SUBMISSION ON LUXURY CAR TAX

BY

VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE

AND

AUSTRALIAN AUTOMOBILE DEALERS ASSOCIATION(Vic)

TO

SENATE ECONOMICS COMMITTEE

6 AUGUST 2008

6. The industry should not be required to act as the Government's tax collector. Requiring car Dealers to anticipate the tax increase, or alternately expose themselves to financial loss in the event they choose not to anticipate the increase in the tax, is inappropriate, inequitable and creates a very awkward situation between the Dealer and Consumer.

DISCRIMINATORY TAX

The luxury car tax is a discriminatory tax, in that no other luxury goods attract a luxury tax. This penalises the local manufacturers.

Furthermore, the tax discriminates against larger vehicles designed to carry passengers and loads over rough roads in difficult to access areas. To tax 4X4 vehicles priced over the threshold is, in these circumstances, to tax a necessity not a luxury. It makes no sense and is unjustifiable that so-called luxury cars attract a unique additional tax.

BRACKET CREEP UNDERMINES THRESHOLD

The luxury car tax (recently adjusted to $57,180) has become misaligned with the price of new cars. In 2007, the luxury car tax captured around 11 per cent of all new vehicles sold, whereas in 1979 this figure was only 2.5 per cent. In 1979, the luxury car tax took the form of the wholesale sales tax on luxury cars.

This has resulted in cars once below the threshold breaking through this ceiling and now being subject to the tax. Essentially, "bracket creep" has now undermined the threshold.

IMPACT ON LOCAL MANUFACTURING

The proposed increase in the luxury car tax will adversely affect local manufacturing. "Bracket creep" has ensured that the middle segment of locally built family cars, when fully optioned, now reach this threshold.

For instance, while sales of the Holden Commodore in the $35k to $45k price bracket have fallen from 60,658 in 2005, to 41,331 in 2007, sales of models above $55k have doubled from 6,073 in 2005 to 11,990 in 2007.

Similarly, while Ford has seen a fall of around 25% in sales in the $35k to $45k bracket, sales in the $55k bracket have remained constant. For Ford Australia, with a new premium Falcon brand (its new G6E models) spearheading its new Falcon range, the announced increase in the luxury car tax will be a double blow to its Australian design and manufacturing operations.

The tax hits a segment of the local vehicle manufacturing industry that has been growing or maintaining sales, while sales in other segments have been falling, and any increase in the tax will simply exacerbate this situation.

ADVERSE EFFECT ON TECHNOLOGY SPREAD

It is in the so-called luxury cars that we see a lot of technology and safety innovation initiated. We need to be cautious that we do nothing to stifle this development and its flow through to other segments of the car fleet.

In a legal opinion VACC has received from Greenwoods and Freehills, it is submitted that "*while the ATO's view is a reasonable one ... it is not the only reasonable interpretation*".

In Brady King Pty Ltd V The Commissioner of Taxation, the Full Federal Court, when considering the application of GST to a property interest, ruled that the equitable and other rights created in Brady King upon entry into the contract, even though it was uncompleted, were sufficient for the company to be said to have acquired an interest in the property.

Freehills says: "*By extension if the Full Federal Court considered that Brady King acquired/held the property upon entry into the contract, it is possible to argue that for GST purposes and therefore also for LCT purposes (by attribution), that the time of acquisition/supply of the luxury car could be taken to be the time at which contractual and other rights are created in the purchaser (i.e. upon entry into the contract)*".

Freehills adds: *So, while the Commissioner's 'time of delivery approach' has clear merit, as a matter of interpretation, we consider that the 'time of contract' approach also has merit. Should the matter be litigated, the approach that would ultimately be adopted by a court is not clear, or at least not as clear as the Commissioner suggests*".

SUMMARY

VACC is opposed to the luxury car tax. We are, therefore, implacably opposed to any increase therein.

If the tax is to remain on the statute books and if there is to be an increase in the tax, the Federal Government must increase the threshold to at least $75,000 and, preferably, to $100,000 to guard against the unintended consequences of bracket creep.

Attachments:
Freehills' Legal Opinion
LCT Calculations
Graphs on Bracket Creep

LUXURY CAR TAX

Senate Economics Committee

6 August 2008

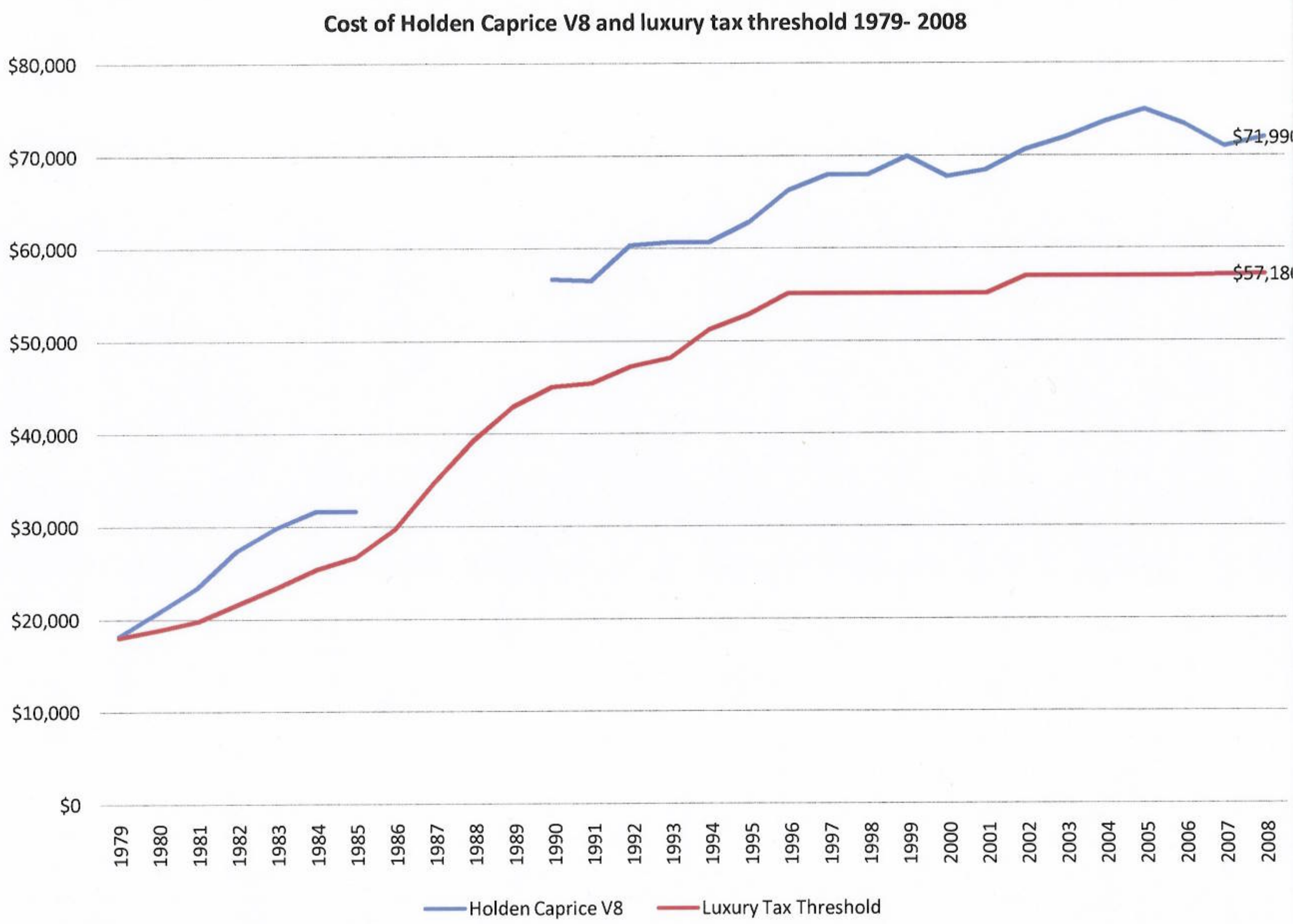
VACC SUBMISSION PAPERS

VACC HOUSE
464 ST KILDA ROAD
MELBOURNE VIC 3004

CONTENTS

VACC

Selected new cars & LCT thresholds 1979 - 2008



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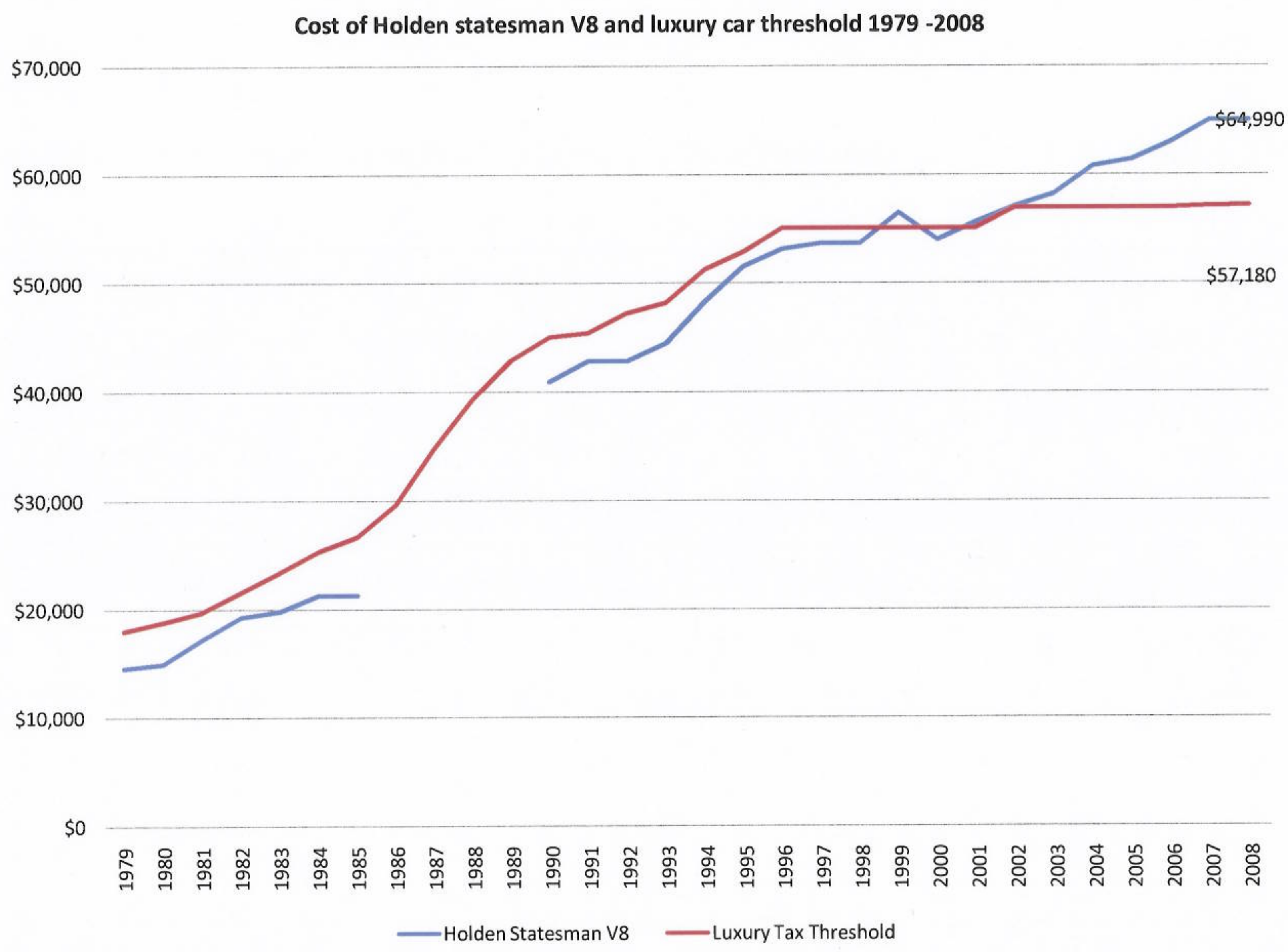

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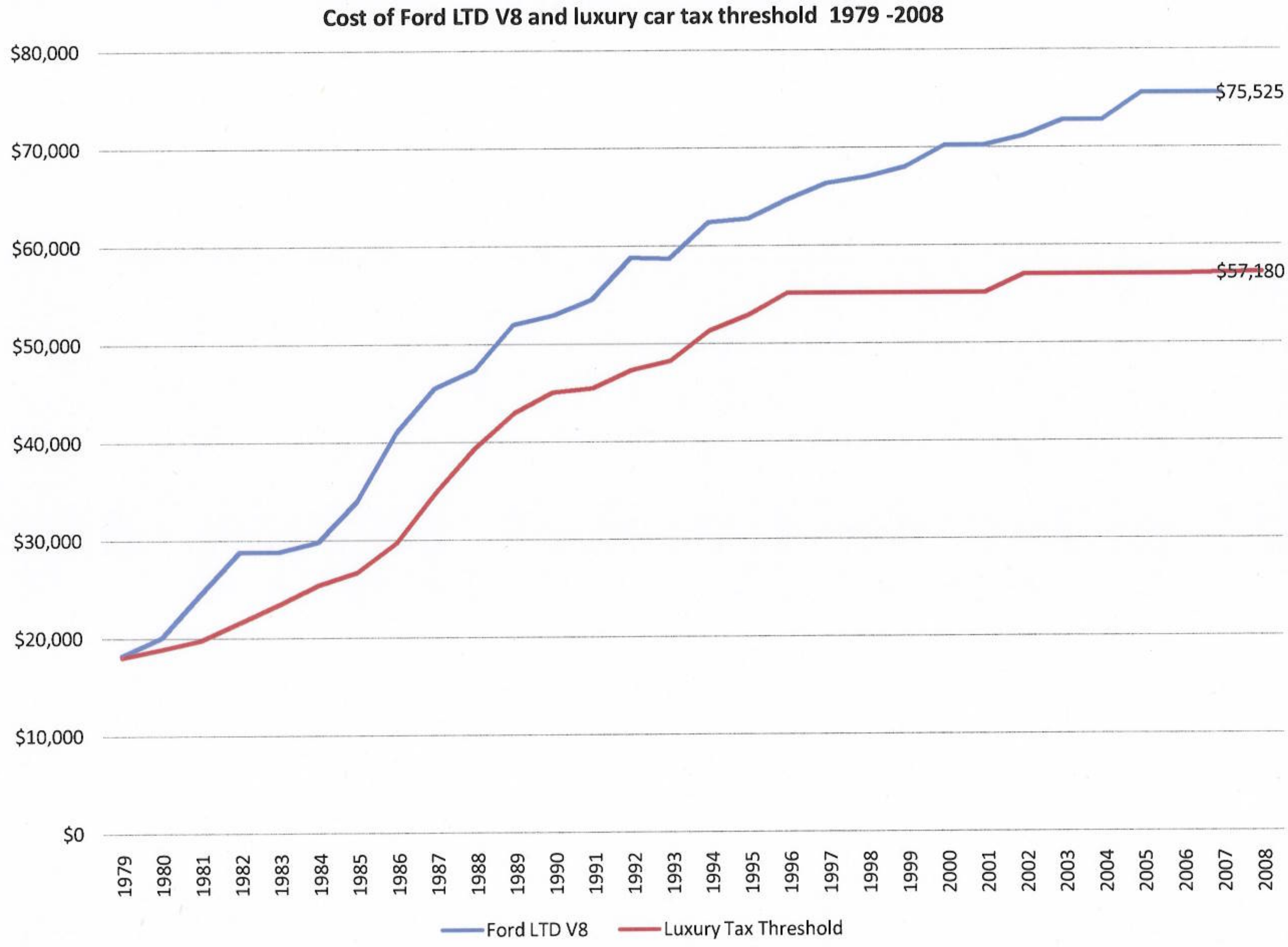

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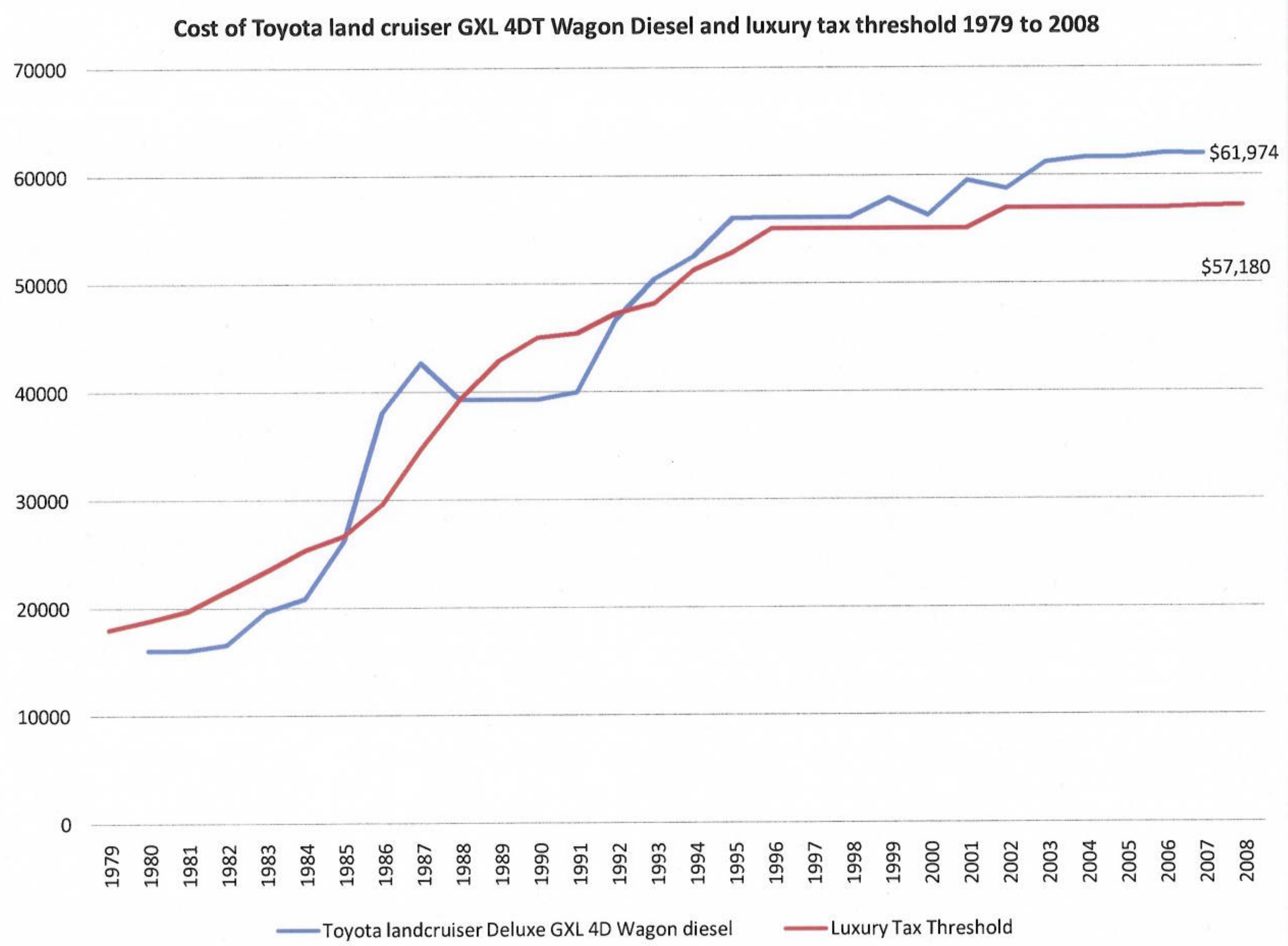

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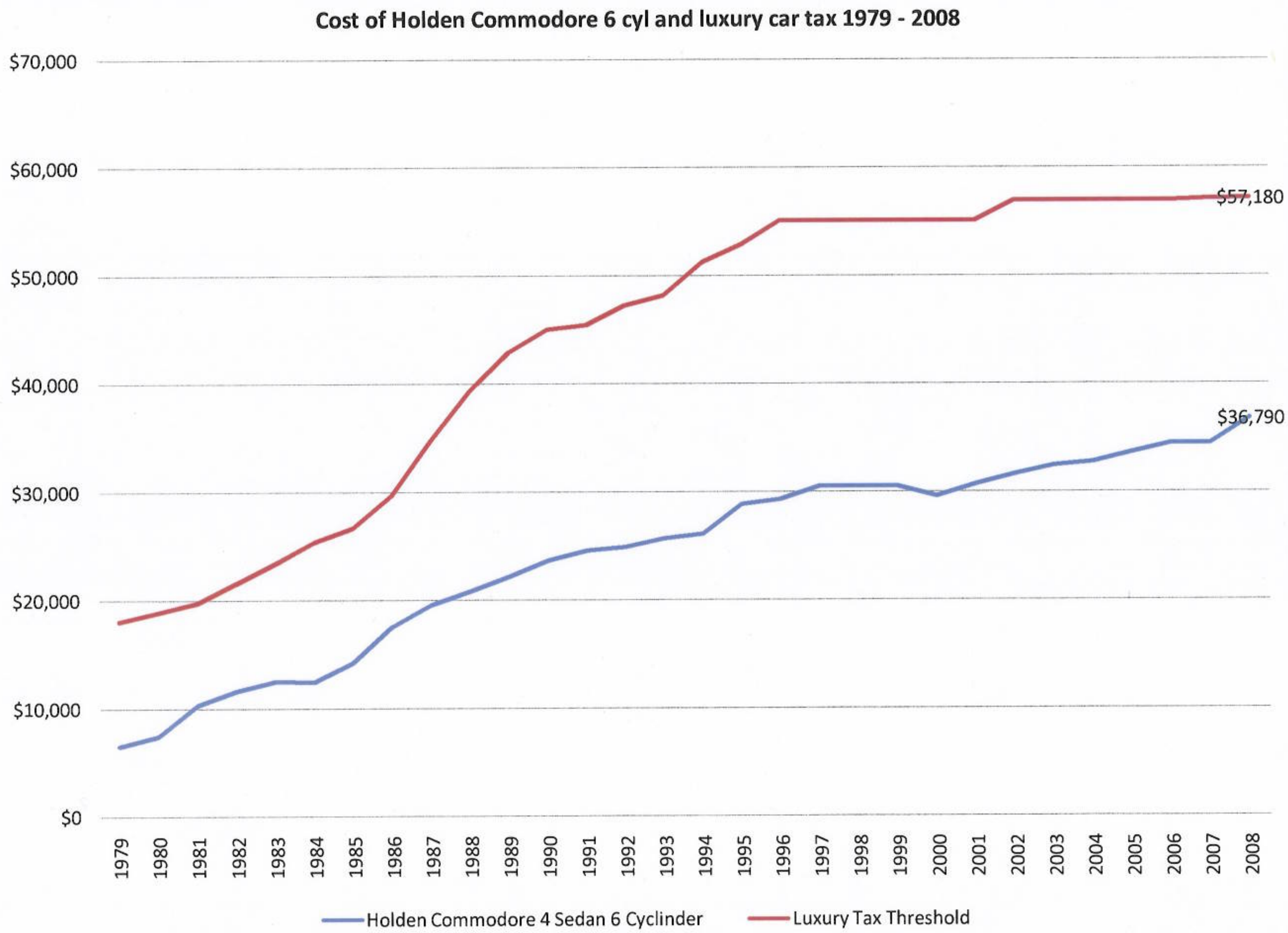

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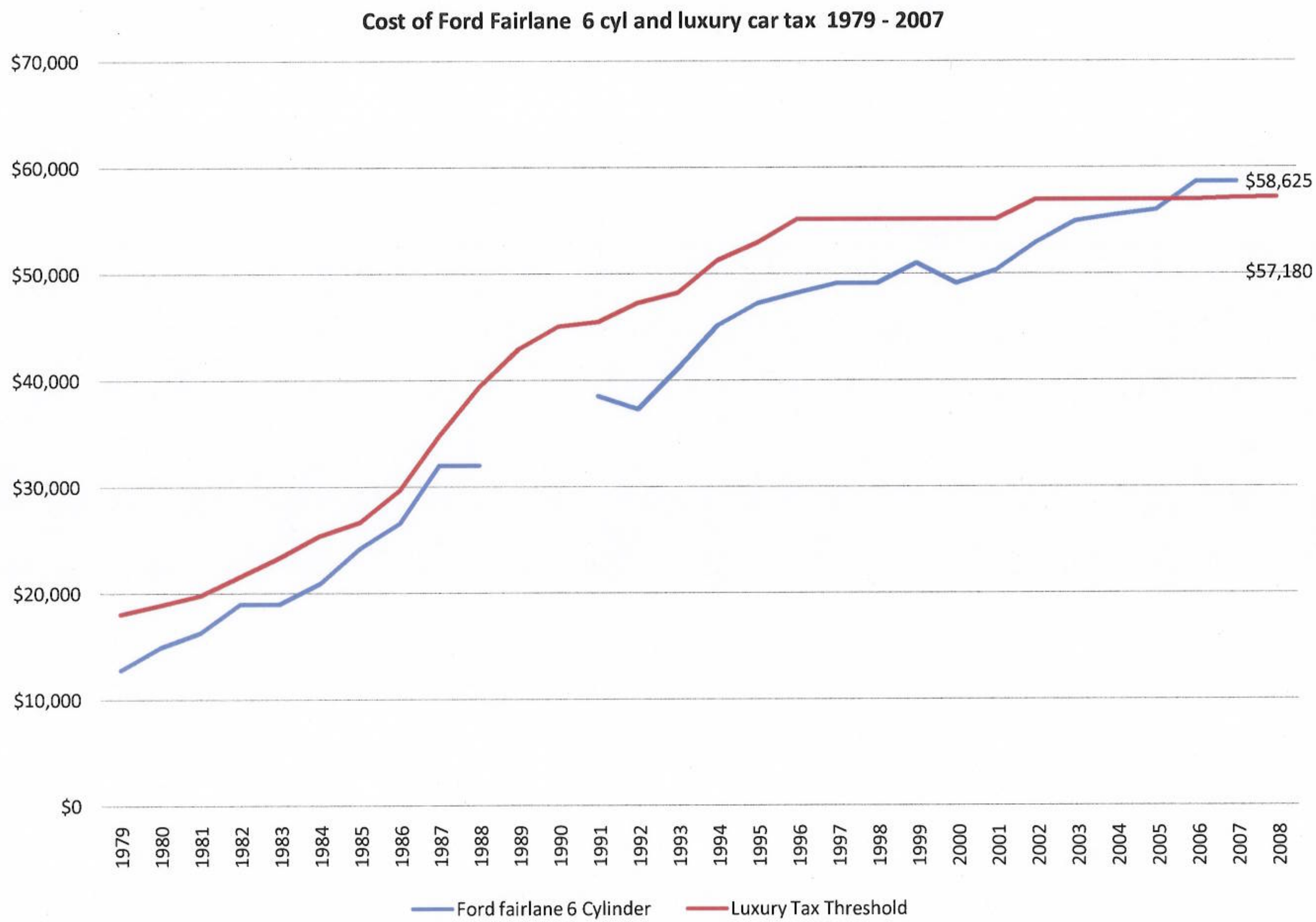
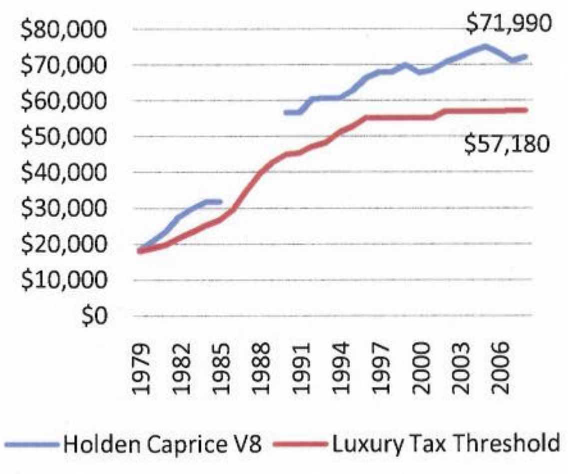


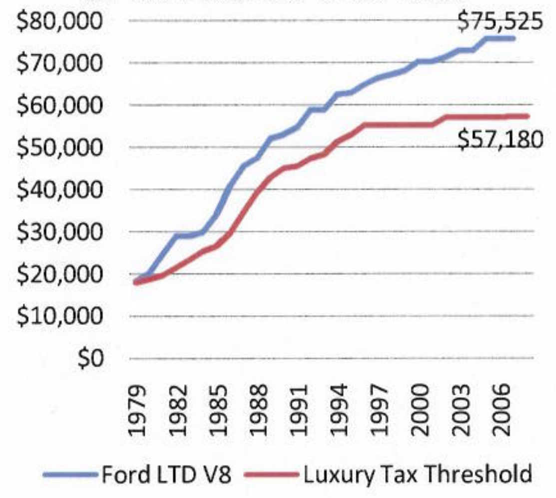
Selected new cars & LCT thresholds 1979 - 2008

Cost of Holden Caprice V8 and luxury tax threshold 1979- 2008

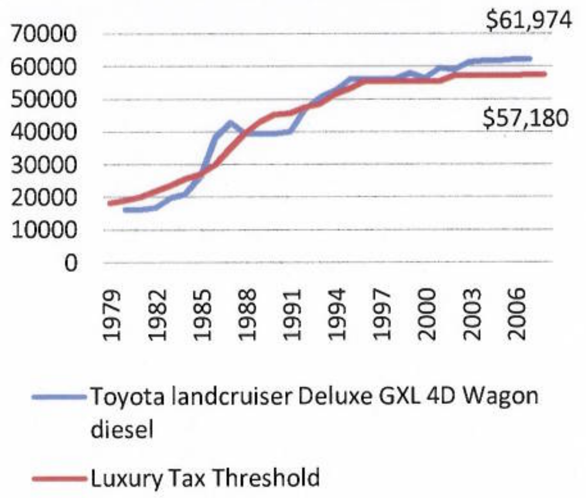


Cost of Holden statesman V8 and luxury car threshold 1979 -2008

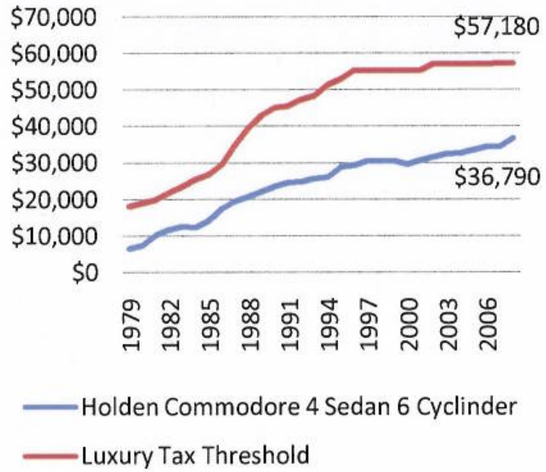
Cost of Ford LTD V8 and luxury car tax threshold 1979 -2008



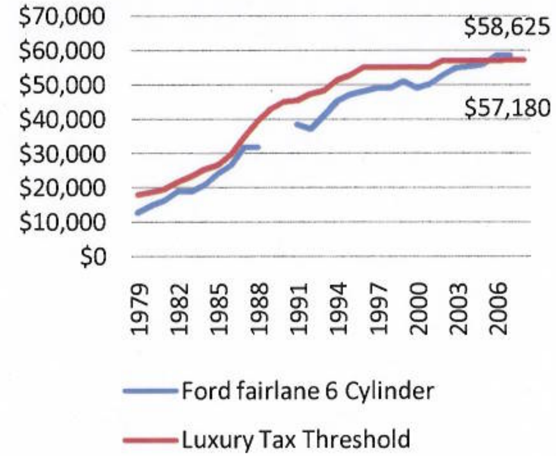
Cost of Toyota land cruiser GXL 4DT Wagon Diesel and luxury tax threshold 1979 to 2008



Cost of Holden Commodore 6 cyl and luxury car tax 1979 - 2008



Cost of Ford Fairlane 6 cyl and luxury car tax 1979 - 2007



Calculations on Luxury Car Tax

How to calculate LCT before July increase – LandCruiser

Step 1
Finding cost of car

	58,790	Net cost of car
+	2,000	Dealer Delivery
	60,790	Cost of car

LCT Calculation

	60,790	Cost of car
-	57,180	LCT threshold
	3,610	

(Prices relate to a Landcruiser Prado 4x4 GXL DT4 Wagon. Price as of July 2008)

Step 2
Exclusion of GST

	3,610	LCT calculation
x	10	
	36,100	Subtotal
/	11	
	3,281.81	

Step 3
Calculate 25% LCT

	3281.81	
%	25	
	820.45	Total LCT

Step 4
New Cost of car price

	60,790	Cost of Car
+	820.45	Total LCT
	61,610.45	
+	3,080.5	Stamp duty (=$10/$200)
	64,690.95	Total Cost of Car (+Registration and CPP)

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Calculations on Luxury Car Tax

New LCT after July increase – LandCruiser

Step 1
Finding cost of car

	58,790	Net cost of car
+	2,000	Dealer Delivery
	60,790	Cost of car

LCT Calculation

	$60,790	Cost of car
-	$57,180	LCT threshold
	$3,610	

(Prices relate to a Landcruiser Prado 4x4 GXL DT4 Wagon. Price as of July 2008)

Step 2
Exclusion of GST

	$3,610	LCT calculation
x	10	
	$36,100	Subtotal
/	11	
	$3,281.81	

Step 3
Calculate 33% LCT

	$3281.81	
%	33	
	1083	Total LCT

Step 4
New Cost of car price

	60,790	Cost of Car
+	1,083	Total LCT
	$61,873	
+	3,093.65	Stamp duty (=$10/$200)
	$64,966.65	Total Cost of Car (+Registration and CPP)

NOTE:
Increased LCT (33%) and stamp duty of $206.00 post 1 July.

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Calculations on Luxury Car Tax

How to calculate LCT before July increase – Ford FPV GTE V8

Step 1
Finding Cost of Car

	$76,990	Net cost of car
+	$2,000	Dealer Delivery
	$78,990	Cost of car

LCT Calculation

	78,990	Cost of Car
-	57 ,180	LCT threshold
	21,810	

(Prices relate to a Ford FPV GTEV8. Price as of July 2008)

Step 2
Exclude GST

	21,810	LCT calculation
x	10	
	218,100	Subtotal
/	11	
	19,827	

Step 3
Calculate 25% LCT

	19,827	
%	25	
	4,956	Total LCT

Step 4
New Cost of car price

	78,990	Cost of Car
+	4956	Total LCT
	83,946	
+	4,1973	Stamp duty (=$10/$200)
	88,143	Total Cost of Car (+Registration and CPP)

NOTE:
Increased LCT (33%) and Stamp Duty of $1617 post 1 July

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Calculations on Luxury Car Tax

New LCT increase after July – Ford FPV GTE V8

Step 1
Finding Cost of Car

	$76,990	Net cost of car
+	$2,000	Dealer Delivery
	$78,990	Cost of car

LCT Calculation

	78,990	Cost of Car
-	57 ,180	LCT threshold
	21,810	

(Prices relate to a Ford FPV GTEV8. Price as of July 2008)

Step 2
Exclude GST

	21,810	LCT calculation
x	10	
	218,100	Subtotal
/	11	
	19,827	

Step 3
Calculate 33% LCT

	19,827	
%	33	
	6,543	Total LCT

Step 4
New Cost of car price

	78,990	Cost of Car
+	6,543	Total LCT
	85,533	
+	4,276	Stamp duty (=$10/$200)
	89,809	Total Cost of Car (+Registration and CPP)

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Luxury car tax
02 Luxury car tax payable on supplying a luxury car

This section explains:

- what a supply is under luxury car tax law
- when luxury car tax is applied to the supply of a luxury car
- when luxury car tax is not applied to the supply of a luxury car
- how to calculate luxury car tax
- how to work out the luxury car tax on cars that have already been subject to luxury car tax, and
- how to apply luxury car tax in other less common situations.

You are liable to pay luxury car tax at the time you supply a luxury car, unless the purchaser quotes their ABN to you in the prescribed format (see 'Quoting your ABN').

What is a 'supply'?

The term 'supply' is broadly defined as any form of supply whatsoever, including any retail and wholesale sales that you make.

The following examples are all considered a supply under luxury car tax law:

- a dealer sells a car to an individual or business and the car's title passes from the manufacturer (or importer) to the finance company, then to the dealership, then to the end customer. Each stage is regarded as a separate supply.
- a dealer, wholesaler, manufacturer or importer provides a luxury car to an employee, either as a bonus or as part of a salary package
- the sale of a car to a Commonwealth, state or territory department, agency or statutory authority, and
- the sale or trade-in of a car that is a capital asset of a business.

When is luxury car tax applied to the supply of a luxury car?

The supply of a luxury car is subject to luxury car tax if you:

- make the supply in the course of your enterprise
- make the supply in connection with Australia, and
- are registered or required to be registered for GST.

When is luxury car tax not applied to the supply of a luxury car?

The supply of a luxury car is not subject to luxury car tax if:

- the person receiving the car quotes their ABN in the prescribed format (see 'Quoting your ABN')
- the car is more than two years old, or
- the car is exported as a GST-free export under GST law.

  A car is more than two years old at the time of supply if it was:

- manufactured in Australia more than two years before the supply, or
- imported and entered for home consumption more than two years before the supply.

If the car has been restored or converted into a limousine, the two-year period starts from when the original car was first manufactured in Australia or entered for home consumption. If the restored or converted car is sold for an amount above the luxury car tax threshold within the two-year period, luxury car tax will apply unless the buyer quotes their ABN.

Greenwoods
& Freehills

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5 August 2008

Dear David

Luxury Car Tax amendments - time of supply

You have asked us to consider the timing aspects of the proposed amendment of the Luxury Car Tax (**LCT**) rate from 25% to 33% from 1 July 2008.

In particular, you have asked us to consider the view of the Commissioner of Taxation (**Commissioner**) that for LCT purposes a taxable supply of a luxury car is made when the car is delivered.

For the reasons detailed in Appendix A, we consider that while the Commissioner's view has merit, it is not the only reasonable interpretation available.

Based on recent court decisions, albeit in respect of similar GST concepts, we consider that it is also reasonable to conclude that the taxable supply of the luxury car could be taken to be 'made' for LCT purposes (as opposed to the timing of the LCT liability) upon entry into a contract for the sale of the car.

Finally, while clearly a matter for the Parliament, we note that it is relatively common for tax amendments such as these to only apply to contractual arrangements entered into after the announcement/date of effect (that is, as a matter of equity, existing arrangements are "grandfathered"). You may wish to pursue that approach further.

Please let us know if you have any queries or would like to discuss this matter further.

Yours sincerely

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Appendix A

1 Scope

To give effect to the announced increase in the LCT rate from 25% to 33%, the following Bills (**LCT Bills**) were introduced into Parliament:

1 *Tax Laws Amendment (Luxury Car tax) Bill* 2008;

2 *A New Tax System (Luxury Car Tax Imposition General) Amendment Bill* 2008;

3 *A New Tax System (Luxury Car Tax Imposition Customs) Amendment Bill* 2008; and

4 *A New Tax System (Luxury Car Tax Imposition Excise) Amendment Bill* 2008;

The LCT rate increase imposed by the LCT Bills applies to "...taxable supplies of luxury cars and taxable importations of luxury cars on or after 1 July 2008".[1]

The Explanatory Memorandum (**EM**) to the LCT Bills states that the change in rate applies "from 1 July 2008", "on or after 1 July 2008" and that:

> *There are no transitional provisions. The new rate will apply to any taxable supply or taxable importation of a luxury car made on or after 1 July 2008.*

The Commissioner has indicated his view that a taxable supply of a luxury car is made when the vehicle is delivered such that the higher 33% rate will, in the Commissioner's view, apply to the sale of all luxury vehicles where delivery occurs on or after 1 July 2008[2].

You have asked us to consider whether that conclusion is reasonable and whether other interpretations might also be reasonable.

2 Timing and attribution in the Luxury Car Tax Act

As with the *A New Tax System (Goods and Services Tax) Act* 1999 (**GST Act**), the *A New Tax System (Luxury Car Tax Act)* 1999 (**LCT Act**) does not contain express "time of supply" rules.

Rather, both Acts use the concept of "attribution" to allocate the tax payable on a transaction to a period.

Pursuant to section 13-15, the LCT payable on the sale of a luxury car is "attributable to the same tax period that the GST on that sale is attributable, or would otherwise be attributable if the sale was subject to GST. Because of the incorporation of GST concepts into the LCT Act, expressly and by reference, much of the analysis is in fact GST related.

Under section 29-5 of the GST Act, this attribution arises for most taxpayers on an "accruals" (as opposed to cash) basis upon the earlier of the Supplier (eg the Dealer):

1 receiving any part of the consideration (other than a "security deposit" to which Division 99 of the GST Act applies); or

2 issuing an invoice.

Thus, the timing/attribution of the LCT liability to a tax period occurs entirely independently of the timing of the underlying sale.

A Dealer will account for LCT based on this attribution irrespective of when the underlying sale occurs. There are provisions that allow for an adjustment where due to a subsequent

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[1] See, for example, Item 2 of Schedule 1 to *A New Tax System (Luxury Car Tax Imposition General) Amendment Bill* 2008. The other LCT Bills contain identical statements.

[2] See the Commissioner's media release 2008/32 of 23 June 2008 "Tax Commissioner provides clarification of luxury car tax" and associated website materials at www.ato.gov.au

event (eg cancellation of the sale or a variation to the price) the correct amount of LCT is different to that paid under the accruals attribution rules.[3]

So, it is clear that from a GST point of view, and by extension for LCT purposes, that for the operation of the basic rules, the time at which a supply occurs is not a relevant concept[4]. This is made clear in the Explanatory Memorandum for the Bill that became the GST Act.[5]

The liability to tax is predicated on the basis that a supply is intended to occur, but the timing of the liability is not (and adjustments arise if the supply is cancelled).

3 Is there a time at which a taxable supply is "made"?

The importance of attribution and its focus on the time of payment/invoicing has meant that neither the LCT Act or the GST Act has needed contain express rules outlining when supplies are taken to occur. This can be contrasted with other tax provisions[6].

This can be contrasted with overseas VAT/GST systems such as that in the UK[7] and New Zealand[8] which prescribe the time at which supplies are taken to have been made (although noting that the New Zealand time of supply tests are similar to the Australian attribution tests).

Thus, with the exception of the *A New Tax System (Goods and Services Tax Transition) Act* 1999 (**GST Transition Act**) , which contained provisions to determine whether a supply occurred prior to 1 July 2000 and was hence not subject to GST, the concept of attribution renders the concept of when a supply is "made" to be largely irrelevant for GST purposes.

Having the LCT rate increase apply to supplies "made" on or after 1 July 2008 raises a question (ie when is a supply made) that does not ordinarily arise in LCT/GST analysis. It therefore becomes a matter of interpretation. As many commentators have noted, in the absence of express rules there a number of possible times at which a supply can be said to be "made"[9].

3.1 Commissioner's view: supply on delivery

The Commissioner has expressed a view that the supply of a luxury car occurs on delivery such that the increased rate should apply to the sale of cars delivered on or after 1 July 2000.

While that is a simplistic approach, it is a reasonable conclusion. It is consistent with the approach adopted for the supply of goods in the GST Transition Act[10].

3.2 Alternative view: supply on contract

While the Commissioner's view is a reasonable one, and certainly one that is open on the terms of the LCT Bills having regard to the EM, it not the only reasonable interpretation.

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[3] See Division 15 of the LCT Act

[4] See also GST determination GSTD 2008/1 in which the commissioner confirms that attribution and not time of supply is the important concept for GST grouping purposes.

[5] See the second fact scenario in the example at paragraph 4.40 wherein the supplier's GST liability arises in tax period 1 due to attribution, even though the goods in question are not delivered until tax period 2.

[6] For example section 104-10 of the *Income Tax Assessment Act* 1997 which, broadly, treats the time of supply for the disposal of an asset for Capital Gains Tax purposes as occurring at the time the contract for the disposal was entered into.

[7] See section 6 of the Value Added Tax Act 1994 (UK)

[8] See section 9 of the Goods and Services Tax Act 1985 (NZ)

[9] See for example "Timing, Groups & the Application of UK VAT Avoidance Cases in Australia", a paper presented by Rebecca Miller of the University of Sydney to the 16th annual GST & Indirect Tax Weekend Workshop of ATAX UNSW in 2004

[10] See section 6(2) of the GST Transition Act

We consider that it is also reasonable to conclude, and that a court would certainly entertain the argument, that for LCT purposes the taxable supply of a luxury car occurs upon entry into the contract of sale.

Having said that the GST Act does not generally focus on the time at which a supply is made, there are some exceptions. One is the margin scheme for the sale of property. For those provisions, it is important to determine whether land was held at, or acquired before, 1 July 2000.

That concept was tested before the Full Court of the Federal in *Brady King Pty Ltd* v *The Commissioner of Taxation*.[11] In that case, Brady King entered into a contract for the purchase of a commercial property in May 2000 (ie before the commencement of GST on 1 July 2000). The sale completed in October 2000 and the transfer of title to Brady King was registered in November 2000. The question was whether, for GST purposes, Brady King acquired or held an interest in the property prior to 1 July 2000 as a result of the May 2000 contract.

In a unanimous verdict overturning the decision of Middleton J at first instance, Heerey, Goldberg and Dowsett JJ held that the equitable and other rights created in Brady King upon entry into the contract, even though it was uncompleted, were sufficient for it to be said to have acquired that interest in the underlying property.

By extension, if the Full Federal Court considered that Brady King acquired/held the property upon entry into of the contract, it must also be that the vendor supplied/disposed of the property (at least for GST purposes) on entry into of the contract. That conclusion would be consistent with the Commissioner's views in public GST ruling GSTR 2006/9 in which he states that for an act to constitute a supply, there must be a corresponding acquisition.

We also note that under the High Court GST decision in *Commissioner of Taxation* v *Reliance Carpet Co Pty Ltd*[12] that a range of "supplies" arise on entry into of a contract. Given the very broad meaning given to the term "supply" for GST/LCT purposes, that decision could be used to support the conclusion that the supply of the car occurs on contract, not on delivery.

On the basis of *Brady King* then, we consider that it is arguable for GST purposes, and therefore also for LCT purposes, that the time of acquisition/supply of the luxury car could be taken to be the time at which contractual and other rights are created in the purchaser (ie upon entry into the contract).

On that analysis, the existing 25% LCT rate would apply to the sale of luxury cars under contracts entered into on or before 30 June 2000, irrespective of whether that car is delivered after that date.

So, while the Commissioner's "time of delivery" approach has clear merit, as a matter of interpretation, we consider that the "time of contract" approach also has merit. Should the matter ultimately be litigated, the approach that would ultimately be adopted by a court is not clear, or at least not as clear as the Commissioner's statement suggests.

3.3 Grandfathering

We understand from you that the interim arrangements proposed by the Commissioner pending passage of the LCT Bills through Parliament have created significant commercial uncertainty for both Dealers and Customers.

The Commissioner has recommended that Dealers either:

1. 'anticipate' passage of the LCT Bills (in their current form) and charge an additional 8% LCT to Customers, with that amount to be paid to the Commissioner on passage of the LCT Bills;

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[11] [2008] FCAFC 118

[12] [2008] HCA 22

2 not 'anticipate' the passage of the LCT Bills, charge 25% LCT and agree with Customers that they will pay an additional 8% LCT amount on passage of the LCT Bills.

The 'anticipation' method requires Dealers to charge Customers for an amount not yet legally payable on the assumption that the LCT Bills will pass Parliament in their current form. The 'non-anticipation' method imposes a credit risk on Dealers in respect of those Customers who may later determine not to pay the additional 8% LCT amount if the LCT Bills pass Parliament in their current form.

Given that uncertainty for both parties, and the arguable inequity of requiring Dealers to either anticipate a law change or take credit risk arising from that potential law change, we suggest that you would have good grounds to seek the introduction of transitional measures to the effect that certain sales are 'grandfathered' and not subject to the increased LCT rate.

That is, for example, sales which occur under contractual arrangements entered into prior to a specified date would not be subject to the existing LCT rate. It is common for amendments to taxation laws to have such 'grandfathering' transitional arrangements and obvious key dates include contractual arrangement entered into before:

1 14 May 2008, being the date on which the increase to the LCT rate was announced by the Government;

2 26 May 2008, being the date on which the LCT Bills were introduced into Parliament;

3 1 July 2008, being the stated effective date of the change to the LCT rate;

4 the date on which the LCT Bills pass through Parliament; or

5 the date on which the LCT Bills, having passed through Parliament, receive Royal Assent.