NSW GOVERNMENT
Crown Solicitor's Office

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3 February 2016

Ms Lisette Rudge
Manager Compliance and Legal Governance and Risk
Service NSW
GPO Box 7057
SYDNEY NSW 2001

By email: lisette.rudge@service.nsw.gov.au

Dear Ms Rudge

Power of Service NSW to charge customers a service fee

I enclose, as requested, my advice in relation to the above matter.

Should you have any queries in relation to the matter, or if you require any further assistance, please do not hesitate to contact Michael Khoury of my Office on tel: (02) 9224-5197 in the first instance. If Michael Khoury is not available, please do not hesitate to contact Amalia Stanizzo on (02) 9224-5056.

Yours faithfully

Michael Khoury
Senior Solicitor
for Crown Solicitor

Encl.

CROWN SOLICITOR
NEW SOUTH WALES

Advice

Power of Service NSW to charge customers a service fee

Contents

Schedule 1, Clause 5
[redacted]

Prepared for: SVC828 Service NSW
Date: 3 February 2016
Client ref: Ms Lisette Rudge, Manager, Compliance and Legal Governance and Risk
CSO ref: 201600227 - T08 - Michael Khoury

1. Summary of advice

1.1 Service NSW is considering charging a customer a service fee in addition to a fee fixed by statute for the provision of a customer service function. It is a long established principle of the common law that a public body or authority, including a branch of the executive Government, may not levy or otherwise impose a charge or fee on members of the public unless there is statutory authority, express or arising by necessary implication, to do so.

1.2 A review of the *Service NSW (One-stop Access to Government Services) Act 2013* ("the *SNSW Act*") indicates that there is no express power conferred on Service NSW in that Act to charge a customer a service fee in addition to any scheduled fee provided for a particular service. Nor, in my opinion, can the power to charge a customer an additional service fee be necessarily implied from that Act.

1.3 By virtue of the operation of ss. 7 and 8 of the *SNSW Act*, the CEO of Service NSW cannot exercise a power in relation to a customer service function that the Government agency that has conferred the function on the CEO itself does not have under another Act or instrument. It is not possible in the time available (and the large amount of legislation involved) to review every Act or instrument to ascertain whether in a given instance, a Government agency and therefore Service NSW acting in reliance on that Government agency's customer service function, has a power to charge a service fee in addition to a scheduled fee. That said, as a general principle unless there is a power (expressly or necessarily implied) conferred on the Government agency to charge an additional service fee under the Act or instrument pursuant to which the Government agency obtains its customer service function, the Government agency and Service NSW acting on that agency's behalf will not have a power to charge a service fee.

1.4 If Service NSW introduced a service fee where it did not have a power (express or necessarily implied) to do so, then it would be acting *ultra vires* (beyond power) and any fee levied would be illegal and therefore invalid. I have set out in my answer to question 2 some possible consequences of this.

1.5 In order for Service NSW to have a general power to charge a customer a service fee, the *SNSW Act* would need to be amended to allow for such a charge.

1.6 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Background

2.1. Service NSW is currently a Public Service agency, specifically a Public Service executive agency related to the Department of Finance, Services and Innovation (see s. 22 and

Schedule 1 to the *Government Sector Employment Act 2013*). It is not a separate legal entity in its own right but is an administrative unit or division of the Crown in right of the State of New South Wales.

2.2 The *SNSW Act* "facilitate(s) the provision by Services NSW of one-stop access to government services" (see the Long Title to the *SNSW Act*).

2.3 Briefly stated, the *SNSW Act* provides for a "Government agency"[1] to be able to delegate to, or enter into an agreement with, the Chief Executive Officer of Service NSW ("the CEO of Service NSW") to undertake "customer service functions" for the Government agency, and also provides, among other things, for the required information transfers between Service NSW and the Government agency so this may occur.

2.4 "Customer service functions" is defined in s. 5 of the *SNSW Act* as follows:

> **"5 Customer service functions**
>
> The following functions are ***customer service functions***:
>
> (a) receipt of applications or fees for, or related to, authorities granted under an Act, or otherwise obtained from a Government agency,
>
> (b) issue of authorities and other functions relating to authorities granted under an Act, or otherwise obtained from a Government agency,
>
> (c) provision of information or advice about Government services or State legislation or any other matter,
>
> (d) receipt of payments or claims for payments, or making of payments,
>
> (e) any function of an agency of the Commonwealth Government, an agency of the Government of another State or Territory or an agency of the Government of another country, as referred to in section 9,
>
> (f) any function of a person (other than a Government agency or an agency referred to in paragraph (e)) as referred to in section 10,
>
> (g) any function that is ancillary to a customer service function."

2.5 "Authority" is defined in s. 3(1) of the *SNSW Act* as meaning "a licence, permit, approval or any other authorisation."

2.6 In relation to the delegation to, or entry into agreements with, the CEO of Service NSW with respect to customer service functions, ss. 7 and 8 of the *SNSW Act* relevantly provide:

[1] This is broadly defined in s. 3(1) of the *SNSW Act*.

"7 **Delegation of customer service functions to CEO under other Acts or instruments**

(1) A Government agency or any other person may, under a provision of an Act or an instrument that permits the delegation of a customer service function by the agency or person (a ***delegation provision***), delegate the customer service function to the CEO.

(2) A delegation provision of any such Act or instrument extends to the CEO as if the CEO were a person to whom functions could be delegated under that provision.

(3) A delegation provision under which a customer service function is delegated to the CEO extends so as to authorise the CEO to sub-delegate the function under that provision to any of the following persons:

(a) a member of staff of Service NSW,

(b) a person, or a member of a class of persons, prescribed by the regulations.

...

8 **CEO may enter agreements to exercise customer service functions**

(1) The CEO and a Government agency, or a person authorised on behalf of a Government agency, may enter into an agreement:

(a) for the CEO to exercise a non-statutory customer service function of the agency, or

(b) with respect to the exercise of a customer service function delegated to the CEO.

...".

2.7 I note from your letter of instructions that Service NSW is considering charging a customer (i.e., a member of the public who accesses a Government service which is undertaken by Service NSW on behalf of a Government agency) a service fee. I also note from your letter of instructions that this "service fee would be in addition to the legislated transaction cost that the customer pays to the relevant agency via the Service NSW distribution network, and in addition to any fee charged by Service NSW to the relevant agency for providing the transaction service."

2.8 In addition, Service NSW is considering charging a customer an additional fee for other services, for example, offering alternative mailing options such as using registered post or express post rather than the regular post or charging an additional fee for the urgent or priority processing of requests.

2.9 I note that the existing arrangements in place with a Government agency on whose behalf Service NSW provides a customer service function are that the Government agency will invoice the customer for the service in question the statutorily prescribed fee and this is the amount that Service NSW collects from the customer. For example, in relation to a driver's licence, the Roads and Maritime Services ("RMS"), which administers the driving licence system established under Chapter 3 of the *Road Transport Act 2013* ("the *RT Act*"), will invoice the customer for the driver's licence fee in accordance with the scheduled fee provided for the service by the *Road Transport (Driver Licensing) Regulation 2008* ("the *RT (DL) Regulations*") and this is the amount that Service NSW will collect on behalf of the RMS from the customer. By operation of cl. 111 of the *RT (DL) Regulation*, the applicable fee for a service provided by the RMS is specified in Schedule 3 to the *RT (DL) Regulation* or otherwise is a fee fixed for that service by the RMS under s. 271(1) of the *RT Act*. In short, Service NSW is considering charging a customer a fee in addition to the statutorily fixed fee.

3. Advice sought

3.1 By letter dated 22 January 2016 you seek my advice on:

1. Can Service NSW charge customers a service fee for transactions processed for agencies?
2. If unable to charge a service fee, what are the legal and other implications in introducing a service fee?

Schedule 1, Clause 5

[redacted]

3.2 My advice is requested urgently and accordingly represents my views in the time available for me to consider the issues.

4 Advice as to question 1: Power to charge a service fee

4.1 It is a long established principle of the common law that a public body or authority, including a branch of the executive Government, may not levy or otherwise impose a charge or fee on members of the public unless there is a statutory authority or power for it to do so. Such statutory authority or power is to be found either from express words in a statutory instrument or otherwise arising by necessary implication from the statutory instrument.

4.2 This principle is reflected in a string of cases to the effect that a public body may not levy charges upon the public unless it can be shown that Parliament has clearly authorised such a charge, whether expressly or by necessary implication arising from the words of a statute (*Gosling v Veley* (1850) 12 Q.B. 328 at 407; *Attorney General v Wilts United Dairies Limited* (1921) 37 TLR 884 at 885-6; *Commonwealth and the*

Central Wool Committee v Colonial Combing, Spinning & Weaving Co. Ltd (1922) 31 CLR 241; *Springvale Washed Sand Pty Ltd v City of Springvale* [1969] VR 784 at 797; *Congreve v Home Office* [1976] 1 All ER 697; *Clark v University of Melbourne* [1978] VR 457; *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572; *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough Council* [1992] 2 AC 48; *Dowling v Commissioner of Water Resources* [1993] 1 Qd R 70 at 78; *Combet v The Commonwealth* (2005) 224 CLR 494 at 535).

4.3 To cite Lord Justice Scrutton in *Attorney General v Wilts United Dairies Limited* (at 885):

> "It is conceivable that Parliament, which may pass legislation requiring the subject to pay money to the Crown, may also delegate its powers of imposing such payments to the Executive, but in my view the clearest words should be required before the Courts hold that such an unusual delegation has taken place. As Chief Justice Wilde said in *Gosling v. Veley* (1850) 12 Q.B. 328, at p.407: 'The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority, established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it'."

And further, in the same case, Lord Justice Atkin states (at 886):

> "... if an officer of the Executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorized the particular charge. The intention of the Legislature is to be inferred from the language used, and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words, of a statute; ...".

4.4 It has been said that the requirement for statutory authority authorising the executive branch of Government (including a public body or entity) to charge or raise money from the public has constitutional backing.[2]

4.5 It is therefore necessary to examine the *SNSW Act* to determine whether there is either an express power or one that can be necessarily implied arising from the words of the *SNSW Act* or from another Act or statutory instrument empowering Service NSW to impose a service fee. Unless such a power can be found, Service NSW may not legally impose such a service fee.

4.6 A review of the *SNSW Act* indicates that there is no express power conferred on Service NSW in that Act to charge a customer a service fee in addition to any scheduled fee

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[2] Aronson, M. & Groves, M., Judicial review of Administrative Action, 5th. Ed., 2013, Lawbook Company at [6.300] p. 353; *Combet v The Commonwealth* (2005) 224 CLR 494 at 535.

provided for a particular service. Nor, in my opinion, can the power to charge a customer an additional service fee be necessarily implied from the *SNSW Act*. In the House of Lords case of *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough Council*, it was held that the "words by necessary implication" proposed a rigorous test going far beyond the proposition that it would be reasonable or even conducive or incidental to charge for the provision of a service. This is consistent with the recognition in the then Premier's Second Reading Speech to the *Service NSW (One-stop Access to Government Services) Bill 2013* that "citizens, businesses and taxpayers get the best possible service and results *from the government they own and fund*" (my emphasis) (*NSW Hansard*, Legislative Assembly, 26 March 2013 at 55).

4.7 By virtue of the operation of ss. 7 and 8 of the *SNSW Act*, the CEO of Service NSW cannot exercise a power in relation to a customer service function that the Government agency that has conferred the function on the CEO itself does not have under another Act or instrument. That is, if a Government agency is only entitled under its statutory scheme to charge a fixed or scheduled fee, then the CEO of Service NSW cannot rely on the relevant Act or instrument to impose an additional fee. For example, in the case of a driver's licence, the RMS may only invoice a customer for the applicable fee as provided for by operation of cl. 111(a) and Schedule 3 to the *RT (DL) Regulation*.[3] In such a situation, the RMS has no power to charge an additional fee and therefore neither will Service NSW because it does not have any greater power than the Government agency on whose behalf it acts.

4.8 It is not possible for me given the time available (and the large amount of legislation involved) to review every Act or instrument to ascertain whether in a given instance, a Government agency and therefore Service NSW acting in reliance on that Government agency's customer service function has an express or implied power to charge a service fee in addition to a scheduled fee. That said, as a general principle unless there is an express power conferred on the Government agency to charge an additional service fee or it may otherwise be said that such a power may be necessarily implied from the Act or instrument under which the Government agency obtains its customer service function, the Government agency and Service NSW acting on that agency's behalf will not have a power to charge a service fee.

[3] Clause 111 of the *RT (DL) Regulation* relevantly provides that the applicable fee for a service provided by the RMS is the fee specified for that service in Schedule 3 (cl. 111(a)); or the fee fixed for that service by the RMS (with the Minister's approval) under s. 271(1) of the *RT Act*. Where a fee is specified in Schedule 3, then the RMS may not fix a fee under s. 271 of the *RT Act* (see s. 271(2)).

5 Advice as to question 2: Implication of introducing a service fee

5.1 If Service NSW introduced a service fee where it did not have a power (express or necessarily implied) to do so, then it would be acting *ultra vires* (beyond power) and any fee levied would be illegally rendered and therefore invalid. While there could be both legal and non-legal consequences that would flow from such conduct, my advice is only concerned with reasonably foreseeable legal consequences.

5.2 Service NSW would be acting in contravention of not only the *SNSW Act*, but also any other Act or instrument which may have set fixed or scheduled fees for services. Legal consequences would include the possible:

1. repayment of the wrongly charged service fee;
2. exposure of the CEO of Service NSW (and the Crown in the right of the State of New South Wales acting through Service NSW) to administrative law remedies such as orders in the nature of certiorari (to quash a decision to levy a service fee) or prohibition (to restrain the purported charging of a service fee);
3. any penalty or other remedy, if any, that may be provided in a specific enactment that has set a fixed or scheduled fee for a service which has been contravened by Service NSW.

Schedule 1, Clause 5

[redacted]

[4] See *Kutlu v Director of Public Professional Services Review* [2011] FCAFC 94 at [35] per Rares and Katzmann JJ.

Schedule 1, Clause 5

[redacted]

Schedule 1, Clause 5

[redacted]

Schedule 1, Clause 5

[redacted]

Signed:

Amalia Stanizzo
Special Counsel
for Crown Solicitor