



PARLIAMENT OF WESTERN AUSTRALIA

**JOINT STANDING COMMITTEE
ON
DELEGATED LEGISLATION**

TWENTY-FIFTH REPORT:

Road Traffic (Drivers' Licences) Amendment Regulations (No. 2) 1997
Road Traffic (Licensing) Amendment Regulations (No. 2) 1997

Presented by the Hon Robert Laurence Wiese MLA (Chairman)

25
August 1997

Joint Standing Committee on Delegated Legislation

Members

Hon Bob Wiese MLA (Chairman)
Hon Nick Griffiths MLC (Deputy Chairman)
Hon Simon O'Brien MLC
Hon Barbara Scott MLC
Hon Jim Scott MLC
Mr Ted Cunningham MLA
Mr Mark McGowan MLA
Mr Iain MacLean MLA

Advisory/Research Officer

Andrew Mason

Committee Clerk

Jan Paniperis

Terms of Reference

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.*

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.

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Report of the Joint Standing Committee on Delegated Legislation

in relation to

Road Traffic (Drivers' Licences) Amendment Regulations (No. 2) 1997 Road Traffic (Licensing) Amendment Regulations (No. 2) 1997

1 The Committee's Duty

- 1.1 By its Rules the Joint Standing Committee on Delegated Legislation is charged by the Parliament with the performance of a scrutiny function in respect of legislative instruments that the Parliament has delegated the creation of to the Executive. This scrutiny role is delegated to the Committee by the Parliament and is the only practical avenue for Parliament to check that the Executive is acting in accordance with the power delegated to it, other than members each reading the hundreds of legislative instruments created each year. However, by its Rules the Committee is constrained in the performance of its scrutiny function to the examination of legislative instruments to determine whether they comply with certain legal principles and broader issues relating to rights, liberties and freedoms. In particular, pursuant to Rule 5(a) of the Committee's Rules it is the function of the Committee to consider and report on any regulation that appears not to be within power. This is usually the starting point for the Committee in the performance of its work for, if the regulation is beyond the power delegated to the Executive and capable of being struck down as such by a court, there is little point in examining the regulations in relation to any other matter.
- 1.2 Where the Committee is of the opinion that any regulation ought to be disallowed, Rule 6 of the Committee's Rules places an obligation on the Committee to report that opinion and the grounds thereof to the House before the end of the period during which any motion for disallowance of those regulations may be moved in either House.

2 The Committee's Procedure

- 2.1 The Committee has had cause to consider regulations 3(c) and (d) of the *Road Traffic (Drivers' Licence) Amendment Regulations (No. 2) 1997* and regulation 3(a) of the *Road Traffic (Licensing) Amendment Regulations (No. 2) 1997*. These regulations are subject to a disallowance motion in this House. Due to the impending expiry of the period in which the Committee could give notice of motion of disallowance, the Deputy Chairman gave notice of motion of disallowance of the regulations on 10 June 1997 because the Committee was concerned about certain aspects of the regulations and

required more information from the Department of Transport.

- 3 The Committee addressed its concerns with the Department. Relevant officers of the Department were called before the Committee to give evidence and the Department was given the opportunity to take legal advice on the issues that were raised by the Committee. At the completion of these investigations and after the Committee took its own independent legal advice from Dr J T Schoombee, it is the Committee's opinion that these regulations are beyond the power delegated to the Governor in Executive Council by the *Road Traffic Act 1974* and that they ought to be disallowed. Dr J T Schoombee is a leading practitioner at the Independent Bar and specialises in constitutional law. It is stressed that Dr Schoombee's advice was provided to the Committee in light of the legal advice provided to the Department.

4 **The Effect of the Drivers' Licence Regulations**

- 4.1 Regulations 3(c) and (d) of the *Road Traffic (Drivers' Licence) Amendment Regulations (No. 2) 1997* increase the fees payable in respect of the issue of a drivers' licence from \$26 to \$29 for an annual licence and from \$90 to \$92 in respect of a five-year licence. These increases have been effective from 1 April 1997. On the basis of information supplied by the Department of Transport to the Committee it has been determined that these increases are required to meet the costs of new digital imaging technology which will be used in the production of the plastic licence card that each driver receives. This will allow for photographs on licence cards to be digitally recorded and for related security features such as holograms and security patterns on the licence. The merits of this technology have not been the subject of question from the Committee.

- 4.2 The Department has advised the Committee that the drivers' licence card is produced by a contractor and that the cost per card is currently \$2.64. A new contract will be required for the supply of the new card produced with digital imaging technology. This contract has not yet been finalised and a tendering process is underway. The Department has advised that it anticipates the contract to be in place by the end of the year with the card being supplied by then as well. In the meantime the Department has estimated that the cost of this new card will be approximately \$4.50. This represents an increased cost of \$1.86. With this increased cost in mind the Department has increased the licence fee by \$3 for an annual licence and \$2 for a five-year licence. The additional \$1.14 and 14 cents are supposed to reflect administrative costs associated with the issue of the card. There are supposedly higher administrative costs associated with the issue of an annual licence as they require renewal notices more frequently and more staff are required to deal with an individual who pays 5 times instead of once in each five year period. Details of these administrative costs have not been provided and nor has it been explained why there will be additional ongoing administrative costs associated with the new card.

5 **The Effect of the Licensing Regulations**

- 5.1 Regulation 3(a) of the *Road Traffic (Licensing) Amendment Regulations (No. 2) 1997* increases the "recording" fee payable in respect of vehicle licences from \$12.50 to \$14.

Again these increases have been effective from 1 April 1997. The Department has advised that these increases are required to meet the costs of and to fund WA's commitment to participate in the National Exchange of Vehicle and Driver Information Systems (NEVDIS). The NEVDIS initiative will apparently provide a better interchange of information between States. Currently this is done manually, by faxes and telephone calls between States. NEVDIS will allow this to be done on-line electronically. There is to be a central NEVDIS server in the Eastern States and then vehicle and driver information will be readily transferable. It is claimed that the NEVDIS initiative is directed towards providing significant benefits to the community. The Department has advised that it is estimated there would be direct cost savings in the improved collection of fees with reduced numbers of unregistered vehicles on the roads, better collection of fines, a reduction in transaction times, a reduction in car fraud, a reduction in accidents with problem vehicles, a reduction in accidents with problem drivers and a reduction in licence fraud. A cost-benefit analysis of the initiative carried out by the co-ordinating body, Austroads, estimated that there would be benefits across Australia of \$20 million per annum without quantifying some of the more intangible benefits. It is not the role of the Committee to comment upon the claims made in support of the fee increase. However the Committee does believe that the benefits sought are all desirable outcomes which would be generally supported by the Parliament and the community.

- 5.2 The Department has advised the Committee that the NEVDIS initiative is a five-year program which has an estimated total cost of \$12.5 million. The increase of \$1.50 in the recording fee is on the basis that it will bring into the Consolidated Fund that \$12.5 million over the five-year period. Some efforts to breakdown how this revenue is to be spent over the five-year period have been made by the Department. The first phase of the project relates to purification of the existing data on the system and connection with the Eastern States server. This has been costed at \$724,874. This phase has already commenced and should be completed by early 1998. The balance of the initiative appears not to have been fully costed and, although some very rough estimates of the breakdown of expenditure have been provided, the Department has not been able to quantify or detail these even though the Committee sought such information in an attempt to verify that the regulations were within power.
- 5.3 One major concern of the Committee is that the new technology is not yet available and WA will not be participating fully in an exchange of driver and vehicle information in 1997. As from 1 April 1997 vehicle drivers have been paying the higher fees but no improved benefit or service has been provided. On the basis of this information the Committee is concerned that the increase in each impost may be a tax, for which there is no legislative authority for the Department to levy.
- 5.4 The Committee questions, if the NEVDIS system will actually result in administrative cost savings, as well as general benefits to the community, as is claimed by the Department (improved collection of fees, reduction in transaction times etc.), why then is this not reflected in the increased fees to be paid by members of the community. The Committee considers that this fact reinforces its view that the fee increases are taxes levied to defray the general administrative costs of the Department.

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The Legal Position

- 6.1 The Committee's concerns have been raised as the increase in each impost appears to fulfill all the accepted attributes of a tax, as referred to by Latham C.J. in *Matthews v. Chicory Marketing Board (Vict.)* (1938) 60 CLR 263 at 276. Each of these fees is compulsory, for public purposes, enforceable by law, and not a payment for services rendered. The only question that arises is whether, when looking at the true character of the exaction, there is something special about the increase or the circumstances in which it is purportedly exacted which, notwithstanding the presence of these attributes, might preclude its characterisation as a tax.
- 6.2 In this regard the Committee has noted that the courts have recognised that a "fee for service" may not be a tax, although the other positive attributes of a tax are present. The observation of the High Court in respect of section 53 of the Constitution in *Air Caledonie International v. The Commonwealth* (1988) 165 CLR 462 at 470 is relevant in this regard -

"Read in context, the reference to "fees for services" [should] 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."

On the basis of these principles the Committee has formed the view **that the fees exacted by the regulations are not for identified services that are rendered to the customer**. The increases apply notwithstanding that digital imaging technology will not be available until the end of the year and WA will not be a full participant in NEVDIS for 5 years. These improved services are not yet **rendered** to those who pay the fees. Accordingly the Committee is of the view that the imposts are not "fees for services" and do not constitute an exception to the concept of a tax.

- 6.3 The Committee has asked the question what benefit does a person receive for paying the higher fee? The Committee must determine the validity of the regulations when they become operative. These regulations became operative on 1 April 1997 and the Department has been unable to show that the person who pays the fee now will receive any related benefit specific enough to satisfy the legal definition of what is a fee.
- 6.4 In light of the above the Committee's legal advice is that:
- 6.4.1 such imposts equate to taxes;
- 6.4.2 nothing in the *Road Traffic Act 1974* appears to authorise the imposition of any charge amounting to a tax; and
- 6.4.3 for these reasons the imposts in question are *ultra vires* or beyond the power contained in the Act to impose by way of regulation.
- 6.5 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 Queens 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.

- 6.6 The Committee reiterates that it is the function of the Committee to consider and report on any regulation that appears not to be within power. Further, where the Committee is of the opinion that any regulation ought to be disallowed Rule 6, of the Committee's Rules places an obligation on the Committee to report that opinion and the grounds thereof to the House. The Committee is of the opinion that these regulations are beyond power and would be struck down as *ultra vires* by a court if challenged. It is with some reluctance that the Committee makes the recommendation to the Parliament that these Regulations should be disallowed. The Committee is very supportive of the intention of the Department, the Minister and the Government in respect of these fee increases. However the Committee would not be performing its task given to it by the Parliament if it were to ignore regulations which are not within the powers granted in the Act to the Executive and which the Committee believes would be struck down by the courts if subjected to challenge. This fact is of great concern to the Committee as it may involve the Executive in expensive and unnecessary litigation.

7 Recommendation

- 7.1 Accordingly, it is the recommendation of the Committee that:

Regulations 3(c) and (d) of the *Road Traffic (Drivers' Licence) Amendment Regulations (No. 2) 1997* and regulation 3(a) of the *Road Traffic (Licensing) Amendment Regulations (No. 2) 1997* be disallowed.

- 7.2 Due to the requirement that the Committee comply with certain time limits, the Committee has not had the opportunity to address all of the complex legal issues that this matter has raised in this brief report. The Committee also wishes to advise the House that it has not simply approached this matter from the purely legalistic view that the above report might indicate. The Committee has been examining solutions to the very real practical problems that are raised for the operation of executive government departments dependent upon fees and charges for their continued operation. The Committee therefore advises the House that it intends to more fully report on this matter shortly as its investigations are near completion. In its next report the Committee intends to address the broader issues that this matter raises and how the executive government can address the problems that are identified.