehicle in a manner that causes a loud noise or smoke to be emitted from the vehicle's tyres. Colloquially known as a “burn out”. The offence will carry a maximum penalty of \$600 and 3 demerit points (clause 15). It can also be a trigger for impounding of an offender's vehicle (clause 12 see sections 78A and 80).

By the operation of section 73 of the Act, this offence will include public places such as the car parks at Scarborough Beach, shopping centers etc.

The offence under section 62A will differ from the offence created in regulation 255 of the *Road Traffic Code 2000* in that the prosecution must prove the driver must have intended the vehicle to emit noise and smoke whereas offences under the *Code* will remain for offences that arise from a lack of attention or human error.

For drafting purposes, Part V of the Act will be divided into four Divisions with four subdivisions.

The second division deals with alcohol and drug offences and includes the current sections 63 to 72.

### **Clause 10 – Division 3 heading inserted in Part V**

For drafting purposes, Part V of the Act will be divided into four Divisions with four subdivisions.

The third division deals with general matters relating driving offences and includes the current sections 73 to 78.

#### **Clause 11 – Section 74 inserted**

This amendment is required as a consequence of the amendments contained in clause 12 which repeal section 78B. It continues the current arrangements that enable the Director General to be represented by departmental officers in applications for extraordinary drivers' licences and before the District Court for the removal of disqualifications. The Commissioner for Police will also continue to have the right to be represented by departmental officers in applications for extraordinary drivers' licences as well as in applications for the impounding and confiscation of vehicles (clause 12 – sections 80, 80A, 80B and 80C).

#### **Clause 12 – Sections 78A and 78B replaced with Division 4 in Part V**

Sections 78A and 78B are to be repealed and replaced with Division 4.

Section 78A provided a limited ability for courts, on the application of the Director General, to order the impounding of vehicles of drivers convicted of a second or subsequent offence of:

- driving under the influence of alcohol;
- driving with a blood alcohol level equal to or exceeding 0.08%; or
- driving whilst disqualified.

for a period not exceeding 14 days.

There is no record of the provision being utilized in recent times. Further, the Office of Road Safety is considering a legislative package of integrated reforms to specifically target recidivist drink drivers that will include action against offenders vehicles.

For drafting purposes, Part V of the Act will be divided into four Divisions with four subdivisions.

The fourth division deals with the substance of this Bill i.e. the impounding and confiscation of vehicles.

#### **Subdivision 1 – Preliminary**

##### **Section 78A Interpretation of Division 4**

**“approved”** is used in the proposed section 79B (form of notice of impounding) and the proposed section 79D (manner for releasing impounded vehicles). In both instances, approved will mean approved by the Commissioner for Police.

**“circumstances of aggravation”**. Before a member of the police service will be empowered to impound a vehicle, he or she must be satisfied that the vehicle has been used in the commission of an offence against section 62A (willfully driving a motor vehicle in a manner that causes a loud noise or smoke to be

emitted from the vehicles tyres) or an offence of dangerous driving causing death, dangerous driving causing bodily harm, reckless driving or dangerous driving committed in circumstances of aggravation.

Circumstances of aggravation include racing another vehicle, attempting to set or break a speed record, testing the capability of the driver or vehicle, deliberately causing the vehicle to emit noise, smoke or lose wheel traction with the driving surface.

**“Commissioner”** means the Commissioner of Police.

**“hired”** is used in the proposed section 79D (a hire vehicle that has been impounded may be released before the 48 hr. period has expired) and the proposed section 80E (hired vehicle not to be impounded or confiscated).

To be a “hire vehicle” it must be owned and form part of the business fleet of a person or company that’s business is the short term hire of vehicles, and must be the subject of a written agreement at the time of the commission of the offence.

Simply claiming that the vehicle was hired from a family member, a friend or an acquaintance will not be sufficient.

**“impounding offence (driver’s licence)”** is used in proposed section 79A (police may impound a vehicle for 48 hrs), the proposed section 79E (convicted driver liable for costs of impounding), the proposed section 80B (power of a court to order impounding of vehicle), the proposed section 80C (power of a court to order confiscation), the proposed section 80G (right of owner or interested person to be heard in an application for impounding or confiscation), the proposed section 80H (expenses of court imposed impounding payable by convicted driver) and the proposed section 80K (power to recover any shortfall in costs following sale of a confiscated vehicle).

The only drivers’ licence offence that could lead to impounding and confiscation of a vehicle is where a person is driving a motor vehicle after having been refused the issue of a licence, or have had their licence suspended or cancelled by the Director General on the grounds that they are addicted to alcohol, suffer from a medical condition which renders them incapable of properly controlling a motor vehicle, or are no longer capable of controlling the class of motor vehicle for which they hold a licence.

**“impounding offence (driving)”** is used in the proposed section 79 (police may impound a vehicle for 48 hrs), the proposed section 79E (convicted driver liable for costs of impounding), the proposed section 80 (power of a court to order impounding of vehicle), the proposed section 80A (power of a court to order confiscation), the proposed section 80G (right of owner or interested person to be heard in an application for impounding or confiscation), the proposed section 80H (expenses of court imposed impounding payable by convicted driver and the proposed section 80K (power to recover any shortfall in costs following sale of a confiscated vehicle).

Offences that could lead to impounding or confiscation are offences against

section 62A (willfully driving a motor vehicle in a manner that causes a loud noise or smoke to be emitted from the vehicles tyres) or an offence of dangerous driving causing death, dangerous driving causing bodily harm, reckless driving or dangerous driving committed in circumstances of aggravation.

**“impounding period”** where a vehicle is impounded by a member of the police service under the proposed sections 79 or 79A, it will be impounded for a period of 48hrs, after which time it will be released to the licence holder. In respect to a court ordered impounding, the period is that is specified in the order, which cannot exceed three months (see proposed sections 80 and 80B).

**“licence holder”** is used in the proposed section 79B (requirement to serve notice of police impounding), 79D (release of impounded vehicle), 80E (surrender of impounded or confiscated vehicles), 80G (notice of intention to seek court order) and 80J (disposal of confiscated and uncollected vehicles).

The licence holder is the person in whose name the vehicle has been licensed either in this state in another Australian jurisdiction. It also includes an off-road vehicle registration.

**“senior officer”** an officer of the rank of sergeant or higher must be informed when a vehicle is impounded (clause 12 – proposed section 79C). A senior officer will also be empowered to authorize the release of a vehicle before the 48 hr period has expired in certain circumstances (clause 12 – proposed section 79D).

**“surrender period”** is the period set out in a court order for the impounding or confiscation of a vehicle in which the vehicle is to be surrendered to the Commissioner for Police.

The expression is used in the proposed section 78C (powers of members of the police force).

### **Section 78B – Penalties etc. not affected**

The impounding or confiscation of a vehicle will not affect any provisions in the Act relating to penalties for offences. Nor will it be a mitigating factor to which the court can have regard when sentencing an offender.

### **Section 78C - Powers for this Division**

Where a vehicle has been impounded or confiscated, a member of the police service or an agent will be empowered to drive or tow the vehicle to the place where it is to be stored and at the place where it is stored. A member of the police service will also be empowered to seize the keys for an impounded vehicle, and if necessary use reasonable force to enter a premises for the purpose of executing a court order.

The power to convey a vehicle are in addition to those powers currently provided under section 86A in respect to the removal of a vehicle used in the commission of an offence to a place of safe custody.

### **Section 78D - Contracts for conveying, storing impounded or confiscated vehicles**

The Commissioner will be able to enter into contractual arrangements with towing firms and other service providers for the provision of services to give effect to the impounding and confiscation provisions of the Act, including the towing and storage vehicles.

### **Section 78E – Recovery of impounding expenses**

The Commissioner will be empowered to institute civil proceedings against the person convicted of the offence giving rise to the impounding or confiscation of the vehicle for any expenses reasonably incurred.

### **Subdivision 2 – Impounding of vehicles by police**

#### **Section 79 – Impounding of vehicles for racing etc.**

A member of the police service will be empowered to impound a vehicle for 48 hours where he or she reasonably suspects that the vehicle has been used in the commission of an offence against section 62A (willfully driving a motor vehicle in a manner that causes a loud noise or smoke to be emitted from the vehicles tyres) or an offence of dangerous driving causing death, dangerous driving causing bodily harm, reckless driving or dangerous driving committed in circumstances of aggravation (i.e. the driver was racing another vehicle, attempting to set or break a speed record, testing the capability of the driver or vehicle, deliberately causing the vehicle to emit noise, smoke or lose wheel traction with the driving surface).

#### **Section 79A – Impounding of vehicles for driving without driver’s licence etc.**

A member of the police service will be empowered to impound a vehicle for 48 hours where he or she reasonably suspects that the vehicle has been driven by a person who has been refused the issue of a licence, or have had their licence suspended or cancelled by the Director General on the grounds that they are addicted to alcohol, suffer from a medical condition which renders them incapable of properly controlling a motor vehicle, or are no longer capable of controlling the class of motor vehicle for which they hold a licence, and the offender had previously been convicted of an impounding offence relating to their drivers’ licence.

#### **Section 79B – Notice of impounding**

As soon as practicable after the police have impounded a vehicle, a notice is to be served on the vehicle licence holder, and where the licence holder was not the driver, the driver detailing:

- The time and date when the vehicle was impounded;
- Where the vehicle is stored;
- How, when and to whom it can be released;

- The powers of the court in respect to the impounding and confiscation of vehicles.

Administrative arrangements will be put in place by the Police Service to ensure the notice also advises that where a vehicle is impounded on the order of a court, and the licence holder was also the driver impounding fees will be required to be paid, or arrangements for payment of the debt by instalment, before the vehicle will be released.

### **Section 79C – Senior officer to be informed if vehicle impounded**

Where a member of the police service below the rank of sergeant impounds a vehicle, he or she must as soon as practicable thereafter advise a senior officer informing them of the grounds on which the vehicle was impounded.

### **Section 79D – Release of impounded vehicles**

A vehicle that has been impounded by the police is not to be released for a period of 48 hrs unless:

- The vehicle was stolen at the time of the offence or is a hire car;
- A senior officer is not satisfied that grounds existed for the impounding of the vehicle; or
- A senior officer is satisfied that in the particular case continued impounding of the vehicle will result in exceptional hardship.

On application, the vehicle is to be released to the licence holder at the expiration of the 48 hour impounding period.

### **Section 79E – Expenses of impounding under section 79 or 79A payable by convicted driver**

The driver of a vehicle convicted of the offence giving rise to a police impounding will be liable for the reasonable costs incurred by the Commissioner in impounding the vehicle.

This will be a civil debt that can be recovered by the Commissioner in a court of competent jurisdiction (clause 12 – proposed section 78E).

### **Subdivision 3 – Impounding and confiscation by court order**

#### **Section 80 – Impounding of vehicles for racing etc.**

Where a court is satisfied that a person has been convicted of an impounding offence (driving) within the previous three years, it may order that vehicle used in the commission of the offence is to be surrendered to the Commissioner for Police and impounded for a period not exceeding three months.

#### **Section 80A – Confiscation of vehicles for racing etc.**

Where a court is satisfied that a person has been convicted of two impounding offences (driving) within the previous five years, it may order that vehicle used in the commission of the offence is to be surrendered to the Commissioner for Police and confiscated to the State.

**Section 80B – Impounding of vehicles for driving without driver’s licence etc.**

Where a court is satisfied that a person has been convicted of an impounding offence (driver’s licence) within the previous three years, it may order that vehicle used in the commission of the offence is to be surrendered to the Commissioner for Police and impounded for a period not exceeding three months.

**Section 80C – Confiscation of vehicles for driving without driver’s licence etc.**

Where a court is satisfied that a person has been convicted of two impounding offences (driver’s licence) within the previous five years, it may order that vehicle used in the commission of the offence is to be surrendered to the Commissioner for Police and confiscated to the State.

**Section 80D – Effect of confiscation**

The property in any vehicle that is confiscated will vest absolutely in the State free of any encumbrances.

**Section 80E – Stolen or hired vehicles not to be impounded, confiscated**

The court is not to make an order for impounding or confiscation of any vehicle that was stolen or a hired vehicle at the time of the commission of the offence.

**Section 80F – Licence holder to surrender impounded, confiscated vehicle at time and place ordered by court**

An order by a court for the impounding or confiscation of a vehicle must specify when and where the vehicle and its keys are to be surrendered to the Commissioner.

**Section 80G – Applications for orders to impound or confiscate vehicles**

The Commissioner can only make an application for the impounding or confiscation of a vehicle as part of the proceedings for the offence giving rise to the action or within three months after the conviction.

The Commissioner must give fourteen days notice of his or her intention to seek the order to:

- The driver;
- The holder of the vehicle licence;
- The Director General;
- Any person the Commissioner is aware has an interest in the vehicle; and
- The public generally by notice in a newspaper with statewide circulation.

A court will not be empowered to make an order for the impounding or confiscation of a vehicle unless it has given a reasonable opportunity for the driver, the licence holder, any interested party who has been served a notice by the Commissioner and any other person the court is satisfied has an interest in the vehicle, the opportunity to show why the order should not be made.

In determining an application, the court may have regard to:

- Whether the offence was committed with the knowledge and acquiescence of an interested person;
- Whether the making of the order will cause severe financial or physical hardship to an interested person or the usual driver of the vehicle; and
- Any other matter the court considers relevant.

Once served with a notice of intention by the Commissioner to seek an order, it will be an offence for the driver, licence holder or any person the Commissioner is aware has an interest in the vehicle to dispose of any interest in the vehicle except with the approval of the court.

Once served with a notice of intention by the Commissioner to seek an order, the Director General must not transfer the vehicle licence until the application is decided.

#### **Section 80H – Expenses of court-ordered impounding payable by convicted driver**

The driver of a vehicle convicted of the offence giving rise to a court ordered impounding will be liable for the reasonable costs incurred by the Commissioner in impounding the vehicle.

Where the licence holder was the driver of the vehicle at the time of the offence, the Commissioner will be empowered to refuse the release of the vehicle until such time as reasonable costs incurred in impounding the vehicle are paid.

Where the licence holder was not the driver, the Commissioner will be empowered to recover the costs as a civil debt in a court of competent jurisdiction (clause 12 – proposed section 78E).

#### **Subdivision 4 – Miscellaneous provisions about impounded or confiscated vehicles**

##### **Section 80I – Before impounded vehicles released, costs of storage for post-impounding period may be payable**

Notwithstanding the licence holder may not have been the driver, the Commissioner will be empowered to refuse the release of the vehicle until such time as expenses incurred in storing the vehicle from the time it became available for collection until it is collected are paid.

The expenses are not to include the cost of storage for days when the place where the vehicle is stored is not open to the public.

### **Section 80J – Disposing of confiscated, uncollected vehicles and items therein**

The Commissioner will be empowered to sell or otherwise dispose of an impounded vehicle and any items that are in the vehicle if it is not claimed within two months after the impounding period has expired.

The Commissioner will not be empowered to sell or otherwise dispose of any vehicle, including one that has been confiscated until any appeals against the conviction of the driver or confiscation of the vehicle have been determined.

Before selling an uncollected impounded vehicle or item, the Commissioner must:

- Give the licence holder at least 14 days notice;
- Give notice in a newspaper with statewide circulation;
- In respect to any item in the vehicle, take reasonable steps to return the item to its owner; and
- Must not sell the vehicle or item until any application that may have been made to a magistrate to defer the sale has been determined (proposed sections 80J(5) and (6)).

It will be open for the owner of an uncollected vehicle to apply to a magistrate to defer the sale or disposal of a vehicle for a period not exceeding 3 months. Similarly, the owner of an item may apply for an order for the return of the item.

Where the disposal of a confiscated or uncollected proceeds, the resulting funds are to be disbursed in the following order of priority:

1. The costs incurred in selling the vehicle;
2. If the licence holder was the driver, the costs associated with a police impounding;
3. If the licence holder was the driver, a judgment debt arising from a police impounding;
4. If the licence holder was the driver, the costs associated with a court imposed impounding;
5. If the licence holder was the driver, a judgment debt arising from a court imposed impounding;
6. The costs incurred in storing the vehicle after the impounding period ended;
7. In the case of an uncollected vehicle, the amount of a debt for which the vehicle is security;
8. In the case of a confiscated vehicle to the Treasurer for the benefit of the State;
9. In the case of an uncollected vehicle to the Treasurer to be dealt with under the *Unclaimed Money Act*.

A person who purchases an uncollected vehicle or item in good faith will get good title to it.

**Section 80K – Expenses of confiscation not obtained on sale payable by convicted driver.**

Where the proceeds of the sale of a confiscated vehicle are insufficient to meet the costs of impounding and sale, the shortfall will be a debt due by the driver to the Commissioner.

**Section 80L – Transfer of vehicle licence**

Where a vehicle is confiscated or is to be sold as an uncollected vehicle, the Commissioner must notify the Director General and the Director General is to transfer the licence for the vehicle to the State of Western Australia.

By giving notice, the Commissioner will be relieved from compliance with the usual requirements placed on a person acquiring a vehicle.

**Clause 13 – Section 101 amended**

This amendment will specifically exclude contractors engaged by the Commissioner of Police for the towage and storage of impounded vehicles from the protection from liability afforded the Minister, the Director General and officers performing functions under the Act.

**Clause 14 – *Unclaimed Money Act 1990* amended**

Section 9 of the *Unclaimed Money Act* provides that Part 2 of the Act applies in respect of money from those sources listed in the section as though it were unclaimed money.

This clause expands the ambit of section 9 to include the residual from the sale or disposal of uncollected vehicle or item.

**Clause 15 – *Road Traffic (Drivers' Licences) Regulations 1975* amended**

The schedule to the regulations prescribes the number of demerit points that attach to offences. This clause provides that 3 points will accrue for the new offence of causing excessive noise, smoke created by clause 9 of this Bill