VICTORIAN ombudsman

Investigation into public transport fare evasion enforcement

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Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament my report on an *Investigation into public transport fare evasion enforcement.*

Deborah Glass OBE

Ombudsman

25 May 2016

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Foreword

> *'My daughter has recently moved to Melbourne from the country … Being told she had to produce $75 on the spot or risk paying $200+ later was a big shock to her … She felt humiliated in public … intimidated by the officer and felt bullied into paying. By no means did she feel she had a choice!'*
>
> Complaint to Victorian Ombudsman

Like many Victorians, I have a myki card, which I would have used last year for about 500 of the 564 million trips on the public transport network. I see Authorised Officers regularly, and like most of the hundreds of people who complained to my office and the Public Transport Ombudsman last year about public transport infringements, I am bewildered by a system that requires so many people to pay a penalty or face court proceedings when there are obvious mitigating circumstances.

The purpose of this investigation was to assess whether public transport fare enforcement is fair and equitable. Fare evasion costs the state tens of millions of dollars; the vast majority of public transport users who buy tickets do not want to subsidise the travel of those who don't. Fair enough. We expect to see a system that effectively deters offenders.

The evidence however of this investigation is overwhelming: the system is disproportionate and poorly targeted. The current approach has not got the balance right between financial imperative and fairness. It hits the vulnerable and innocently ignorant and fails to focus on recidivist fare evaders. Not only is it unfair, it is costly.

The maximum amount of revenue lost per offence in the metropolitan area is $7.80 – the price of an adult daily fare – but it costs a vast multiple of that to pursue offenders through a labyrinthine system, ultimately to court, with only a 20 per cent chance of any financial return at the end of the process.

The infringement system has been around for years and was the subject of criticism by my office in 2010. Sadly, things have not improved. Penalty fares were introduced in 2014, intended to allow Authorised Officers to check more tickets and target the 1.7 per cent of the population who are recidivist fare evaders and responsible for 68 per cent of fare evasion. Without appropriate use of discretion however, the drift net catches large numbers of unsuspecting tourists, students, homeless people and numerous other 'one-off' evaders, many of whom are left baffled, distressed and almost invariably poorer.

Here's the chronology of an offence, and some of the inequities of the system. First, there is the immediacy. Your ticket is not valid – will you pay an on-the-spot penalty of $75 or give your details for an infringement notice of $223? If you cannot immediately pay the $75 by credit card or EFTPOS you have no choice. There is no review for the penalty fare, and although you can complain to Public Transport Victoria or the Public Transport Ombudsman, you are very unlikely to be told this.

Let's say you have a concession card but left it at home, so you elected the infringement process where you could appeal. The Authorised Officer will have filled out a Report of Non-Compliance, which should be thoroughly checked by departmental staff on its merits before an infringement is issued.

'I don't think the Department even read my request to have this infringement reviewed, as all I received was a standard reply letter …'

Complaint to Victorian Ombudsman

In practice, an officer simply stamps and signs the paperwork before issuing the infringement notice. If you then seek a review after receiving the notice, it will be equally perfunctory. The lack of real review is patently unfair. Any system that imposes financial penalty and can end in court must offer a credible appeals process.

You might give up at this point and pay, or you may elect to go to court. At which point it is likely that you will wait over a year for the case to be heard – but you have a good chance of being one of the 80 per cent of matters brought before the court where no financial penalty is imposed.

But how much did it cost both you and the department – in time, funds and stress – because you were originally unable to show evidence of entitlement for a $3.90 concession fare? It is even more ludicrous when the concession is a student card, and your daughter was issued with an infringement even though she is plainly a child in school uniform.

How much would the system have saved if the Authorised Officer had exercised his or her discretion more reasonably in the first place? Or if a review by the department had, indeed, been a review of the merits? How much better could the department's and the court's resources be used?

The court process for infringements – for those who have the stamina, resources or legal aid to get that far – is complex, distressing, lengthy, expensive and ultimately ineffective. This is the stark experience of many homeless people, who cannot pay either a penalty fare or an infringement, yet are pursued through the court system at great cost and to no-one's benefit.

While the intent of a quicker and cheaper penalty fare option is laudable, it has created a parallel track for those who can afford it, rather than a single, cohesive and well targeted system.

So what is the answer? To go back to basics: the system should be designed to focus on recidivists, not honest folk who may have made a mistake or 'lack ticketing competence'. The parallel 'penalty or infringement' system should be repealed, with consideration given to a single penalty option with a review. This could have choices for immediate or delayed payment, and penalty escalation for recidivists.

Authorised Officers, in addition to improving their approach to customer service, should learn to exercise discretion. They should take into account – at the start of the encounter – what the likely outcome will be at the end of it. If an infringement will eventually be withdrawn due to the 'special circumstances' of someone's vulnerability, why waste bureaucratic time and money, and cause personal distress?

We need a system that balances financial return with fairness, enforcement with equity.

The Minister for Public Transport has assured me of the government's commitment to reforming the enforcement system to ensure it is fair, in response both to this investigation and the department's own review. I await her imminent response to my recommendations.

Deborah Glass

Ombudsman

Scope and methodology

Terms of reference

1. On 4 December 2015 I wrote to the Minister for Public Transport, the Hon Jacinta Allan MP; the Secretary of the Department of Economic Development, Jobs, Transport and Resources (the department), Mr Richard Bolt; and the then CEO of Public Transport Victoria (PTV), Mr Gary Liddle notifying each of my intention to conduct an own motion investigation into public transport fare enforcement strategies.
2. The investigation has been undertaken pursuant to section 16A of the *Ombudsman Act 1973*.
3. On 12 January 2016 I publicly announced the investigation examining the administration of public transport fare enforcement including:
    - the issuing of penalty fares and infringement notices
    - complaint and review processes
    - the exercise of discretion by Authorised Officers (AOs) and relevant authorities.
4. Importantly, my investigation was also to assess whether the current approach to fare enforcement is fair and equitable.
5. I made the decision to commence this investigation on the following grounds:
    - the number of complaints about public transport infringement-related matters received by my office – almost 400 from 10 August 2014 to 1 December 2015
    - concerns raised by the Public Transport Ombudsman (PTO) regarding an increase in complaints to her office about infringements and on-the-spot penalty fares
    - concerns expressed by members of the legal profession about the infringement system and on-the-spot penalty fares
    - increasing media reports on the fairness of on-the-spot penalty fares.

Separate review by the department

6. On 11 December 2015 the Victorian Government announced a review of public transport fare enforcement to be undertaken by the department.
7. The timing of my investigation and the departmental review were coincidental. I chose to continue my investigation after the government announced the review and my office has remained in contact with the department regarding its review. This contact enabled my office to be aware of the direction of the departmental review and to ensure that the two processes, while separate, did not run at cross purposes.

Coordination with the Public Transport Ombudsman

8. During this investigation my officers worked closely with the Public Transport Ombudsman, Ms Treasure Jennings and her staff to seek their views and assistance with case studies in particular.
9. I would like to thank Ms Jennings for the assistance her office provided during this investigation.

Approach

10. This investigation involved:

- analysing information provided by the department and PTV about the penalty fare and transport infringement systems including:
  - policy proposals and business cases
  - data on infringements and on-the-spot penalty fares
  - training and guidance materials for AOs
  - departmental policies for infringement issue, review and prosecution
  - PTV policies and strategic documents on revenue protection and fare evasion
- conducting interviews with:
  - three members of staff from the department
  - two members of staff from PTV
  - two AO Team Leaders from Metro Trains
- meeting and interviewing members of peak community law, transport and advocacy bodies, including:
  - Ms Lucy Adams, Manager and Principal Lawyer with Justice Connect Homeless Law[1] (referred to throughout as Homeless Law)
  - Mr Tony Morton and Mr Daniel Bowen of the Public Transport Users Association
  - Professor Graham Currie, Chair of Public Transport, Director of Research (Transport Engineering) at Monash University
  - Ms Cassandra Bawden, Team Leader, Peer Education Support Program at the Council for Homeless Persons
- conducting interviews with senior barristers involved with transport infringements, including Mr Julian Burnside QC
- attending and observing infringement matters at the Melbourne Magistrates' Court
- conducting file inspections of infringement reviews at the department
- conducting file reviews of complaints received by the PTO
- comparing fare enforcement in Victoria with other jurisdictions both in Australia and internationally
- considering and reviewing relevant legislation including:
  - *Transport (Compliance and Miscellaneous) Act 1983*
  - *Infringements Act 2006*
  - *Transport (Ticketing) Regulations 2006*
  - *Transport Integration Act 2010*
  - *Transport (Compliance and Miscellaneous) (Conduct on Public Transport) Regulations 2015*
- reviewing the 490 complaints about the department that my office received from 10 August 2014 to 1 December 2015, 80 per cent of which related to fare evasion enforcement
- authorising my officers to enter and inspect documents at PTV under section 21 of the Ombudsman Act
- providing a copy of my draft report to the department and PTV for comment. I have fairly included their responses in my final report.

1 Homeless Law is a free specialist legal service for people experiencing or at risk of homelessness.

11. All interviews for this investigation were undertaken voluntarily. Two witnesses interviewed were legally represented.

12. Although I did not make a public call for submissions in this investigation, several community, legal and other organisations provided submissions to my office. These were often the same submissions made to the parallel review being conducted by the department, referred to earlier.

13. My officers reviewed all of these submissions as part of my investigation; some are referred to in this report.

14. I am reporting my opinion and the reasons for that opinion to the Minister for Public Transport, the Secretary of the department and the CEO of PTV under section 23(1)(b) and 23(2)(b) of the Ombudsman Act. My opinion is that the administration of public transport fare enforcement is unjust within the meaning of section 23(1)(a) of the Ombudsman Act for the reasons set out in this report; and that action should therefore be taken to rectify and alter the current system of public transport fare enforcement.

15. In accordance with section 25A(3) of the Ombudsman Act, I advise that any individual who is identifiable, or may be identifiable, from the information in this report is not the subject of any adverse comment or opinion. They are named or identified in this report as:

    - I am satisfied that it is necessary or desirable to do so in the public interest
    - I am satisfied that identifying those persons will not cause unreasonable damage to the persons' reputation, safety or wellbeing.

Investigation delays

16. On 10 December 2015 my officers wrote to the department requesting that specific documents be provided to assist my investigation, and that these be provided within 14 days. This did not occur and my office made several attempts in late December 2015 and early January 2016 to facilitate the provision of the information. More than six weeks after the initial request, and after the majority of the information had not been provided, the Deputy Ombudsman wrote to the Secretary of the department.

17. The Deputy Ombudsman and the Director of Strategic Investigations also met with the Secretary of the department to express concern about the delay in providing the requested material.

18. The majority of the information requested on 10 December 2015 was not provided until 4 February 2016.

19. My officers experienced similar delays when seeking material from PTV. An initial request from my officers was made on 17 December 2015. PTV provided some material on 24 December 2015. As with the department, the Deputy Ombudsman and the Director of Strategic Investigations subsequently met with the CEO of PTV to raise concerns about delays.

20. The Deputy Ombudsman wrote a follow up letter to the CEO of PTV on 27 January 2016 as some of the material requested on 17 December 2015 had not been provided. The letter included a request for copies of minutes from all meetings of the PTV Board since 2012.

21. PTV asked if my office would accept extracts of the requested board minutes. My office responded in writing advising that copies or access to the full minutes were required, as had been requested. Despite this, PTV provided selected extracts of the board minutes to my office on 9 February 2016.

22. As a result, I decided to use my coercive powers under section 21 of the Ombudsman Act and authorised my officers to enter PTV and inspect the board minutes that had been requested. This inspection was undertaken on 15 February 2016, several weeks after the initial request.

23. This is the first time since my appointment as Victorian Ombudsman in March 2014 that I have needed to use this coercive power to obtain information from a public agency or government department.

24. The issues in obtaining documents from both the department and PTV put my investigation six to eight weeks behind schedule and has delayed my tabling this report in the Parliament.

25. In its response to my draft report, the Acting CEO of PTV, Mr Jeroen Weimar stated:

> It was not PTV's intention to delay or confuse the investigation. I regret any delay that this may have caused to your investigation.

Public transport in Victoria

26. The two primary public agencies responsible for public transport in Victoria are the department and PTV.[2]

27. The department's functions in public transport include:

    - developing strategies, plans, standards, performance indicators, programs and projects
    - transport system operations, asset management and project management
    - strategic policy advice
    - regulatory policy
    - data and research into the transport system[3].

28. PTV is a separate statutory authority established pursuant to the Transport Integration Act. PTV's role is:

    > ... to plan, coordinate, provide, operate and maintain a safe, punctual, reliable and clean public transport system consistent with the vision statement and transport system objectives contained in the Transport Integration Act 2010[4].

29. One of PTV's key functions is to manage relationships with transport operators who are contracted to provide services on behalf of the state, such as Metro Trains, Yarra Trams, V/Line and others[5]. The operators are engaged by the state to run various aspects of the public transport network.

30. The department develops and maintains the policy framework for Victoria's public transport network, while PTV and the operators are responsible for its day-to-day running.

31. As with the operation of public transport, the responsibility for fare enforcement is shared between agencies. In summary:

    - the department processes and issues infringement notices as well as prosecutions through the court system. It is also responsible for authorising and training AOs
    - PTV administers the penalty fare system and revenue protection strategies across the network
    - transport operators employ AOs who work on their mode of transport, i.e. Metro Trains engages over 300 AOs on the metropolitan train network; Yarra Trams employs its own AOs to monitor the tram network.

2 The *Transport Integration Act 2010* nominates the relevant authority as the Public Transport Development Authority. This body is currently known as Public Transport Victoria.

3 Department website, <economicdevelopment.vic.gov.au/about-us/organisation-structure> viewed on 8 April 2016.

4 *Transport Integration Act 2010*, section 79AD.

5 Metro Trains and Yarra Trams are privately owned, whereas V/Line is a government-owned enterprise.

32. Fare enforcement on public transport is underpinned by several pieces of legislation and regulation. Table 1 summarises several of these referred to in this report.

Table 1: Legislation and regulations governing fare enforcement

Legislation and regulations	Effect
Transport Integration Act 2010	sets out the powers and responsibilities of parties administering Victoria's public transport system, including the department and its Secretary, PTV and others
	provides for AOs and sets out their powers: • to require a person, under certain circumstances, to provide their name and address • to make arrests and remove people from trains, train stations and similar places • enables an AO to issue an on-the-spot penalty fare
Transport (Compliance and Miscellaneous) Act 1983	establishes the power by which Authorised Officers can issue an infringement notice
Transport (Ticketing) Regulations 2006	• prescribes certain conditions and enforcement powers in relation to tickets • defines 'Authorised person (ticketing)' for the purpose of checking tickets and concession cards • sets out obligations of people to hold a valid ticket on public transport • sets maximum court penalties for relevant offences and establishes defences to the prescribed offences • establishes enforcement powers in relation to tickets • prescribes ticketing offences for the purposes of penalty fares and prescribes the amount of a penalty fare
Transport (Compliance and Miscellaneous) (Conduct on Public Transport) Regulations 2015	contains offences in relation to safe and acceptable conduct on public transport vehicles and property
Infringements Act 2006	• sets out the process the department must follow once an infringement is issued in order to engage the Magistrates' Court jurisdiction, including internal reviews, enforcement orders and warrants • defines 'special circumstances' as applying to a person who for various reasons (including mental or intellectual disability, a serious addiction to drugs, or homelessness) is unable to understand or control conduct which constitutes an offence under the Act. This includes transport ticketing offences.

Public transport use

33. According to PTV, during the 2014–15 financial year, Victorians made 564 million trips using public transport on trains, trams, buses and coaches[6]. This is set out in Table 2.

34. Victoria's population in June 2015 was approximately 5.94 million people[7]. On average, Victorians take 94 public transport trips each year. 2012 data shows that 60 per cent of Melburnians travel on public transport at least once a month[8].

35. The maximum daily full fare ticket for an adult using the metropolitan public transport network is $7.80. The maximum concession fare for metropolitan public transport is $3.90[9].

Table 2: Victorian public transport use 2014–15

Mode of travel	Trips (million)
Metropolitan train	227.5
Metropolitan tram	182.1
Metropolitan bus	124
Regional train	13.6
Regional coach	1.4
Regional bus	15.4
	564 million

Data source: PTV.

6 Public Transport Victoria, *Annual Report 2014–15*, 2015, pages 26-28, 30-31.

7 Australian Bureau of Statistics website, <www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0> viewed on 15 March 2016.

8 Plan Melbourne, *Transport Fact Sheet*, May 2012.

9 Fare prices at 28 April 2016. This does not include V/Line fares, which vary across the state.

Fare enforcement

36. Passengers are required to carry a valid ticket on public transport at all times[10]. If adult passengers are found by an AO without a valid ticket or proof of concession, they have two options:
    - pay an on-the-spot penalty fare of $75 or
    - decline to pay and an AO will complete a Report of Non-Compliance (RONC). This report is provided to the department which can then issue an infringement notice for $223.
37. According to data from PTV, AOs checked more than 14 million tickets across Victoria's train, tram and bus network in the 2014-15 financial year. From this, 181,581 Transport Infringement Notices for ticketing offences and 75,262 penalty fares were issued[11].
38. Fare enforcement is an important aspect of managing the costs of the public transport network in Victoria. PTV undertakes surveys twice a year to measure fare compliance and estimate what fare evasion is costing the transport network. Table 3 shows the results of the last four surveys[12].
39. Table 3 shows:
    - fare evasion has been decreasing on the metropolitan network
    - the estimated lost revenue from fare evasion more than halved in the 18 months from May 2014 to October 2015
    - well over 90 per cent of trips on Victoria's public transport network are made by commuters using a valid ticket.

Table 3: Fare evasion surveys, May 2014 – October 2015

Survey	Fare evasion, metropolitan network (%)	Fare evasion, regional train network (%)	Estimated cost per annum ($)
May 2014	8.7	4.9	64.2 million
October 2014	5.9	7.0	51.6 million
May 2015	5.0	6.1	38.2 million
October 2015	3.8	4.9	30.9 million

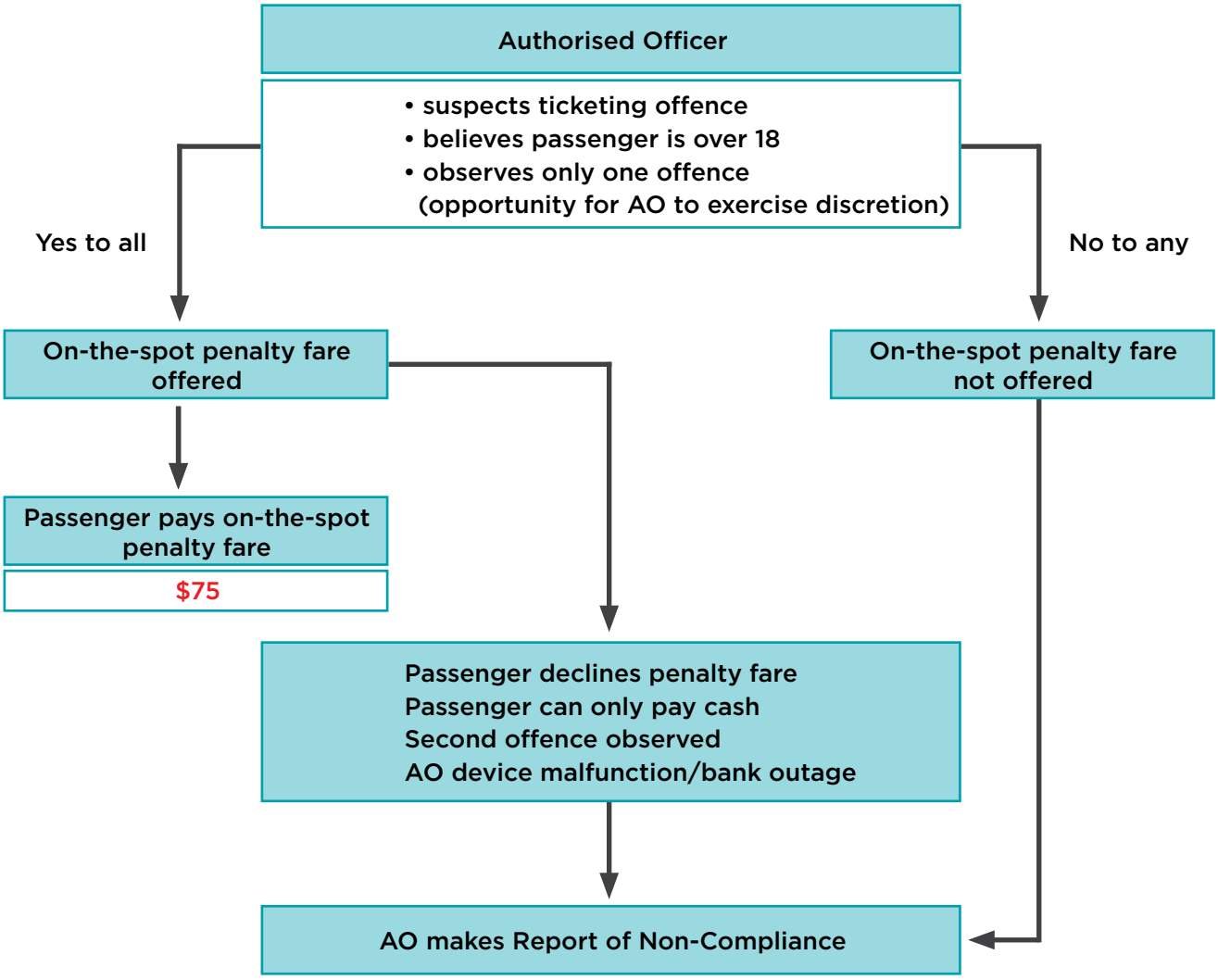
Data source: PTV.

10 *Transport (Ticketing) Regulations 2006*, regulation 6.

11 Penalty fares were introduced on 10 August 2014 so this figure does not represent a full financial year.

12 Public Transport Victoria, *Victorian Official Fare Compliance Series*, May 2014; October 2014; May 2015; October 2015.

Figure 1: Flow chart of Authorised Officer contact with passenger



Source: Victorian Ombudsman.

40. This report discusses fare enforcement strategies used to deal with a range of offences. Table 4 shows some common offences and the penalties applied.

Table 4: Offences and penalty options*

Offence	On-the-spot penalty fine available	Penalty fare amount ($)	Infringement amount ($)
Travelling without a valid ticket	Yes	$75	$223
Travelling without a valid concession entitlement	Yes	$75	$223
Under 18 travelling without a valid ticket	No	N/A	$76
Under 18 travelling without a valid concession entitlement	No	N/A	$76
Littering	No	N/A	$228
Having feet on the furniture or fittings	No	N/A	$228
Behaving in a disorderly or offensive manner	No	N/A	$303
V/Line passengers travelling without a valid ticket	No	N/A	$223

Data source: The department.

* Except where specified, this table refers to on-the-spot penalty and infringement amounts applicable to adults.

Penalty fares

Introduction of on-the-spot penalty fares

41. Penalty fares were introduced in August 2014. The key features of this system are:

    - passengers found not to have a valid ticket or proof of concession entitlement have the option of paying a penalty fare of $75 or electing to have an AO write a RONC, which could lead to a $223 infringement from the department
    - a penalty fare cannot be challenged in court and there is no right of appeal or review
    - penalty fares are only available for ticketing offences, not for behavioural offences or to people under 18 years of age. For people under 18, an infringement notice will be issued for a maximum of $76, not $223 as is applied to adults
    - where a person is unable to pay the $75 penalty fare (for example, if they have no debit or credit card) a RONC may be issued
    - penalty fares are not available to V/Line passengers, in part because of the higher cost of V/Line tickets.

42. Documents provided to my officers show that a business case for penalty fares was well developed by PTV as early as 2012. An undated PTV document titled 'Penalty Fares in Victoria – Preliminary Business Case v7.1' (the business case) proposed that penalty fares be introduced on metropolitan public transport when the previous Metcard ticketing system was to be phased out in late 2012.

43. The business case centred on the argument that introducing penalty fares would increase efficiency in fare enforcement. It stated that AOs issued on average one RONC per shift. The introduction of penalty fares would mean that a RONC would not have to be completed when someone was found without a valid ticket, speeding up the process and enabling AOs to check more tickets per shift.

44. The business case stated that in order to reduce fare evasion, a large number of penalty fares would have to be issued and that operators should be 'incentivised to increase their productivity'. It proposed that revenue from penalty fares be shared between the public transport operators and the state, in addition to the $30 administrative fee that the operators received for every infringement paid as a result of an AO completing a RONC[13].

45. The business case stated:

> The efficiency with which a Penalty Fare can be issued is expected to significantly increase the number of fare evaders who pay a financial penalty. This, in turn, is expected to reduce fare evasion and increase farebox revenue to the State.
> ...
> The introduction of Penalty Fares is expected to reduce revenue lost to fare evasion by around 17% and create additional funding for a greater number of revenue protection staff. Customers who do not purchase a Penalty Fare will be subject to the same enforcement process as presently occurs – they will be no worse off[14].

46. The business case also recommended that there be no appeals process for penalty fares, and that people wishing to appeal would be able to give their details to an AO to complete a RONC, and then request a review by the department. According to the business case, a 'pay later' option would be time consuming and administratively complex, defeating the purpose of the penalty fare regime[15].

13 Public Transport Victoria, 'Penalty Fares in Victoria – Preliminary Business Case V7.1', undated, page 12.

14 *ibid,* page 3.

15 *ibid,* page 7.

Monash University research

47. Professor Graham Currie, Chair of Public Transport, Director of Research (Transport Engineering) at Monash University was engaged by PTV in 2012 to undertake research into fare evasion. He completed his report in April 2013.

48. While this report is not publicly available, it was provided by PTV to my officers. The report sought to 'understand the psychology behind fare evasion and provide accountable recommendations for use in improving compliance'. The key results of the research included:

> Quantitative research demonstrates that lost revenue from fare evasion mainly results from deliberate fare evaders who fare evade often and travel on public transport frequently. **Some $42M (68%) in lost revenue annually comes from recidivist fare evaders who deliberately and frequently evade paying fares** [author's emphasis]. These tend to be high frequency public transport (PT) users and represent 67,200 people [1.7% of Melbourne residents] with an average revenue loss per person of $623 p.a. Conversely one-off evaders who tend to accidentally evade and are unlikely ever to do this again represent an annual revenue loss of $3M p.a. and are estimated to involve 597,000 people (14.9% of Melbourne residents)[16].

49. My officers interviewed Professor Currie about his research, in particular what his research led him to believe was an effective way to combat fare evasion. At interview he said:

> Our advice was to target recidivists. We were able to profile them for the research … but the other side of it was, you know, you shouldn't be stopping people on a first offence and then fining them. It doesn't make any sense. We said use the opportunity to record who they are so you can tell if they're recidivists. And use the opportunity to send them information about how to use the ticketing system, because one of the things we found to be correlated with unintentional evasion was something we classified as ticket incompetence or lack of ticketing competence[17].

50. Professor Currie said that he has since researched other jurisdictions, both interstate and overseas. The methodology used in Melbourne was applied to eight other cities: Toronto, New York, San Francisco, Boston, Sydney, Brisbane, Perth and London[18]. A key finding in Melbourne was replicated in other cities: that most fare evasion is done by a small group of recidivist evaders.

51. PTV cited the Monash University report in its 2014 Network Revenue Protection Plan for the introduction of penalty fares:

> The Monash University study found that the risk and perceived risk of being caught for fare evasion has a significant impact on the decision to fare evade, particularly for recidivist fare evaders. This is borne out by historical trends in fare evasion and fines issued. There are two key areas of focus to support improved AO [Authorised Officer] impact:
>
> The introduction of penalty fares will provide AOs with the capacity to check more tickets and increase the risk to fare evaders of getting caught. This approach, which allows AOs to issue an on-the-spot penalty fare of $75, will also reduce the risk of unpaid Ticket Infringement Notices by requiring immediate and full payment. Penalty fares provide an opportunity to increase fare evasion detection rates, thereby reducing overall levels of fare evasion.
>
> If a passenger elects to pay the penalty fare, a receipt is issued but no further enforcement activity is required. This reduces the time of each interaction between the Authorised Officer and the passenger, thereby allowing each Authorised Officer to check more tickets during each shift[19].

16 Professor Graham Currie and Research Fellow Alexa Delbosc, *Understanding the Psychology of Fare Evasion – Final Report*, April 2013, page iii.

17 Interview with Professor Graham Currie, Monash University, 16 February 2016.

18 Professor Graham Currie and Research Fellow Alexa Delbosc, 'New Methods Exploring "Recidivism" in Urban Transit Fare Evasion – An International Study', unpublished, page 2.

19 Public Transport Victoria, *Network Revenue Protection Plan*, 2014, page 13.

Passenger's dealings with an AO

Passenger G was a regular train traveller, but on this occasion she caught a tram. G had a monthly pass, which had some days until expiry, and a spare myki, which she did not regularly use. On this day she tapped on when boarding the tram, not realising that she had used her spare myki. She also did not realise that she had not touched on successfully due to insufficient funds.

When approached by an Authorised Officer, G did not understand why the myki was invalid, explaining that she had a monthly pass. She became flustered and confused with what she described as the 'rude and abrasive' manner of the Authorised Officer. She said:

> I was confused and kept saying … I have a monthly pass – why can't you see that. He didn't even take the time to listen to me.

Passenger G paid the penalty fare. She later called PTV, who confirmed she had a valid monthly pass. Only then did she realise she had used the wrong myki. Passenger G felt that if the Authorised Officer had listened to her, she would have realised her mistake.

PTV denied G's initial request for a refund of the penalty fare, stating that the fares were non-refundable and that if a customer believes they have a valid defence, they should not opt for the penalty fare option.

The Public Transport Ombudsman became involved. PTV later offered Passenger G a 'goodwill gesture' of $75 to resolve the complaint.

Source: Public Transport Ombudsman

How penalty fares are used

52. AOs carry a laminated card (reproduced in Figure 2) explaining a passenger's options to take a penalty fare or a possible infringement. The card sets out the conditions of the penalty fare, including that there is no review or appeal. The card is shown to people before they are required to make a decision on whether to accept a penalty fare.

Figure 2: Authorised Officers' card for explaining passengers' options

53. Should a passenger take this option, a penalty fare of $75 must be paid immediately by credit card or EFTPOS. Cash is not accepted. This means a passenger has to make an immediate decision on whether to accept the penalty fare option, and have access to funds by electronic transfer.

54. If someone cannot pay on the spot, the reduced penalty option is no longer available. Instead, an AO will complete a RONC. Then, in almost all cases, an infringement notice will be issued. This increases the potential penalty amount to $223 – a rise of $148.

55. While there is no review or appeal, passengers can complain to PTV and then the PTO. They are, however, not made aware of this when they pay the penalty fare.

56. The introduction of penalty fares creates a two-tiered enforcement system where those with the means to pay immediately can reduce their penalty. One of the AO Team Leaders interviewed said:

> In my personal experience and opinion, no I don't think it's fair because the only people that can purchase a penalty fare are those that are in a position, a fortunate position, to be able to purchase a penalty fare.
> ...
> ... but those for instance that might not have purchased a ticket due to their circumstances of being a low income earner, not coming from a great family sort of situation, they might physically not be able to purchase a penalty fare. They get stung with an infringement[20].

57. As shown in Table 4 on page 13, penalty fares are not available for people under 18. Instead, the infringement amount for children is $76. This means that an adult who accepts a penalty fare pays a lower penalty than a child for a ticketing offence.

58. The department's Manager of Prosecutions commented on this at interview with my officers:

> Why is a child still $76 when an adult can walk away with a penalty fare of $75? If the government have seen fit to make a penalty fare a prescribed penalty of $75, why have an infringement notice for a child of $76 ... That's unfair, right?[21]

59. As is clear from complaints to the PTO and my office, the immediacy of the on-the-spot payment creates issues for passengers. Having to decide between a penalty fare or a possible infringement notice can be difficult in the few minutes a passenger is interacting with an AO.

> *'This morning I was seated next to a young girl on the tram whilst plain-clothed AOs were conducting ticket inspection duties. They checked her myki and advised there was insufficient credit ... The girl spoke with broken English and it was clear that she didn't quite understand what was happening. ... [She] was pressured into accepting a course of action that would result in forfeiting both her right to an internal review and right to challenge the matter at court.'*
>
> Lawyer witnessing interaction with AOs
>
> *Complaint to Victorian Ombudsman.*

20 Interview with Team Leader A, Metro Trains, 1 March 2016.

21 Interview with Manager Prosecutions, Department of Economic Development, Jobs, Transport and Resources, 11 March 2016.

60. Many complaints to the PTO and my office come from passengers with particular needs or characteristics that may reduce their capacity to make an informed choice, particularly under time pressure. These fall into broad categories:

    - limited skills in English: AOs are equipped with information cards explaining the penalty fare in a variety of languages. They can also call an interpreter service to help passengers understand their options, however this may not be available in all circumstances
    - disability or illness
    - unfamiliarity with the system: generally, visitors from regional Victoria, interstate or overseas.

Passengers with low levels of English

Passengers with limited English language skills may have difficulty understanding their options.

Passenger A and her daughter were approached by AOs on a bus. Both presented valid myki cards, however A was not able to provide proof of her concession, as she had left her card at home.

Both passengers hold refugee status. A is unable to communicate in English, so the AO spoke with her daughter, presenting the option of paying a penalty fare or providing their personal details so that a RONC could be issued. Passenger A paid the penalty fare.

A complaint was made on behalf of A, raising concerns that she had limited English, may not have understood her rights (especially regarding the option of appealing a RONC), and given her background, becomes distressed in the presence of enforcement officers, including AOs.

In response, PTV confirmed that the passengers were provided with information about their options and that the information provided was relayed to A by her daughter. They also stated that:

> PTV is empathetic to [Passenger A's] past experiences in Egypt in relation to persons of authority; however she need not have the same concerns in Australia.

The PTO took up the matter and PTV offered a 'goodwill gesture' of $75 to close the case.

Source: Public Transport Ombudsman

People with disability

A complaint was made to the PTO by 19-year-old Passenger B's mother, concerned that her daughter, whom she described as having an obvious intellectual disability, had been asked to pay a penalty fare by an AO. B's mother told the PTO that her daughter did not understand the concept of paying a penalty fare, and that after the incident she 'cried for six hours'. The mother was particularly concerned that the AO had not exercised discretion in this instance.

The PTO was able to confirm that the daughter had topped up her myki, but had not touched on. When she later arrived at Melbourne Central station, she was unable to exit the barrier gates and approached customer service operators for assistance. She was directed to AOs, where she was offered the choice of a penalty fare or a RONC. The daughter paid the penalty fare at the time.

Passenger B's mother reported that her daughter had lost her confidence and was no longer able to travel by herself.

After B's mother made the complaint, PTV agreed to provide 'an ex-gratia payment' of $75 to resolve the complaint. PTV offered additional assistance to the family, proposing the 'Try before You Ride' program, designed to assist passengers with disability to travel on public transport.

Source: Public Transport Ombudsman

Passenger with a medical condition

Passenger C approached the PTO after receiving a penalty fare for travelling without a valid ticket. She described that she had used her myki to touch on when boarding the tram, and heard the corresponding beep from the reader. AOs later boarded the tram and found that her myki was not validated.

C pointed out the myki reader she had used, explaining to the AOs that she believed she had validated her ticket and asking for the reader to be checked. She said that 'the officers did not respond to me at all', instead later being told it was her responsibility to look at the screen to ensure a successful touch on. C explained to the AOs that she had a medical condition, making it difficult to see the screen and causing her to rely on the sound of the machine only. Passenger C subsequently accepted a penalty fare, reporting that she felt intimidated by the AOs:

> I … tried to explain to this officer that I had swiped my myki and heard the beep sound, the AOs, all 3 of them, stood over me in a physically intimidating manner. I did not argue or rise [*sic*] my voice, which I am unable to do. I am 55 years of age.

C also reported that she did not receive any written information about penalty fares and infringements.

She made a complaint to PTV which was not upheld. When she later approached the PTO, PTV offered her a 'goodwill gesture' of $75, acknowledging both her disability and the newness of the penalty fare program.

Source: Public Transport Ombudsman

Comparisons with other schemes and jurisdictions

61. My officers reviewed infringement schemes across Victoria and found that the penalty fare for public transport is the only type of enforcement scheme that requires people to pay the penalty immediately. For example, with a speeding infringement, the options are to pay the amount within a set timeframe, seek an internal review or challenge the infringement in court[22].

62. My investigation found that on-the-spot penalty payments are not common on public transport networks across the world and not replicated anywhere else in Australia. A KPMG report commissioned by PTV in 2013 lists only three of 22 other cities with on-the-spot payment of penalties: Budapest, Prague and Singapore[23].

63. The penalty fare system does not offer an appeal process. Review or appeal is a statutory right under the Infringements Act for all infringements. As penalty fares are not an infringement for the purposes of the Infringements Act, there is no statutory right of appeal. PTV policy states:

> If a passenger pays an On-the-spot Penalty Fare they have no right to appeal [review] at a later date and no refunds are provided[24].

64. The business case for the introduction of penalty fares in Victoria cites the example of penalty fares in the United Kingdom:

> Penalty fares are extensively used in the UK, including on London transport services and throughout the privately franchised UK mainline rail companies. There has been research into penalty fares in Britain. They are generally considered to be an effective part of an overall strategy to deal with fare evasion[25].

International experience

65. My officers reviewed the penalty fare system in the United Kingdom and identified important differences between the two: the option for a formal review and the timeframe for payment.

66. Under the London Underground scheme, if a passenger is found travelling without a valid ticket they can be issued a penalty fare. Unlike Victoria, however, passengers are not required to pay the fare on the spot. The penalty fare amount is £80 (approximately $150 AUD) reduced to £40 (approximately $75 AUD)[26] if the fare is paid or appealed within 21 days.

67. Another difference is that passengers in Victoria must pay the penalty fare by EFPTOS or credit card on the spot, whereas in the UK there is a 21 day period to consider options.

68. Under the London Underground scheme, there is also a three-stage appeals process:

    1) Independent Appeals Service
    2) consideration by the Youth and Penalty Fares Manager in Transport for London's Enforcement and On-Street Operations
    3) Independent Appeals Panel[27].

    If the penalty fare is not paid following these appeal processes then the passenger can be prosecuted.

22 Victoria Police website, <www.police.vic.gov.au/content.asp?Document_ID=10366> viewed on 20 April 2016.

23 KPMG, 'PTV Penalty Fare Modal Review (Draft)', July 2013, page 16.

24 PTV website, <www.ptv.vic.gov.au/penaltyfares> viewed on 17 March 2016.

25 Public Transport Victoria, 'Penalty Fares in Victoria – Preliminary Business Case V7.1', undated, page 7.

26 Exchange rate calculated on the XE website, <www.xe.com/> as at 26 April 2016.

27 Transport for London website, <content.tfl.gov.uk/penalty-fares-appeal-new.pdf> viewed on 7 April 2016.

PTV review of penalty fares

69. In August 2015 PTV completed a review of the penalty fare system to:

> provide an overview of the outcomes of the first year of the scheme, and assess whether the scheme has achieved its objectives and if the model needs to be changed[28].

70. The review was not made public, however it was made available to my officers. My officers were told it is being considered as part of the broader review being undertaken by the department. Key considerations for the PTV review were:

- the impact of penalty fares on fare evasion rates and revenue
- the cost of running the scheme and the operational funding model
- the impact of the penalty fares option on customers, including passenger–AO interactions
- the impact of penalty fares (if any) on the number of Transport Infringement Notices issued and on their payment rates
- opportunities to improve the penalty fare delivery model, including whether a cash payment option should be introduced[29].

71. The review notes that compliance levels in May 2015 were the highest they had been since fare compliance surveys started in 2005[30]. Penalty fares alone had generated $5.6 million in revenue at the end of June 2015[31].

72. Regarding the impact penalty fares had on AOs, the review notes that:

> From an AO perspective, the availability of Penalty Fares has had a positive impact on interactions with customers because they allow AOs to check more tickets and assist more customers. The simplicity and immediacy of the Penalty Fares process is felt to be helpful in encouraging customers to pay for their travel. In addition, the speed of the transaction results in less embarrassment for the customer and personal details are not required[32].

73. My officers interviewed two AO Team Leaders who expressed differing views about penalty fares. One said:

> I personally dislike the process. I think it opens up a lot of avenues of misinterpretation, misidentification of the role of an Authorised Officer. It opens up a lot of doors and avenues of confusion and that sort of thing.
> ...
> The practicality side for an Authorised Officer, it makes our job harder, it's more equipment that we have to carry, it's another procedure that we have to follow ... it's more confusing for those it's being offered to[33].

74. The second Team Leader said:

> ... it's convenient for both parties because in terms of, as an Authorised Officer, it's less paperwork for us in terms of we're just processing it there. There's no court, it doesn't go to court, the matter's finalised there[34].

28 Public Transport Victoria, 'Review of On-the-spot Penalty Fares', August 2015, page 3.

29 *ibid*.

30 *ibid*, page 4.

31 *ibid*, page 8.

32 *ibid*, page 11.

33 Interview with Team Leader A, Metro Trains on 1 March 2016.

34 Interview with Team Leader B, Metro Trains on 10 March 2016.

75. Regarding the public acceptance of the penalty fare system, the review states:

> Penalty Fares have generally been well received, with lower rates of complaints or feedback than for TINs [Transport Infringement Notices]. Since the introduction of the program, less than one per cent of people who accepted a Penalty Fare have lodged a complaint. By comparison, 25 per cent of TINs have been appealed in the first six months of 2015[35].

76. Low complaint numbers may be a result of how the options are presented rather than a reflection of satisfaction with the system. As noted earlier, the penalty fare system offers no refund or right of appeal to people who pay it and this is made clear to passengers at the point of contact with an AO. Although a passenger can complain to PTV or the PTO about a penalty fare, this is not a review process and AOs do not tell passengers about these options.

77. In contrast, there is an appeal process for infringements, such as traffic infringements, which is set out on the notice sent to recipients.

35 Public Transport Victoria, 'Review of On-the-spot Penalty Fares', August 2015, page 11.

Authorised Officers

78. Fare enforcement on the public transport system is undertaken primarily by AOs. There are over 600 AOs working across the Victorian public transport network.

79. The role of AOs is described on the department's website:

> AOs are employed by public transport companies to ensure people comply with ticketing and behavioural rules. This helps ensure the successful and safe delivery of public transport services[36].

80. The system by which AOs are authorised, employed, trained and supervised is complicated. They are:

- authorised under the Transport (Compliance and Miscellaneous) Act to undertake enforcement activity[37] for a 'passenger transport or bus company'
- trained by a TAFE organisation on behalf of the department
- employed and supervised by one of the accredited operators (e.g. Metro Trains, Yarra Trams, V/Line).

81. AOs undertake enforcement activity on behalf of both PTV and the department. They can issue penalty fares, which PTV administers, or complete RONCs, which are sent to the department, which can then issue infringement notices.

82. An AO Team Leader from Metro Trains said at interview:

> We've got our employer, Metro Trains, who have an expectation of us and policies and procedures that we have to follow under them. Then we've got the [department] that stipulates our conditions of our authority and what their expectations of us are. And then we've got PTV that obviously … have their expectations … on what we need to do. So I guess as an Authorised Officer it's almost frustrating to a degree because sometimes it can conflict, sometimes there can be grey areas that you don't really understand and it's about trying to … fall in line with every expectation[38].

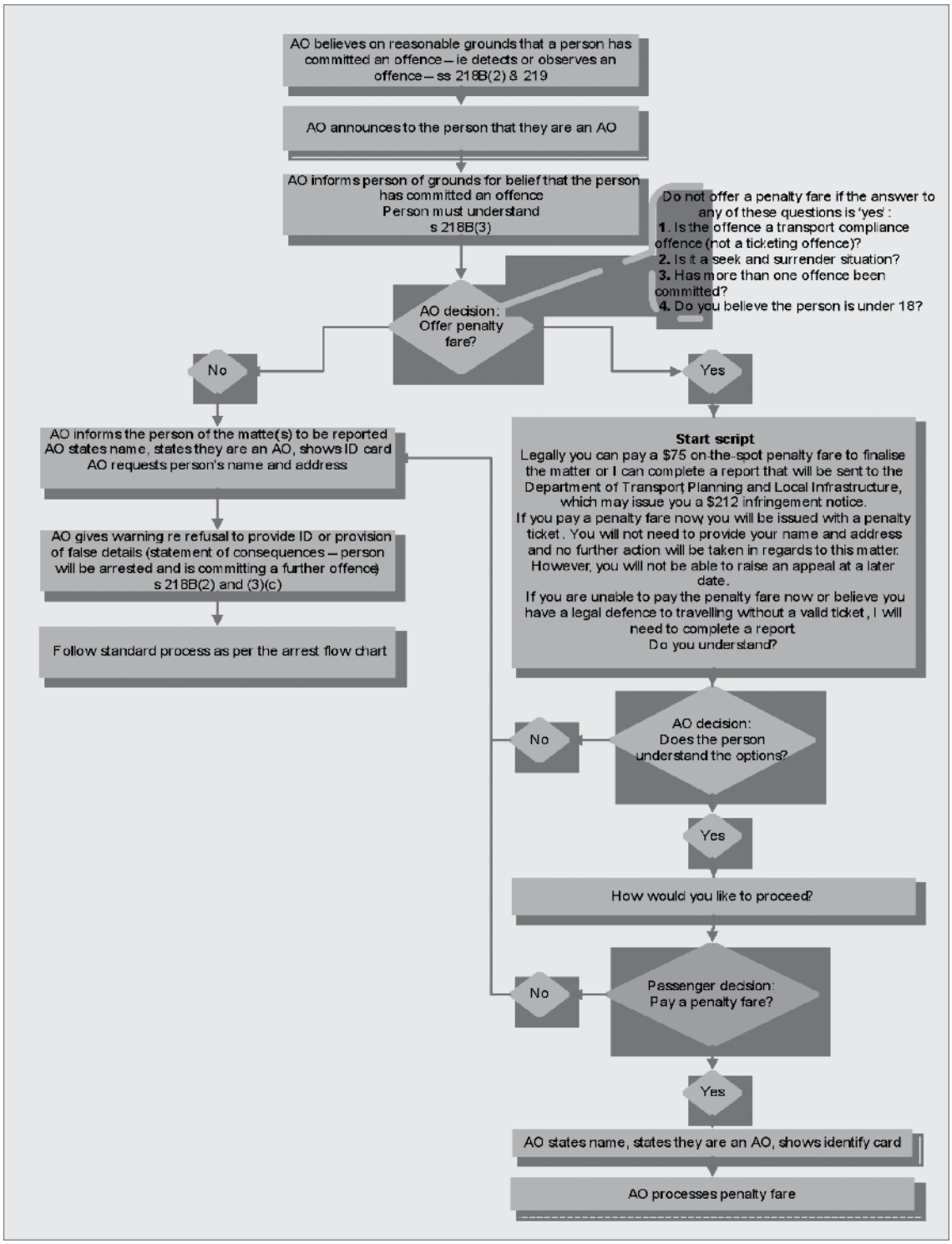
83. Figure 3 is a flow chart given to AOs, including the statements they need to make to the passenger at different stages of the process.

36 Department website, <economicdevelopment.vic.gov.au/transport/legislation/Authorised-officers> viewed on 21 March 2016.

37 *Transport (Compliance and Miscellaneous) Act 1983* sections 221A and 221AB.

38 Interview with Team Leader A, Metro Trains, 1 March 2016.

Figure 3: Penalty fare flow chart



Source: *Law and Procedure Reference Notes for Public Transport Authorised Officers*[39].

39 Department of Transport, Planning and Local Infrastructure, *Law and Procedure Reference Notes for Public Transport Authorised Officers*, May 2014, page 21.

Authorised Officers' use of discretion

Guidance and instruction

84. In the first encounter between a passenger and an AO where the passenger is found not to have a valid ticket or concession, the options the AO presents are:

    - the passenger pays a penalty fare
    - the AO writes a RONC or
    - the AO exercises discretion and takes no further action.

85. In undertaking their role, AOs have the opportunity to exercise discretion in deciding whether to pursue enforcement of any kind.

    The exercise of discretion is covered in a section of the *Law and Procedure Reference Notes for Public Transport AOs* (the reference notes). This document, prepared by the department in consultation with transport operators, forms part of the training and induction all AOs undertake before they start their duties.

86. Near the beginning of the document, the reference notes give AOs discretion:

    > In some rare circumstances, you can use your professional judgement and experience – your discretion – to decide not to report a matter if you believe it is entirely inappropriate to do so[40].

    The language used – 'rare circumstances' and 'entirely inappropriate' – indicates that this discretion is to be exercised only in exceptional contexts.

87. In a section called 'Discretion to complete a RONC', the reference notes correctly define 'discretion' as:

    > A free exercise of judgement to choose a possible course of action or non-action in a situation not clearly requiring mandatory action by law, policy or directive[41].

88. The reference notes then provide guidance to AOs on when discretion can be exercised when issuing a RONC:

    > The practice is that **all** offences detected should be reported in the appropriate manner no matter who the person is unless a policy directive stipulates otherwise. However, there are times when it may not be appropriate to report a person who has breached the Transport (Compliance and Miscellaneous) Act or Regulations, particularly regarding tickets offences.
    >
    > For this reason, you may consider using your discretion and decide not to report a ticketing offence where you have formed a reasonable belief that one of the following circumstances exists:
    >
    > - the passenger is physically incapable of purchasing and/or validating a ticket as a result of old age or disability
    > - the passenger genuinely does not understand the need to, or how to, purchase a ticket, because they:
    >   - are very young
    >   - are a visitor or tourist from outside Melbourne
    >   - have no (or limited) understanding of English
    >   - have diminished responsibility because of suspected or apparent mental impairment
    > - the passenger is homeless, or has little or no money[42].

40 Department of Transport, Planning and Local Infrastructure, *Law and Procedure Reference Notes for Public Transport AOs*, May 2014, page 11.

41 *ibid*, page 52.

42 *ibid*, pages 52–53.

89. There is no comment however on the exercise of discretion in the section on penalty fares. This raises the question of whether AOs are free to apply their discretion when a passenger opts for a penalty fare or only if a RONC is to be issued.

90. While the reference notes provide a starting point for exercising discretion, my officers found little evidence that AOs are given much training or further guidance on when and/or how to apply this in the field.

91. My office interviewed two experienced AO Team Leaders from Metro Trains, who have been in the role for seven and nine years respectively. Neither was able to recall specific training or a set of guidelines to assist AOs in exercising discretion. Instead both described it as something an AO learns on the job.

92. There is anecdotal evidence that AOs do exercise discretion not to penalise passengers (with either a penalty fare or RONC) once they have heard their point of view, but there is no training material to support this, so it is likely to be inconsistent. This suggests that AOs learn that they can exercise discretion but are not well equipped to apply it.

93. AOs do not record any interactions where there is no penalty fare or RONC issued, so there is no data on the use of discretion.

94. In response to my draft report PTV stated that:

> Training of Authorised Officers is separately being revised. Part of this revision will be to ensure consistency in the use of discretion, including (and especially) in assisting vulnerable people[43].

95. As is clear from the many case studies included in this report, AOs do not exercise discretion in all appropriate cases, for example, where a passenger is homeless or has an intellectual disability.

43 PTV response to draft report, 6 May 2016, page 4.

Visitors unfamiliar with the system or the consequences

Interstate visitor

Passenger D (67 years old) travelled from interstate to Melbourne with her daughter, who was receiving treatment for serious health issues. Using a myki for the first time, D boarded a tram and believed she had touched on, seeing the myki reader screen flash and light up. She did not have her glasses on at the time. When her myki was inspected by AOs it was found she did not have a valid ticket, although she believed she had touched on and had a positive balance.

Passenger D was offered the choice of a penalty fare or the possibility of an infringement. As she disputed that the myki was not valid, she received a RONC, which leads to an infringement notice being issued.

Following this, Passenger D's daughter became highly distressed about the potential cost of the infringement, and D returned to the AOs asking to pay a penalty fare instead. During this transaction, D's daughter was attended by Ambulance Victoria, having collapsed in the street with a seizure. The Ambulance Officer later spoke to the AOs, reportedly saying it was 'a bit rough' that Passenger D was 'fined' given she was from interstate.

Passenger D raised her concerns with the PTO. PTV initially determined that they were 'sorry to hear about [Passenger D's] experience however the acceptance of an On-the-spot Penalty Fare is final and cannot be appealed therefore PTV is not offering to refund it'. However an offer was later made to Passenger D to resolve the matter.

Source: Public Transport Ombudsman

Tourist visiting Melbourne

Passenger E was an interstate tourist visiting Melbourne with her 88-year-old father. Neither of them were familiar with the myki system, and they tried to purchase a ticket at an unstaffed suburban train station. E said the ticket machine was damaged and neither she nor her father could read the display screen. Unable – after some effort – to purchase a ticket, they boarded a city-bound train with the intention of purchasing a ticket at Flinders Street Station.

While on the train. E was approached by AOs. Despite explaining her situation, she was reported to the department and received an infringement notice.

In her complaint, E wrote:

> … after explaining to them that I was an honest but uninformed visitor from Queensland who was not trying to skip paying a fare, he told me I could not purchase a return ticket at Flinders Street and that I needed a valid travel card. Because I didn't have a 'myki' card, he said he had to issue me with a $217 fine. It was quite a humiliating experience as he was more like a policeman than a transport worker.

E requested a review of the decision; however, upon review, the infringement notice was upheld.

> … They didn't even appear to look at my case, instead sent out a generic letter saying that no further review will take place.

My office made written enquiries with the department to determine whether E's circumstances had been considered. Following these enquiries, the department advised my office that it had withdrawn the infringement.

Source: Complaint to Victorian Ombudsman

New to Australia

New to the country, Passenger R was commencing a journey between two train stations. On arrival at the first station, she touched on her myki and, seeing that the balance was low, recharged her card at the vending machine at the station. She then touched on again, not realising that she had actually caused the card to touch off. When Authorised Officers later checked her myki it was not valid for travel as she had inadvertently touched off.

After unsuccessfully complaining to PTV, R raised concerns with the PTO that despite explaining her situation to the AOs at the time, she felt that she was not listened to, and was pushed to pay the penalty fare. PTV later advised that the travel history report confirmed that Passenger R had touched on, topped up her myki and again touched her myki to a reader, all within 15 minutes of the initial touch on. This created a 'change of mind', cancelling the valid product on the myki.

Recognising that a genuine error may have occurred, PTV offered Passenger R an 'ex-gratia payment' of the same amount of the penalty fare.

Source: Public Transport Ombudsman

96. There is evidence that, at times, AOs do not check data or equipment where passengers claim there may be a technical fault.

myki wrongly coded

The PTO received a complaint from Passenger F, regarding her travelling on a concession myki without entitlement. Passenger F, an infrequent traveller, had purchased the card over 18 months before, believing it to be a full fare myki. When Authorised Officers checked her card they found it to be a concession myki, and as she had no concession entitlement, she accepted a penalty fare.

PTV initially responded to the complaint by pointing out that Passenger F should have known the card was a concession myki, as it has a large 'C' on one side with the word 'Concession' written underneath. PTV added that if she did not believe that she had committed an offence, she should not have paid the penalty fare, and therefore no refund would be issued.

Upon further investigation, PTV conceded that Passenger F's myki did look like a full fare myki and had in fact been incorrectly coded as a concession myki. While PTV apologised for the error, it added that as the passenger 'believed that she had not committed an offence, she should not have paid the penalty fare at the time'.

Passenger F was offered a 'one-off goodwill gesture' of $56.55 (the amount of the penalty fare less the amount she saved by travelling seven times on a concession fare).

Source: Public Transport Ombudsman

Infringement notices and internal reviews

97. This section explores how infringements are issued and reviewed.

98. The department is responsible for the infringement function of fare enforcement. It processes RONCs from AOs and conducts infringement reviews. Refer to Appendix A for the infringement process.

Department process: how a RONC becomes an infringement

99. If a passenger is found without a ticket and elects or is unable to pay the penalty fare, the infringement is the next step in the fare enforcement process. AOs can complete a RONC, which is forwarded to the department to be processed by the Transport Infringement Administration (TIA) team. The TIA team decides whether an infringement notice will be issued.

100. Quality control officers (also known as issuing officers) are responsible for deciding whether an infringement notice should be issued, based on the information in the RONC. The current process – where AOs report passengers to the department – creates a perception that quality control officers conduct a merits review of each RONC before deciding whether to issue an infringement notice. This is reinforced by the department's Issuing Officer Code of Conduct which states:

> The [department] Issuing Officer who processes a RONC … will conduct a thorough merits based review[44].

101. In practice, however, the process is an administrative check against 22 points to ensure that the RONC is a full and complete record, and that the offence has been made out. This includes that the RONC is legible and logical, addresses are complete and correct, and that the offence code matches the description of the offence[45].

Table 5: Transport Infringement Administration team by number and role

Number of staff	Role	Workload
1 team leader		
5.5 administration officers	Data entry of RONCS 205,109 RONCS entered in 2014-15	Average of 820 RONCs per working day
2 quality control officers	Review (administrative check) of RONCs, leading to 181,581 ticketing infringements issued in 2014-15	

Data source: The department and PTV.

44 Department of Economic Development, Jobs, Transport and Resources, *Issuing Officer Code of Conduct,* undated, page 2.

45 *ibid.*

102. Data provided to my officers shows that in 2014-15 there were 205,109 RONCs issued on the public transport network[46]. The TIA team entered all these RONCs into the database. Of these, there were 214,604 infringement notices issued, of which 181,581 were for ticketing offences[47].

103. Over a working year of 250 days, this equates to the TIA team processing more than 820 RONCs per day, or the two quality control officers processing around 28 assessments each per hour. This does not take into account any other duties, breaks or leave.

104. The *Issuing Officer Code of Conduct* provides that an official warning can be issued if the RONC shows sufficient evidence of special circumstances. As discussed earlier, special circumstances allow issuing agencies or courts to consider issues such as mental illness, disorder or disability, addiction or homelessness when deciding if it is appropriate to issue or uphold an infringement[48].

105. However, when reviewing a number of RONCs, my officers found that there is limited space for AOs to provide details of an offence. There is no space where an AO could indicate that special circumstances may apply.

106. While there is some scope for the use of discretion at this point in the process, the volume of RONCs and the limited information available to quality control officers would indicate that in the majority of cases, it is not exercised. There is no data available from the department to indicate how many RONCs do not result in an infringement notice being issued.

'If the Department of Transport cannot bring themselves to spend a couple of minutes investigating [my son's] myki transaction records, and conferring with Centrelink about his Disability Pension card (without which Myki would not have issued a [concession card] in the first place) I would be very happy to take the matter to court, to show the Department of Transport to be the lazy, ignorant buffoons they seem to be. I would prefer not to waste the court's time on such an easily proven matter.'

Father of autistic young man whose concession card had expired

Complaint to Victorian Ombudsman: infringement withdrawn following my office's enquiries.

46 Email from Manager Revenue Protection and Security, PTV, 3 February 2016.

47 Some RONCs have multiple offences recorded for ticketing and behavioural offences.

48 *Infringements Act 2006* section 3.

Passenger options

107. Once a person receives an infringement notice they can:
    - pay the infringement
    - request a review
    - elect to contest the matter in court
    - take no action.

Requests for review of infringements

> *'I was shocked to receive the infringement notice … How is a myki customer supposed to keep track of the expiry dates of their card? … I wrote back to the Department of Transport for re-consideration of my case. However there was a negative reply from them classifying my case as "absolute liability" … '*
>
> Passenger with sufficient balance on his card but it had expired
>
> *Complaint to Victorian Ombudsman: decision was reversed following my office's enquiries.*

108. Reviews are conducted by the Infringement Review team, a team of five staff within the TIA team. Under the Infringements Act, a passenger – or someone acting on their behalf – may request a review if they think the infringement was not issued legally, if their identity was mistaken or if special or exceptional circumstances apply[49].

109. The Team Leader of the area advised that there were previously two other staff members in the unit, but they left as part of the Sustainable Government Initiative.

110. Outcome letters are not written by review officers but are generated automatically by entering codes into the area's IT system. There are 51 different pro forma letters that can be used.

111. The merits of a passenger's grounds for review are rarely discussed in the letters, which instead often rely on 'absolute liability' in upholding the infringement.

112. Using pro forma letters creates a perception for passengers that their case has not been properly considered; and complaints to my office bear this out. The overly formal language of the letters can also be difficult for passengers to understand.

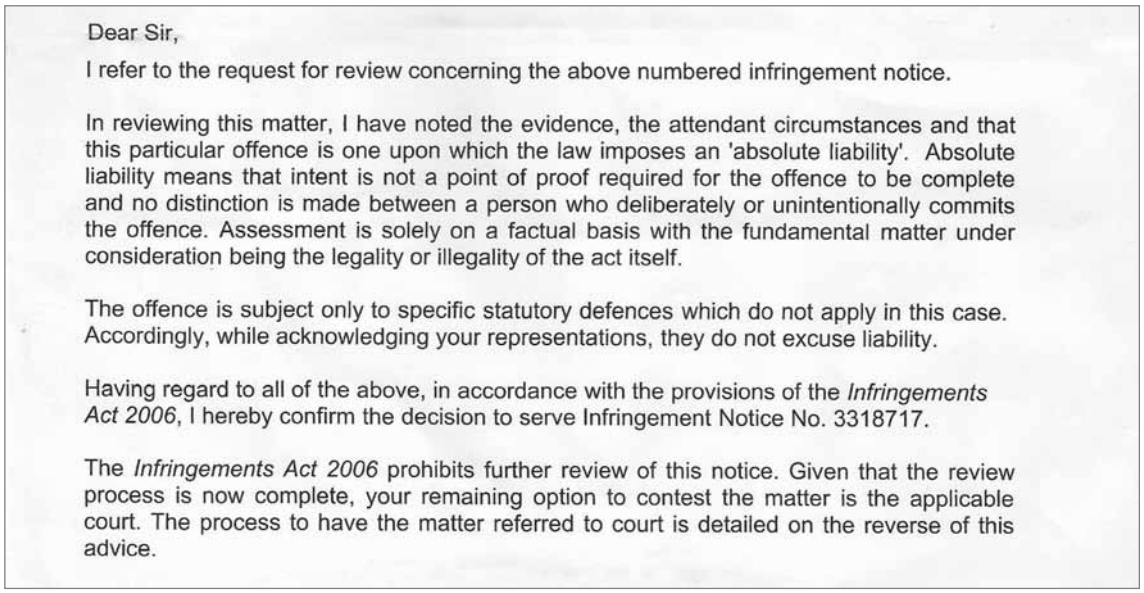
Table 6: TIA Infringement Review team

Review team	Role
5 staff total 1 team leader 2 case review officers 2 case review assistants, one of whom assists with other duties in the infringements area	Considered 44,426 requests for review in 2014-15: • around 177 per day • around 5 minutes per review.

Source: The department.

49 *Infringements Act 2006* section 22.

Figure 4: Examples of pro forma letters responding to requests for review



Dear Sir,

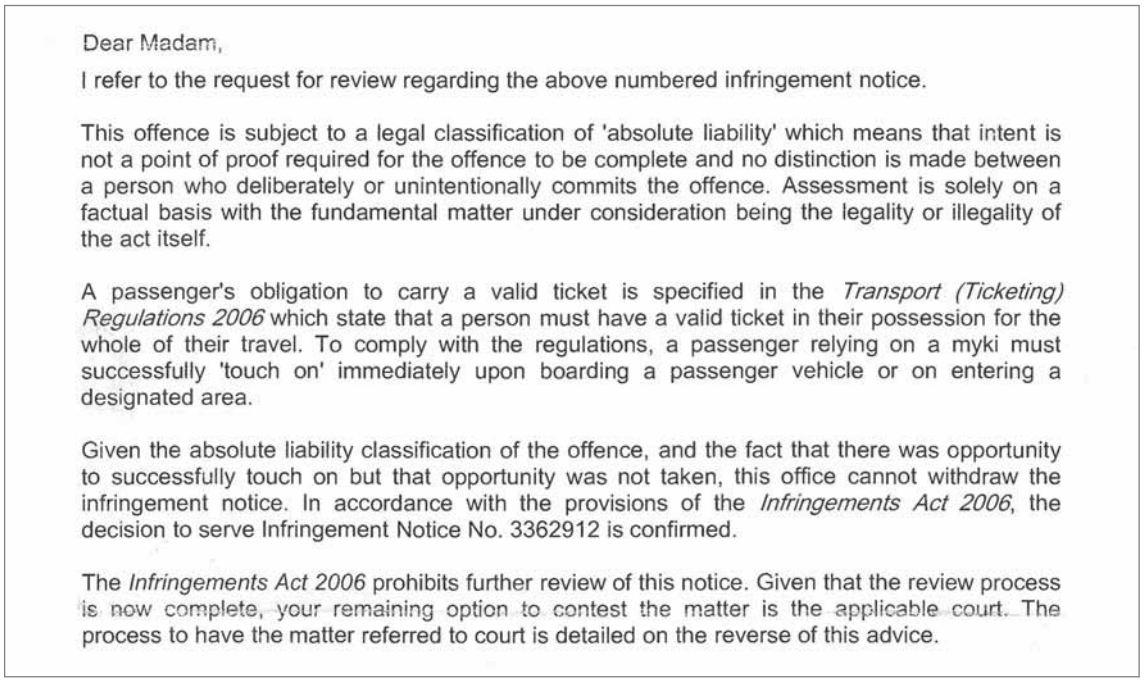
I refer to the request for review concerning the above numbered infringement notice.

In reviewing this matter, I have noted the evidence, the attendant circumstances and that this particular offence is one upon which the law imposes an 'absolute liability'. Absolute liability means that intent is not a point of proof required for the offence to be complete and no distinction is made between a person who deliberately or unintentionally commits the offence. Assessment is solely on a factual basis with the fundamental matter under consideration being the legality or illegality of the act itself.

The offence is subject only to specific statutory defences which do not apply in this case. Accordingly, while acknowledging your representations, they do not excuse liability.

Having regard to all of the above, in accordance with the provisions of the *Infringements Act 2006*, I hereby confirm the decision to serve Infringement Notice No. 3318717.

The *Infringements Act 2006* prohibits further review of this notice. Given that the review process is now complete, your remaining option to contest the matter is the applicable court. The process to have the matter referred to court is detailed on the reverse of this advice.



Dear Madam,

I refer to the request for review regarding the above numbered infringement notice.

This offence is subject to a legal classification of 'absolute liability' which means that intent is not a point of proof required for the offence to be complete and no distinction is made between a person who deliberately or unintentionally commits the offence. Assessment is solely on a factual basis with the fundamental matter under consideration being the legality or illegality of the act itself.

A passenger's obligation to carry a valid ticket is specified in the *Transport (Ticketing) Regulations 2006* which state that a person must have a valid ticket in their possession for the whole of their travel. To comply with the regulations, a passenger relying on a myki must successfully 'touch on' immediately upon boarding a passenger vehicle or on entering a designated area.

Given the absolute liability classification of the offence, and the fact that there was opportunity to successfully touch on but that opportunity was not taken, this office cannot withdraw the infringement notice. In accordance with the provisions of the *Infringements Act 2006*, the decision to serve Infringement Notice No. 3362912 is confirmed.

The *Infringements Act 2006* prohibits further review of this notice. Given that the review process is now complete, your remaining option to contest the matter is the applicable court. The process to have the matter referred to court is detailed on the reverse of this advice.

113. The terms 'absolute' or 'strict liability' are used in infringement systems so that it is not necessary to prove that someone intended to commit the offence, as is the case in more serious matters.

114. Mr Julian Burnside QC has taken an active interest in the prosecution of public transport infringements. When interviewed, Mr Burnside said in relation to absolute or strict liability:

> It just means you don't have to show the person's intention. It doesn't mean you're guilty in any circumstances; it doesn't mean the prosecution needn't prove its case.
> ...
> But for them [the department] to hide behind absolute liability in the review process just misses the point[50].

115. The number of requests for internal review puts pressure on the team and affects their capacity to conduct a review on its merits. As shown in Table 6 on page 32, there were 44,426 requests for review in 2014-15[51]. This means the team needs to process on average 177 reviews per day.

116. When interviewed for my investigation, the Team Leader of the review team stated:

> Back from June, July last year [they were] getting in excess of 2-300 appeals a day. ... [we] got behind, no time to look at the ones we should have ... the whole department is stressed[52].

While acknowledging that it was difficult to be exact, he estimated that his team would spend 'probably about five minutes per review'.

117. Figure 5 shows the workload issues in the infringements area by comparing data from my predecessor's 2010 report[53] with current data.

118. Since 2010:

- requests for review have increased by more than 51 per cent
- RONCs have increased by more than 18 per cent
- ticketing infringement notices have increased by over five per cent.
- staffing levels have decreased by more than 30 per cent.

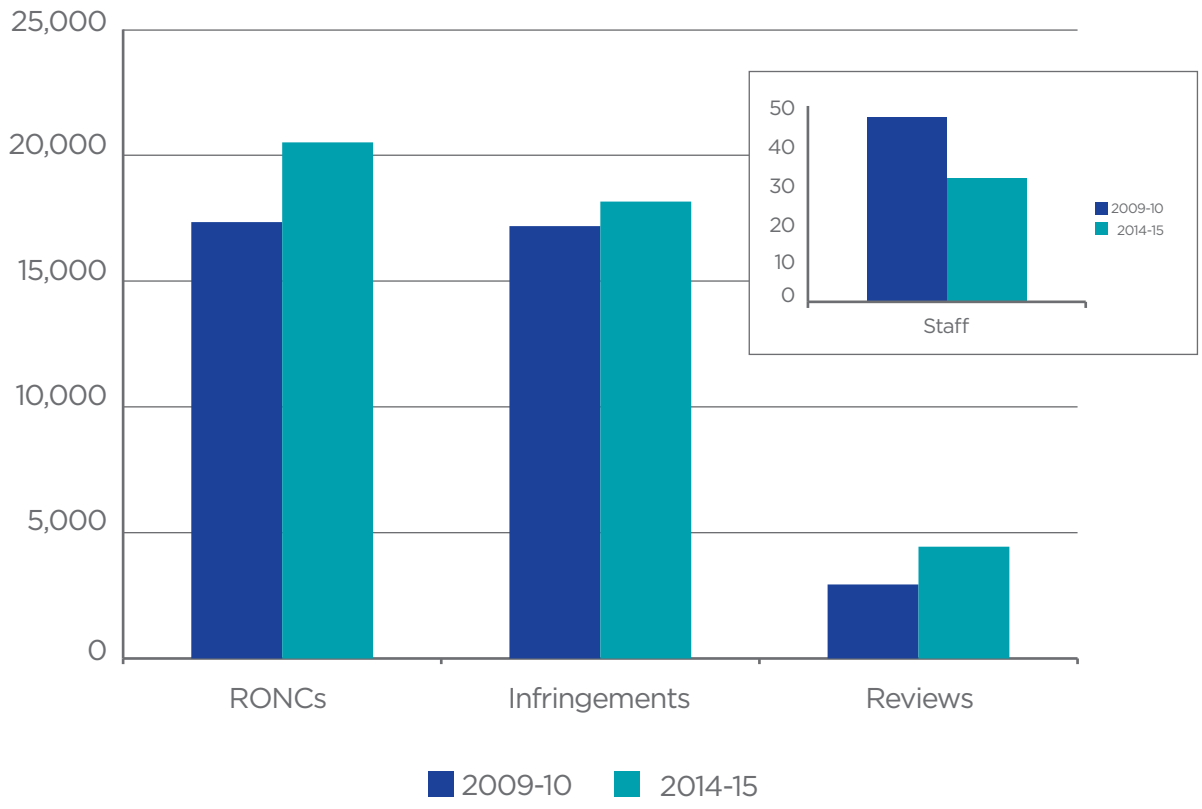
50 Interview with Mr Julian Burnside QC, 22 December 2015.

51 Email from Director Portfolio Services, Department of Economic Development, Jobs, Transport and Resources, 13 January 2016.

52 Interview with Team Leader Case Review, Department of Economic Development, Jobs, Transport and Resources, 9 March 2016.

53 Victorian Ombudsman, *Investigation into the issuing of infringement notices to public transport users and related matters,* December 2010.

Figure 5: Infringements area and workload staffing comparisons 2009-10 and 2014-15



Data source: Email from Director Portfolio Services, the department, 3 February 2016.

Complaints to the Victorian Ombudsman about the review process

My officers recently examined seven case files at the department which had been the subject of complaints from members of the public to my office. Key findings included:

- On most files the majority of information consisted of letter/s from the person seeking the review, a copy of the original RONC completed by the Authorised Officer, and the pro forma letter advising a passenger of the review outcome.
- In one case, the department made enquiries with an AO only after my office made enquiries. The matter was withdrawn and an official warning issued.
- In one case, the department withdrew a matter after my office made enquiries, stating that those enquiries revealed new information about the passenger. However, this information was clearly set out by the passenger in their review letter to the department.
- On the files where an infringement review was initially rejected but the infringement was withdrawn after enquiries by my office, there is no documentation as to why this occurred, aside from my office's involvement.
- One file contained handwritten notes and attached 'post it' notes.
- Some files had typed notes but in most cases these were brief, coded and difficult to understand.
- While on occasion the content of a telephone discussion with a member of the public may have been noted, the reason for rejecting or accepting the review request was not.

Nothing on these files indicated why a review was rejected or accepted.

Victorian Ombudsman's 2010 investigation

The issues around the review process have been reflected in complaints to my office for several years. They were raised by my predecessor Mr George Brouwer in a 2010 report, *Investigation into the issuing of infringement notices to public transport users and related matters*[54].

In the 2010 report some of the concerns were:

- Evidence of the department's internal review assessment lacked detail. The initial assessment comprised a stamp on the letter requesting a review. The stamp recorded details of the infringement number, the initials of the person who reviewed the matter, and the code of the relevant pro forma letter. There was no other record of the assessment and no details of actions, analysis and/or reasons for the review's outcome.
- Despite passengers' detailed submissions, the department's outcome letters were generic and did not address the specific issues raised. As a result, people complained to my office that the department had not adequately considered their concerns.

In the 2010 investigation, Mr Brouwer said:

> It appears that the infringement review response letters were deliberately sparse in detail, and seldom addressed all the points raised as the department only considered 'absolute liability'[55].

My predecessor made several recommendations for improvement which were accepted, at least in principle, by the department. In revisiting these issues for this investigation, many remain relevant, with recommendations not effectively implemented.

My officers have found that requests for review are assessed in the same way now as they were in 2010: initially by an officer who stamps the request and inserts the information described above and then counter-signed by a second to indicate agreement with the initial officer.

54 Victorian Ombudsman, *Investigation into the issuing of infringement notices to public transport users and related matters*, December 2010.

55 *ibid*, page 38.

Concession infringements

> *'Honestly it's very frustrating that I was given a concession card to help me out while I am trying to find a job and end up paying a big fine that is multiples of the concessions I received and it's the last thing I need in such circumstances'*
>
> Concession-card holder receiving infringement notice
>
> *Complaint to Victorian Ombudsman: decision reversed following my office's enquiries*

119. Concession travel on public transport is available to the following groups at a daily rate of $3.90:
    - asylum seekers
    - Australian Pensioner Concession Card holders
    - children 16 years and under
    - eligible primary, secondary and tertiary students
    - holders of a Health Care Card with a Victorian address
    - Victorian and interstate Seniors Card holders
    - war veterans and war widows[56].

120. If a passenger is found by AOs to have paid a concession fare but does not have proof of entitlement, they are deemed to have committed an offence. The passenger may then choose to pay a penalty fare (although this option is not available to passengers under 18 years of age) or a RONC can be issued.

121. If an infringement is the result, the penalty for not having proof of concession entitlement is $223, the same as not having a valid ticket.

122. Many requests for review are made on the basis that a passenger is entitled to a concession but did not have the proof on them at the time.

123. Concession infringements made up almost 32 per cent of ticketing offences in 2014-15 and 53 per cent (23,691) of requests for review[57].

56 Public Transport Victoria, *Victorian Fares and Ticketing Manual,* effective 1 January 2016, page 18.

57 Email from Director Legal and Legislation, Department of Economic Development, Jobs, Transport and Resources, 1 April 2016.

Asylum seeker concession

Passenger J's complaint to my office was made on his behalf by a community organisation as he was an asylum seeker. Passenger J had been fined for travelling on a myki concession ticket without the necessary concession card. The organisation assisting Passenger J had provided him with a letter stating that the concession card for which he was eligible had been applied for but had yet to be provided. At the relevant time Passenger J did not have this letter with him.

The organisation wrote to the department seeking a review of the infringement on the basis that Passenger J was entitled to a concession but that it had yet to be provided by PTV. This review was rejected, with a pro forma letter, advising that as Passenger J was travelling without a valid concession he had committed an offence.

My office made enquiries with the department asking that it provide a more detailed response to the request for review so the organisation and Passenger J could better understand why it had been rejected. The department did not provide a more detailed explanation, but it withdrew the infringement.

Source: Complaint to Victorian Ombudsman

124. Where a person is entitled to concession travel but does not have proof available, in effect there has been no lost revenue. There is some recognition of this in the department's guidelines for the use of official warnings:

> It has been practice for many years to show leniency, given appropriate circumstances, with regard to first offending children under 15 years and first time concession offenders[58].

125. While conducting the file review at the department, my officers were advised that the department's practice is to offer a warning if a person can provide proof of concession entitlement during a review. However, my officers were advised that this discretion is exercised on the first offence only. If a person receives any further infringements for a concession offence, even if they can prove they are entitled to concession travel, the infringement will not be withdrawn.

58 Department of Economic Development, Jobs, Transport and Resources, *Use of official warnings for infringement offences guidelines*, undated, page 1.

126. This matter was raised in the Homeless Law submission to the government review of public transport fare enforcement, which stated:

> In recognition of the challenges many concession card holders can experience, including homelessness, mental illness, disability, caring obligations and/or substance dependence, the public transport ticketing infringement framework should allow evidence of entitlement for a concession fare to be provided within 28 days of (a) being approached by an Authorised Officer, resulting in a Report of Non-Compliance; and (b) receiving an infringement notice.
>
> This would present two opportunities for concession card holders to avoid being inappropriately caught up in the infringement system.
>
> Such reforms recognise the life realities for most concession card holders and move away from the current regulations, which impose absolute liability on vulnerable people who, despite having a valid ticket and being entitled to a concession, fail to produce evidence of their concession status 'without delay'[59].

Students and concession fares

127. Students are entitled to concession travel and are likely to be active on public transport.

128. As outlined earlier in this section, children under 16 and 'eligible primary, secondary and tertiary students' are entitled to concession travel. However, unlike other concession groups, students are required to obtain a specific concession card through PTV.

129. The Victorian Public Transport Student Concession Card costs $9. To obtain this card a student must:

- fill out a form
- provide two colour passport photos
- have the form signed by a representative from the school or institution and the photographs overstamped.
- take the form to an issuing point for processing and payment of the $9 fee[60].

130. Any student over 16 years of age has to go through this process to prove they are a student, as do younger students if they want to purchase a half-yearly or yearly travel pass.

131. Unlike several other jurisdictions, student cards issued by schools or institutions, or school uniforms are not accepted as proof of a concession entitlement. This puts Victoria out of step with most other jurisdictions in Australia. In its submission to the departmental review, which was sent to my office, the Infringements Working Group[61] noted that:

- in the Northern Territory and Queensland, wearing school uniform or showing school-issued ID is sufficient.
- in the Australian Capital Territory, school-issued ID cards are accepted
- and in Western Australia, policy dictates that officers do not issue infringements to secondary students in uniform if they are unable to display proof of concession[62].

59 Justice Connect Homeless Law, *Fair's Fare: Improving access to public transport for Victorians experiencing homelessness,* March 2016, page 45.

60 Public Transport Victoria, *2016 Victoria Public Transport Student Concession Card and Student Pass Application Form.*

61 The Infringements Working Group is a joint working group of the Federation of Community Legal Centres (Victoria) and the Financial and Consumer Rights Council, supported by lawyers from Victoria Legal Aid.

62 Infringements Working Group, *On track to fairer fares and fines – Public transport position paper,* 2016, page 29.

132. The infringement amount for people under 18 is $76 rather than $223. This means that students pay more for the same offence than adults who elect to pay a penalty fare.

Person under 18 receives infringement

Passenger K was under 18 and a complaint was made to my office on his behalf by his father. Passenger K was asked by AOs to produce his ticket but was unable to locate it at the time. His details were taken so a RONC could be forwarded to the department. Some minutes later Passenger K found his myki in his school bag and showed it to the same AO who had taken his details. The officer advised him that he would have to seek a review with the department.

A review was sought but was rejected by the department. This was despite the fact that Passenger K had produced a valid ticket. My office made enquiries with the department who advised that the AO had not recorded any details of the valid ticket Passenger K produced. Following my enquiries the department withdraw the infringement.

Source: Complaint to Victorian Ombudsman

Homeless people and fare enforcement

'I'm like a dog who has been hit. Once you've had the crap beaten out of you a few times it just becomes "yes sir", it's kind of sad in a way.'

A homeless man's experience of the transport infringement system

Source: Justice Connect Homeless Law *(full case study on page 44)*

133. The reference notes issued to AOs identify homelessness as a factor which would warrant the use of discretion when they are considering issuing a penalty fare or a RONC. Evidence from Homeless Law indicates that the use of discretion for people experiencing homelessness is not exercised as broadly as it should be.

134. According to Homelessness Australia there are over 22,000 people experiencing homelessness in Victoria[63]. Around 47 per cent are under 34 years of age, with men accounting for just over half the total.

135. People experiencing homelessness are in many cases reliant on public transport to move around. According to the Council for Homeless Persons, they can spend considerable time travelling the city to attend various appointments and to secure accommodation for the night.

63 Homelessness Australia website, <www.homelessnessaustralia.org.au/images/publications/Infographics/Victoria - updated_Jan_2014.pdf> viewed on 21 March 2016.

136. Ms Cassandra Bawden of the Council for Homeless Persons described what a homeless person's day may entail:

> Say [they] have got children, [they] have to go and drop them off at school. [They] have to go before 9 o'clock to be at the homelessness service … if [they] are going to access housing you need a support worker, so there's another appointment. If the support worker is going to have any chance of getting [them] any housing, [they] will usually be more vulnerable, which means more things going wrong for [them]. So say [they] have health issues, [they] will have to have a specialist and a doctor. [They] might have legal issues, so then there's another appointment. It all adds up. The homelessness service in itself [they] will have to go back to every day. And then [they] have to pick the kids up from school and get them to wherever [they] are staying that night. So [they] will be on [public transport] a lot in one day. It's really crucial for people[64].

137. If a RONC is written and an infringement issued, the Infringements Act allows for special circumstances to be considered by a court or issuing agency. These are applicable to several infringement types, not just public transport infringements. Special circumstances are defined in the Infringements Act as:

> (a) a mental or intellectual disability, disorder, disease or illness where the disability, disorder, disease or illness results in the person being unable –
>
> (i) to understand that conduct constitutes an offence; or
>
> (ii) to control conduct that constitutes an offence; or
>
> (b) a serious addiction to drugs, alcohol or a volatile substance within the meaning of section 57 of the Drugs, Poisons and Controlled Substances Act 1981 where the serious addiction results in the person being unable –
>
> (i) to understand that conduct constitutes an offence; or
>
> (ii) to control conduct which constitutes an offence; or
>
> (c) homelessness determined in accordance with the prescribed criteria (if any) where the homelessness results in the person being unable to control conduct which constitutes an offence65.

138. There is however no reference to special circumstances or the Infringements Act in the reference notes issued to AOs. It is unlikely AOs are aware of this legislative provision.

64 Interview with Ms Cassandra Bawden, Coordinator of the Peer Education Support Program, Council for Homeless Persons, 4 March 2016.

65 *Infringements Act 2006* section 3.

139. At interview, Ms Lucy Adams, Manager and Principal Lawyer with Homeless Law was asked about the experience of homeless people on public transport. She said:

> It seems to make it more likely that they will a) be using public transport and [therefore] b) be approached by enforcement officers on public transport[66].

140. Ms Adams said that infringements tend to be the biggest legal issue facing homeless people because they are 'conducting their private lives in public places'[67].

141. Data provided by Homeless Law indicates the effect of infringements on homeless people. In a submission to the government's review of transport fare enforcement, which was also provided to my office, Homeless Law stated that in 2014-15:

- their clients had been issued a total of 231 infringement notices for public transport offences, totalling $83,705.
- 21 (48% of analysed infringements files) involved public transport ticketing offences (i.e. failure to have a valid ticket, failure to provide proof of concession).
- their clients had been issued with 180 infringement notices for public transport ticketing offences, totalling $68,050. One client had 44 infringements for public transport ticketing offences, totalling $16,387[68].

142. At interview, Ms Adams was asked about fining homeless people for ticketing offences:

> There is no point in our experience in fining them because that idea of a deterrent, for example, or an incentive to pay for your public transport [does not exist]. That isn't the framework that they're operating in at that point in their lives. So their decision making is impacted by something else and the whole special circumstances system is set up … to recognise that … that is because of their homelessness or their mental illness, and/or substance dependence they're unable to understand or control their conduct at the time. And so that idea of a deterrent or an incentive does not apply. They are already experiencing extreme personal and financial hardship so are very poorly equipped to exit that system through payment or through navigating the system …[69]

143. In its submission Homeless Law included the following case study of one homeless man's experience of transport infringements.

66 Interview with Ms Lucy Adams, Manager and Principal Lawyer of JusticeConnect Homeless Law, 22 January 2016.

67 Interview with Ms Lucy Adams, Manager and Principal Lawyer of JusticeConnect Homeless Law, 22 January 2016.

68 Justice Connect Homeless Law, *Fair's Fare: Improving access to public transport for Victorians experiencing homelessness,* March 2016, pages 4, 10.

69 Interview with Ms Lucy Adams, Manager and Principal Lawyer of JusticeConnect Homeless Law, 22 January 2016.

Hamish's story[70]

I've been homeless since my mid-teens, living mainly in the inner city. I've been squatting for ages so I kind of don't feel like part of society anymore.

...

It's a bit upsetting when you are on a tram or train and you find that whenever there is a ticket officer they immediately bee-line their way to you. It does something to your self-esteem. The first few times it happens you think nothing of it, but then by the end you are looking for these people. I'm like a dog who has been hit. Once you've had the crap beaten out of you a few times it just becomes 'yes sir', it's kind of sad in a way.

A couple of times people giving the infringements have been nice, but a couple of times it has been demeaning. Once I had an appointment at Centrelink, I got off the train and was approached by four plain clothed officers. They asked me for a ticket, when I didn't have one they took me aside and photographed me for 'local records'. It was a bit weird standing on the platform getting your photo taken.

...

It is beneficial for the community to change the system because with the fines, it's like throwing paper at a fire. I don't know whether it has to do with training but also setting guidelines. If it does become that you can't get on public transport without a ticket, that's going to keep people from getting public transport to their doctors and to their appointments. It puts additional strain on the health system, the legal system and the welfare system.

> Getting the fines sorted was like a weight lifted, like going to the dentist and having the pressure released. It's a good feeling. It encourages me to get my stuff a bit more organised and together, start working again[71].

144. Confusion about whether homeless people should be the subject of enforcement action is reflected in the responses of the AO Team Leaders interviewed during my investigation.

    One Metro Trains Team Leader said:

    > I must admit there's no real set guidelines, it sort of comes down to an interpretation[72].

    Another stated:

    > You might give a discretion one day, but if you've come across that person three or four times you might need to take some action[73].

    When asked to clarify what was meant by taking action he said 'you can write a RONC'.

145. Reporting people without tickets who were likely to be homeless was seen by the Team Leader of the department's infringement review team as leading to a better outcome for them through the courts:

    > If you report [homeless people], eventually it will work its way through to the courts and they will get some help. But [if not reported, the homeless person] doesn't get any help. Shouldn't we try at least to help him some way? At least when you put him before the courts, the courts can look at him and say 'alright, what's happening here, can we do something, can we get him to report to someone, must he report to someone that will give him some help'. Because otherwise they just stay on the streets and no one does anything about it[74].

70 Not his real name.

71 Justice Connect Homeless Law, *Fair's Fare: Improving access to public transport for Victorians experiencing homelessness,* March 2016, page 25.

72 Interview with Team Leader A, Metro Trains, 1 March 2016.

73 Interview with Team Leader B, Metro Trains, 10 March 2016.

74 Interview with Team Leader Case Review, Department of Economic Development, Jobs, Transport and Resources, 9 March 2016.

A protocol for homeless people

146. In New South Wales a *Protocol for Homeless People in Public Places* (the protocol) has been developed. The Protocol is described as:

> … help[ing] ensure that homeless people are treated respectfully and appropriately and are not discriminated against on the basis of their homeless status. The Protocol also aims to assist homeless people to receive services if they need or request them. It is an important element in the Government's strategy for responding effectively to homelessness[75].

147. Several government agencies are signatories to the protocol including RailCorp and the State Transit Authority of NSW[76]. It contains guidelines for when public officers approach homeless people in the course of their work, and options for providing assistance. The Protocol sets out a range of criteria including:

> A homeless person is not to be approached unless:
>
> - they request assistance
> - they appear to be distressed or in need of assistance
> - an official seeks to engage with the person for the purpose of information exchange or provision of a service
> - their behaviour threatens their safety or the safety and security of people around them
> - their behaviour is likely to result in damage to property or have a negative impact on natural and cultural conservation of environment, including cultural heritage, water pollution and fire risks
> - they are a child who appears to be under the age of 16
> - they are a young person who appears to be 16 to 17 years old who may be at risk of significant harm[77].

148. The *Victorian Protocol for people who are Homeless in Public Places 2006* was established to coincide with the Commonwealth Games. It does not appear that this protocol was applied to the public transport network and was primarily adopted by inner city councils. The protocol was not referred to in departmental or PTV material provided during my investigation. None of the witnesses interviewed from the department, PTV or Metro Trains were aware of it.

75 Housing NSW, *Protocol for Homeless People in Public Places – Guidelines for Implementation,* May 2013, page 11.

76 *ibid*, page 4.

77 *ibid*, page 11.

The court process

149. This section looks at the court process for fare enforcement of infringement matters and whether it represents an effective part of the fare enforcement system.

150. During 2014–15, the department prosecuted a total of 4,574 infringement matters in the Magistrates' Court[78]. Just over half (2,621) of these were instigated by a passenger electing to have the matter heard and determined before the court[79].

Infringements in Magistrates' Court

151. Infringements come to the Magistrates' Court for two reasons:

- the person who has received an infringement notice, or the department, elects to have the matter heard in court
- the infringement is not paid and becomes subject to an enforcement order, and is listed in the Magistrates' Court by the Registrar of the Infringements Court.

152. An enforcement order is a legal notice issued by the Infringements Court which forces a person to comply with an infringement notice. It must be issued before a warrant can be taken out. An enforcement order must also be revoked or complied with before the infringement can be finalised.

When a person elects to go to the Magistrates' Court

153. Under the Infringements Act, a person may elect to have their matter heard in the Magistrates' Court at any time before an enforcement order has been made.

154. In this instance, a departmental prosecution liaison officer requests a sworn statement from the AO who issued the RONC. This statement, together with the RONC paperwork, myki transaction reports and any correspondence to or from the alleged offender are provided as a consolidated file to a departmental prosecutor.

155. The prosecutor is responsible for assessing whether the elements of the offence alleged in the RONC are reasonably likely to be found proven in court on the basis of the evidence. If a prosecutor considers that these elements cannot be reasonably proven, the matter is not authorised to proceed and the infringement notice will be withdrawn.

156. Where a matter does proceed, it is referred back to the Prosecution Liaison Team, which compiles a brief of evidence before the matter is listed before the Magistrates' Court.

157. In February 2016, the department's Prosecution Liaison Team consisted of four liaison officers and one team leader. The Prosecutions Team comprised four prosecutors, one team leader and one manager. Despite the department's workload having increased since 2010, there are seven fewer staff since then[80]. The implications of this reduction are delays and staff prevented from spending more time on complex matters.

78 Email from Director Portfolio Services, Department of Economic Development, Jobs, Transport and Resources, 3 February 2016.

79 Email from Deputy Secretary, People and Executive Services, Department of Economic Development, Jobs, Transport and Resources, 24 March 2016.

80 Email from Director Portfolio Services, Department of Economic Development, Jobs, Transport and Resources, 3 February 2016.

When the department elects to go to the Magistrates' Court

158. The department may also elect to have matters heard in the Magistrates' Court at any time before an enforcement order has been made.

159. The Manager of the department's Prosecution Team said at interview however:

> ... court is really a last resort ... if we can settle a matter rather than going to court to get that voluntary compliance then we try and do that ... we take people to court who ... [are] not prepared to accept the decision of the case review and we're satisfied there's more than sufficient evidence to warrant the charge before court[81].

160. The Manager went on to say that:

> Our job is to try and gain voluntary compliance. That is what it's all about. We are like the end product for people that just don't abide by the rules[82].

Department's handling of an infringement

Passenger M approached my office after having had an infringement withdrawn by the department. His circumstances differed from many complaints received by my office in that he was not seeking our intervention to have his infringement withdrawn. Instead, his complaint was about how the department had pursued the infringement against him.

M received an infringement and requested the department review and withdraw the infringement. The department rejected Passenger M's grounds for review. Passenger M made further enquiries with the department by telephone and in writing seeking to resolve the issue without having to attend court. He told my officers that the only advice he received from the department was that the matter would have to be contested at court.

When M wrote to the department seeking details of his court appearance as well as information (such as myki reader reports and CCTV footage) to prepare his defence, he received no reply. The next correspondence he received was from the court advising that the department had requested 'non-prosecution' of the infringement. It was at this point that M wrote to my office. In his complaint he stated:

> I am now feeling that the Dep [*sic*] was using its status and substantial resources to bully me.

In reviewing the correspondence M provided to my office, there are only two short pro forma style letters from the department rejecting his earlier requests for review. Following enquiries by my office the department apologised to M for not advising him that it had withdrawn from court prosecution.

Source: Complaint to Victorian Ombudsman

81 Interview with Manager Prosecutions, Department of Economic Development, Jobs, Transport and Resources, 11 March 2016.

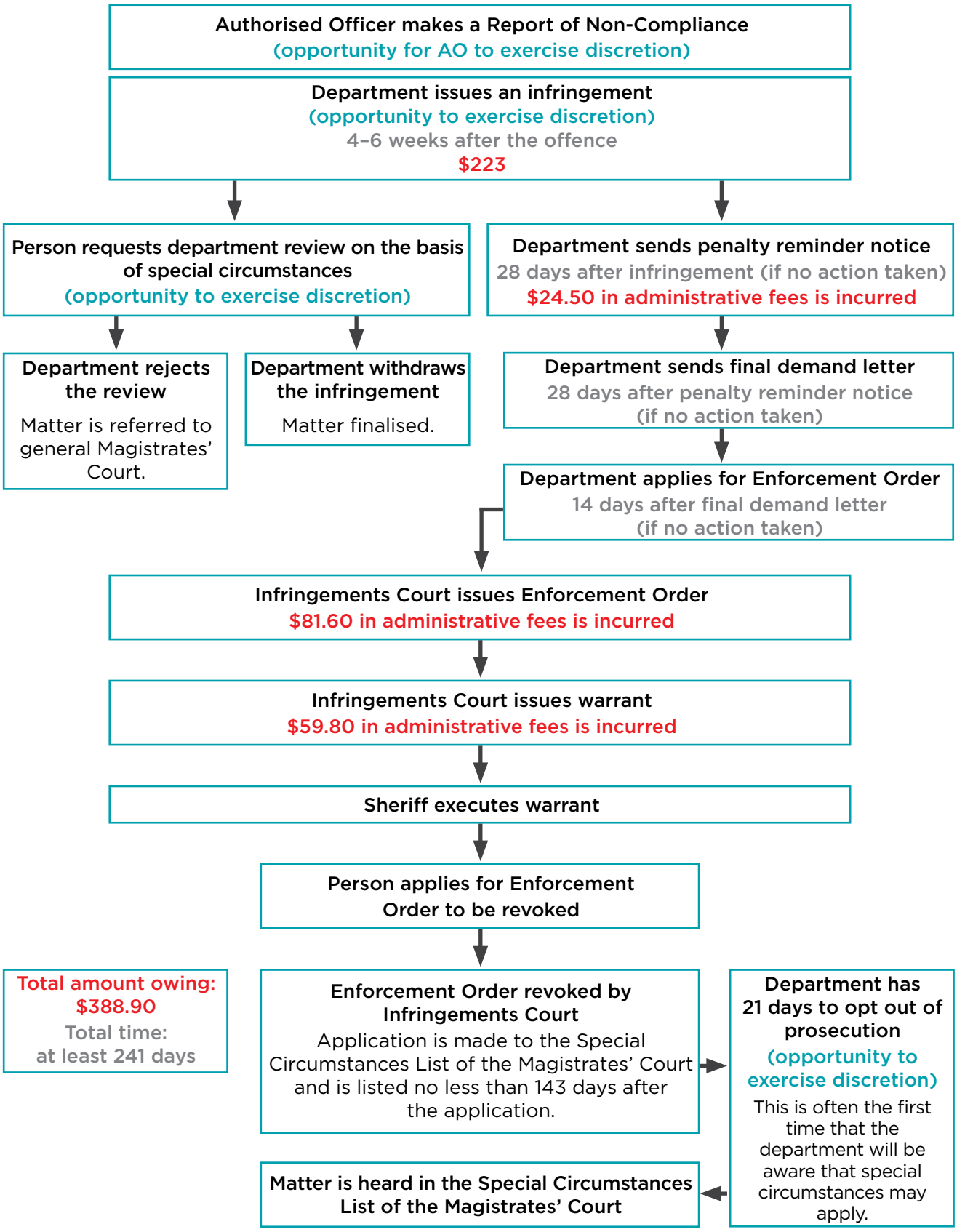
82 Interview with Manager Prosecutions, Department of Economic Development, Jobs, Transport and Resources, 11 March 2016.

When a person takes no action

161. Infringement matters commonly enter the Magistrates' Court because a person takes no action on their infringement. When this happens, the department takes steps to ensure that the person is aware of their infringement. If these steps are exhausted the department will apply for an enforcement order. This is often the case if a person has no fixed address and does not receive correspondence from the department.

162. This process, which can invoke a number of administrative fees increasing the cost to the passenger, is set out at Figure 6.

Figure 6: Flow chart of legal process from RONC to court



Source: Victorian Ombudsman.

163. If an enforcement order is revoked, the original infringement must still be resolved and the matter is referred to the Magistrates' Court for hearing.

164. This process is the most common way special circumstances matters come before the court, and the only entry to the Special Circumstances List. This is explained in further detail in the special circumstances section on page 52.

165. As Figure 6 shows, there are a number of opportunities for exercising discretion, including:

- when AOs use their discretion not to issue a RONC when someone is found without a valid ticket
- the departmental review of the RONC
- where a review of the infringement notice is requested
- when a prosecutor determines whether a matter should be prosecuted
- when an enforcement order is revoked at the Magistrates' Court and the department has 21 days to opt out of the prosecution.

The department as prosecutor

166. Departmental prosecutors use three key policies issued by the department in assessing whether infringement matters should proceed to court, and the procedure for any resulting prosecution:

- *Prosecutions Policy and Procedures,* May 2014
- *myki Prosecutions Guide,* February 2016
- *Prosecutorial Discretion Policy,* June 2015.

Assessing whether matters should be prosecuted

167. The *Prosecutions Policy and Procedures and myki Prosecutions Guide* are primarily procedural documents that set out how prosecutors are required to run prosecutions.

168. Central to a departmental prosecutor's role is assessing whether infringement matters should be authorised to proceed to court. The process for assessment is outlined in the myki Prosecutions Guide. For a matter to be authorised, the prosecutor must:

- consider what offence has been alleged
- assess the RONC against the possible offences
- check the relevant legislation
- identify the elements of the offence.

169. The elements of an offence are the points of proof that must be proven in court. For ticketing offences, these are set out in the Transport (Ticketing) Regulations and the Transport (Compliance and Miscellaneous) Act.

For a ticketing offence under Regulation 6(1) of the Transport (Ticketing) Regulations, a prosecutor must consider that the following points of proof can be made out in court prior to authorising a matter to proceed:

- the passenger's identity
- that they were travelling on public transport
- that they did not have in their possession a ticket that was valid for the whole of the travel in that vehicle[83].

83 Department of Economic Development, Jobs, Transport and Resources, *myki Prosecutions Guide*, 2016, page 9.

170. Prosecutors must also consider other evidence that may be required, for example, a person's myki history or reports that show a myki machine was working at the time of the alleged offence. If a prosecutor believes that the points of proof are made out and that a court is likely to find the matter proven, it will be authorised to proceed.

171. While the time the department takes to prepare a file can vary, the Manager of the department's Prosecution Team said at interview:

> … we won't put matters in court if we don't think we have all the evidence and therefore the process takes a while before it goes through. Now for ticket infringements we [are] up to 12 months from the date of the offence[84].

172. The Manager went on to highlight his team's heavy caseload, at times prosecuting 80 matters in an afternoon at the Magistrates' Court[85].

Exercising discretion during prosecutions

173. The department applies the Prosecutorial Discretion Policy to promote consistency of decision making across the Prosecutions Team. The policy is underpinned by the principles contained within the Office of Public Prosecutions' (OPP) *Director's Policy: Prosecutorial Discretion*, which sets out that a prosecution may only proceed if:

- there is a reasonable prospect of a conviction
- a prosecution is required in the public interest[86].

174. According to the OPP policy, the prosecution should only proceed if the public interest to prosecute outweighs the public interest to not prosecute. Public interest includes, among other things:

- the seriousness of the offence
- the degree of culpability of the offender
- whether the offence is of considerable public concern
- the availability and efficacy of any alternatives to prosecution
- the offender's background
- the youth, age, intelligence, physical health, mental health or special infirmity of the offender[87].

175. Pursuing appropriate prosecutions, according to the department, is a matter of two public policy imperatives:

- the need for voluntary compliance, particularly to minimise fare evasion
- to see general deterrence reflected in sentencing[88].

84 Interview with Manager Prosecutions, Department of Economic Development, Jobs, Transport and Resources, 11 March 2016.

85 Interview with Manager Prosecutions, Department of Economic Development, Jobs, Transport and Resources, 11 March 2016.

86 Office of Public Prosecutions, *Director's Policy – Prosecutorial Discretion,* 2014, page 2.

87 *ibid*, page 3.

88 Department of Economic Development, Jobs, Transport and Resources, *Prosecutorial Discretion Policy*, June 2015, page 1.

Special circumstances

176. When the Infringements Act came into effect in 2006, the Attorney-General published a set of guidelines to help enforcement agencies meet their responsibilities for issuing and enforcing infringement notices. This included a commitment to the consideration of 'special circumstances':

> The recognition of 'Special Circumstances' in the *Infringements Act 2006* is to ensure that certain members of the community are not unfairly caught up in the infringement system … Agencies are reminded that the Act seeks to divert from the criminal justice system those who do not have the ability to understand the consequences of their actions[89].

177. During 2014–15, more than 3,000 of the 4,574 matters the department prosecuted in the Magistrates' Court related to people with special circumstances: 65 per cent of all infringement matters that were prosecuted in the Magistrates' Court during that year.

178. As outlined previously in this report, special circumstances are defined in the Infringements Act as:

- a mental or intellectual disability
- a serious addiction
- homelessness.

179. The majority of this 65 per cent are heard before the Special Circumstances List at the Magistrates' Court after an enforcement order has been revoked. However, they can also be heard in the general Magistrates' Court (not as part of the Special Circumstances List) if a person applies for a review on the basis of special circumstances but is unsuccessful. In these instances the department must refer the matter to the general list of the Magistrates' Court[90]. These alternative processes are set out in Figure 6.

180. While people with special circumstances can apply for a review at an earlier stage, this is not common. In its 2016 report, *On track to fairer fares and fines*, the Infringements Working Group noted that:

> Unpredictable, inconsistent approaches to internal review applications by enforcement agencies and the likelihood of ending up in open court mean that people with special circumstances may choose to wait until the Infringements Registrar makes an enforcement order before making an application for revocation[91].

181. Homeless people often have no fixed address and are unlikely to receive infringement notices, reminder notices or enforcement orders. As a consequence they are unable to apply to the department for a review. The first time they are able to deal with their infringement or contact legal or other support networks is when the Sheriff has executed a warrant. This can be years after the offence has occurred, and only when a number of infringements are outstanding.

89 Department of Justice, *Attorney-General's guidelines to the Infringements Act 2006*, 2006, page 7.

90 *Infringements Act 2006* section 25(3).

91 Infringements Working Group, *On track to fairer fares and fines*, 2016, page 20.

182. At interview, the Judicial Registrar of the Special Circumstances List in the Magistrates' Court highlighted the drawn-out nature of special circumstances matters:

> … [Special circumstances] take a long time to get from point 'a' to point 'b' … because of the nature of a lot of people who get infringements … I might be hearing matters as far back as 2010. The process from the Infringements Court to the 'Specials List' can take several months. That's apart from the date of the actual offence, it can take years[92] .

183. The department may exercise its discretion to opt out of prosecuting an infringement within 21 days of the Infringements Court acknowledging special circumstances and revoking an enforcement order. Despite this, evidence obtained by my officers suggests that in most instances the department still prosecutes these matters in the Special Circumstances List.

184. The department often has no way of knowing that special circumstances may exist until this stage of the process.

185. At interview the department's Manager of Prosecutions commented on the time constraints and its impact on decision making:

> We have a lot of ticket related matters go before … the Special Circumstance List … If [a special circumstances matter] does come to us [from the Infringements Court] … we've only got 21 days so we say, 'Look, we'll have to go to the specials'[93].

92 Interview with Judicial Registrar, 30 March 2016.

93 Interview with Manager Prosecutions, Department of Economic Development, Jobs, Transport and Resources, 11 March 2016.

Court outcomes

186. My officers attended the Melbourne Magistrates' Court to observe both general infringement and special circumstances hearings.

General Infringements List

187. Twenty per cent of matters brought before the Magistrates' Court by the department in 2014–15 resulted in a financial penalty being imposed on the offender.

188. Seventy per cent resulted in no conviction or penalty:

- 40 per cent resulted in the offence being 'proven and dismissed', which means that the offender was found guilty, but they were not convicted or required to pay the infringement amount or any additional costs
- 30 per cent were struck out, withdrawn, dismissed, or resulted in the person being placed on an undertaking of good behaviour without conviction[94].

189. Of the 4,574 matters prosecuted in the Magistrates' Court by the department in 2014–15, 499 related to concession offences. This is more than 10 per cent[95].

190. Six of the seven hearings my officers observed concerned people who had been intercepted by AOs with a valid myki that had been touched on, but the person did not have a valid concession entitlement.

191. In many of these hearings, the departmental prosecutor advised the court that the defendant had provided evidence of their concession to the department, sometimes months before their hearing date. The prosecutor did not dispute the defendant's concession entitlement, but stated that the offence was their failure to present their concession to the AO at the time.

192. My officers identified that in prosecuting a concession offence, at least six departmental officers are involved in issuing an infringement notice, conducting a review, compiling a brief of evidence and prosecuting the matter in court.

193. There is no loss in revenue if the passenger is entitled to and has paid a concession fare. The Magistrates' Court dismisses the majority of these cases.

194. In its business case for introducing penalty fares, PTV described prosecuting infringement matters as '... a hugely expensive and time wasting process'[96].

Special Circumstances List

195. One Judicial Registrar in the Magistrates' Court is responsible for presiding over all infringement matters in a weekly session. More than 65 per cent of all ticketing matters prosecuted by the department during 2014–15 related to special circumstances.

94 Email from Director Portfolio Services, Department of Economic Development, Jobs, Transport and Resources, 3 February 2016.

95 Email from Director Portfolio Services, Department of Economic Development, Jobs, Transport and Resources, 3 February 2016.

96 Public Transport Victoria, 'Penalty Fares in Victoria Preliminary Business Case V7.1', undated, page 4.

196. My officers observed 10 special circumstances hearings, nine of which involved the defendant being legally represented, generally by a community lawyer. Homeless Law gave my officers an analysis of transport infringement matters where they provided free legal assistance to their client. It identified that on average:

- each client had 8.9 public transport infringements in their matter
- each client had $3,240 in public transport ticket infringements (including administrative charges)
- lawyers spent 51 hours working on each matter, translating to $16,640 in equivalent commercial legal fees[97].

197. Hearings rarely exceeded 10 minutes. My officers observed that it was common for hearings to include infringements that had been issued more than five years earlier.

198. My officers noted that many people who appeared before the Special Circumstances List may have been eligible for a PTV Access Travel Pass. The pass is designed for people with a significant permanent physical or mental disability who travel independently on the public transport network. A person is eligible for the pass provided that they:

- can travel independently on the public transport network
- are unable to use the ticketing system due to a disability
- have their application certified by a medical professional
- are a Victorian resident[98].

199. In nine of the 10 cases observed, it was found that special circumstances existed at the time the infringements were issued. While all of the matters my officers observed were found proven, no convictions were recorded. Only one person was required to pay a penalty, which amounted to less than one-quarter of the infringement amount.

At interview the Judicial Registrar said:

> Generally, it's dismissals under section 76 [of the Sentencing Act 1991][99], or an adjourned undertaking with conditions … counselling, drugs and alcohol treatment, that type of thing[100].

200. Data provided by the department confirmed that over 45 per cent of special circumstances matters are dismissed without conviction, withdrawn or struck out. In a further 28 per cent of matters the person was released without conviction and placed on an undertaking[101].

201. The department's figures also show that less than 14 per cent of cases brought before the Special Circumstances List by the department during 2014–15 resulted in a financial penalty being imposed on the offender[102].

97 Homeless Law, *Fair's Fare: Improving access to public transport for Victorians experiences homelessness,* 2016, page 10.

98 Public Transport Victoria, *Victorian Fare and Ticketing Manual 2016*, pages 23–24.

99 Section 76 of the *Sentencing Act 1991* states 'a court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) dismiss the charge'.

100 Interview with Judicial Registrar, 30 March 2016.

101 Email from Director Legal and Legislation, Department of Economic Development, Jobs, Transport and Resources, 26 February 2016.

102 Email from Director Legal and Legislation, Department of Economic Development, Jobs, Transport and Resources, 26 February 2016.

The cost to the system

During this investigation it became apparent that the process of an infringement notice ending up in the court system is protracted and expensive. However, the department has never analysed the costs associated with pursuing a prosecution through the Magistrates' Court.

For this reason, my office engaged forensic accountants to try and establish an indicative cost to the state of one infringement matter that ends up in the Magistrates' Court. This included attempting to account for the costs of AOs; departmental staff in the infringement, review and prosecution areas; as well as the cost of a court to hear a matter.

Despite extensive research of publicly available information and data, as well as examining material provided by the department and PTV, the forensic accountants were able to provide only basic costs which were, due to the significant gaps in data, considered unlikely to be sufficiently indicative.

To give the forensic accountants the further data they needed to provide a more accurate figure would have required time, money and resources not available to my office.

However, it is concerning that the overall cost, including the impact on the justice system, is not an explicit consideration in developing infringement policies, especially in light of how few infringements result in a monetary penalty.

This issue has previously been considered by several bodies[103] concerned with efficient and effective administration of justice. In 2014, the Law Institute of Victoria proposed establishing a framework where policymakers developing any policy likely to have an impact on the civil or criminal justice systems must prepare a justice impact assessment.

A similar model operates in the UK called the 'justice impact test' where consideration is given to the impact of policy right across the justice system: civil and criminal, including legal aid, courts and tribunals, prisons and probation services, prosecuting bodies and the judiciary. Under this model, policy-makers assess whether a policy will increase the volume of cases going through the courts.

In Victoria, formal mechanisms for assessing the impact of legislation and regulation are legislative impact assessments, regulation impact statements and statements of compatibility with the *Charter of Human Rights and Responsibilities Act 2006*.

However, it is apparent from the work of my office – not only in this investigation – that the impact of policy changes in one department on a justice system administered by another department is often not taken fully into account when considering the overall cost to the system.

103 The Law Council of Australia's policy statement (September 2013) proposed the Commonwealth adopts a national justice impact assessment process <www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Justice_Impact_Assessment_Policy_Statement_September_2013.pdf>.

Also considered by Victoria Legal Aid, in its response to the 2016 Access to Justice Review <www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-access-to-justice-submission.pdf>, viewed on 12 May 2016, pages 73–74.

Conclusions

> *'It is beneficial for the community to change the system because with the fines, it's like throwing paper at a fire.'*
>
> A homeless man's experience of the transport infringement system
>
> *Source: Justice Connect Homeless Law (full case study on page 44)*

202. Fare evasion on Victoria's public transport costs the state tens of millions of dollars and it is in the public interest to minimise this loss. A fare enforcement system needs to act both as a deterrent to those who consider fare evasion and as a sanction on those who do evade.

203. However, an enforcement system also needs to weigh these financial imperatives against what is fair and reasonable. The evidence from my investigation shows that the current enforcement system is not getting this balance right.

204. There are three overarching issues which emerge from my investigation:

    i. the present dual arrangement of penalty fares and an infringement process is not integrated

    ii. the way penalty fares are enforced focuses on financial return at the expense of fairness and equity

    iii. the court process for infringements is complex, distressing, lengthy, expensive and ultimately ineffective.

Penalty fares

205. The introduction of penalty fares to the enforcement system in 2014 appears to have helped reduce fare evasion. Revenue lost dropped by more than half between May 2014 and October 2015. However the operation of two systems has resulted in inconsistency and confusion:

- Penalty fares and infringements are imposed and processed by two different agencies – PTV and the department.
- There is no consistent guidance on, or exercise of, Authorised Officer discretion when using penalty fares or issuing RONCs, and no indication Authorised Officers are aware of, or are required to consider, the special circumstances provisions in the Infringements Act.
- Statutory rights to review are available for infringements but not penalty fares.

206. The business case that sat behind the introduction of penalty fares emphasises reducing fare evasion and providing incentives to the operators to support this. Allowing people a quick and easy option of paying a penalty without having to go through the infringement system has merit, but in practice has led to inequities:

- the requirement to make a decision on the spot, often under considerable pressure in a public place
- the confusion around whether discretion can be applied in the penalty fare context and on what grounds
- there is no statutory right to a review or appeal process for a penalty fare, which though less than an infringement, is still a significant impost.

207. If the penalty fare scheme is to be maintained, these issues need to be addressed.

208. A system that subjects people to a financial penalty must be supported by a robust and articulated appeals or review process. The UK scheme for penalty fares provides the opportunity for a reduced penalty if payment is made within 21 days while providing an appeals mechanism.

209. PTV uses the terms 'goodwill gestures' and 'ex gratia payments' when it has decided to review and withdraw the penalty fare. This is however an ad hoc process.

210. The penalty fare system creates two-tiered enforcement. People who can afford to pay the penalty fare are demonstrably better off as their penalty is reduced by around 66 per cent, an option that is not available to all people and is clearly inequitable.

211. While penalty fares may achieve the aim of allowing Authorised Officers to check more tickets on the transport system, it is not clear how effectively they deter recidivist fare evaders, which as Professor Currie pointed out, account for 68 per cent of lost revenue.

212. The lack of data collected by AOs on people paying penalty fares or other interactions means the system cannot effectively address recidivist fare evaders.

Authorised Officers

213. It is acknowledged that the role of an Authorised Officer is challenging and that appropriate exercise of discretion is difficult. However, a passenger's interaction with an Authorised Officer is the first and arguably best point in the fare enforcement system to exercise discretion.

214. The evidence of the two experienced Authorised Officer Team Leaders interviewed shows that exercising discretion is largely learned 'on the job' with insufficient material to help Authorised Officers use discretion consistently and appropriately.

215. It is imperative that Authorised Officers receive sufficient training and guidance on when and how to exercise discretion, including an awareness of special circumstances under the Infringements Act.

216. According to the department's reference notes, it appears an Authorised Officer can make a decision in the first instance whether to approach a passenger, but once they have approached the passenger, they can only exercise discretion when the passenger has declined a penalty fare and a RONC is to be issued.

217. Given that more than 70 per cent of matters that meet the special circumstances criteria and proceed to court are dismissed, withdrawn, struck out or no penalty is imposed, there is clearly opportunity for Authorised Officers to exercise more discretion at this initial stage.

218. The difficulties of people experiencing homelessness who are subject to fare enforcement indicates how this failure to exercise proper discretion affects some of the most vulnerable in our society.

Infringement notices and internal review

219. The infringements system has significant flaws which cost both the state and passengers considerable time, money and distress.

220. There are two opportunities for review – firstly before an infringement is issued to ensure it meets requirements, and secondly when passengers request review of an infringement notice.

221. The first of these is an administrative process that involves little consideration of the merits of the case; what may be viable explanations from passengers for not having a valid ticket are unlikely to be examined, given workload and the current approach. An infringement is generally issued.

222. Requests for review of infringement notices have risen by over 50 per cent since 2010, indicating significant dissatisfaction with the system. The lack of a genuine merits review is a real frustration to many and contrary to the principles of procedural fairness.

223. The pro forma letters used to advise people of the outcome of their review creates a perception that their arguments were not considered and leads to dissatisfaction with the review process.

224. The cases reviewed by my officers do not record the decision making process. It is not clear from one file to the next why a review may or may not have been successful.

225. While there may have been a thorough consideration of a person's request for review, this is not reflected on the department's file or in its outcome letter. This erodes public confidence in the review system and my office's ability to assess departmental decision making.

226. My investigation found that the problems in these areas are in part due to a lack of resourcing. The numbers of RONCs, infringements and requests for review have all increased since this office's 2010 report, yet overall staff numbers in the unit have declined by over 30 per cent. Without sufficient staff the infringement unit is unable to effectively perform its role.

227. Despite concerns identified by this office in 2010 and the recommendations made by my predecessor, there remain serious deficiencies in the department's infringements area. The recommendations accepted by the department in 2010 were not effectively implemented. This is disappointing.

Concession infringements

228. The penalty for concession infringements is disproportionate to the offence and does not take into account the means of those who are fined. Despite the fact that there is less, and in many instances, no revenue lost for a concession offence, the penalty of $223 is the same as that for someone travelling without a ticket.

229. The department's practice of withdrawing an infringement if someone can later prove their entitlement to concession only for a first offence is inflexible and unfair.

230. Requiring school students over 16, or those under 16 with a half-yearly or yearly travel pass, to carry a PTV issued concession card is unnecessary. School- issued student cards and uniforms should be sufficient proof of a concession entitlement.

The court process

231. My investigation revealed that the process by which an infringement comes before the Magistrates' Court is complex, confusing, expensive, time-consuming, and requires significant departmental resources. In addition, the department prosecutes more matters with less resources available to it than it did in 2010, leading to longer delays.

232. The department's prosecution teams and the courts are unable to respond in a timely way, meaning there can be an accumulation of infringements, escalating costs and lengthy delays. In the end, the state recoups a very small fraction of its costs in pursuing these matters, given that only two in ten result in any financial penalty.

233. The court system is disproportionately used in fare enforcement against vulnerable Victorians and those of limited means.

Special circumstances

234. The department's decision to prosecute special circumstances matters is unlikely to be in the public interest.

235. However, over 3,000 transport ticketing matters were heard in the Special Circumstances List last financial year, representing approximately 65 per cent of all ticketing matters prosecuted in the Magistrates' Court by the department. Less than 14 per cent of these cases resulted in a financial penalty.

236. People with special circumstances as defined in the Infringements Act are particularly vulnerable. They are required to manage a legal procedure and appear before the court (in some cases years after the alleged offence) only to have the matter dismissed, withdrawn, struck out or have no penalty imposed.

237. Significant costs are incurred by the state through the courts, and also by community assistance and legal organisations engaged to help people navigate the system.

Recommendations

To the Department of Economic Development, Jobs, Transport and Resources:

The choice/s for passengers without a valid ticket

Recommendation 1

The system should provide for a single penalty with the ability to seek a review.

Recommendation 2

How to seek a review or make a complaint should be made clear during a passenger's interaction with an Authorised Officer.

System should have clear escalation and review options

Recommendation 3

The system should provide for clear options if payment is not made, or if the penalty is challenged.

Recommendation 4

A review should be on the merits against objective, published criteria which include 'special circumstances', whether proof of concession has been provided and whether the person was an interstate, overseas or regional visitor who was unaware of how to comply.

Recommendation 5

The department should enable the lodgement of a review via an online form with predefined fields to assist the passenger to understand if their reasons are likely to fit the criteria for a successful appeal and to allow for faster internal processing.

Recommendation 6

The department should review its prosecutorial guidelines to ensure that in considering whether it is in the public interest to prosecute a matter, that court outcomes are considered, particularly where special circumstances or concession matters are involved.

Recommendation 7

The department should review the template letters it uses when providing responses to requests for review so they are in plain English and address the specific concerns raised by the passenger.

Authorised Officers

Recommendation 8

The guidelines that apply to Authorised Officers and their use of discretion should be amended to specify that, in the following circumstances, Authorised Officers should not issue Reports of Non-Compliance:

- where there is clear evidence that 'special circumstances' apply to a passenger
- where there is clear evidence that the passenger is visiting Melbourne from interstate, overseas or regional areas and was genuinely unaware of how to comply
- where there is clear evidence of concession entitlement, for example, where a school uniform is being worn or another card is available (Health Care Card or similar), even though the fare evader does not hold the required proof of concession entitlement.

Targeting recidivist offenders

Recommendation 9

The department should consider how a record of fare evasion can assist with targeting recidivist offenders, by for example, retaining a record of any warnings issued to passengers.

Concession cards

Recommendation 10

Penalties for concession offences should be withdrawn at the review stage if a concession entitlement existed at the time of the offence and can be proven.

Homeless people

Recommendation 11

The department should develop a protocol similar to that which exists in New South Wales, including that AOs are authorised to not issue Reports of Non-Compliance to homeless people.

Students

Recommendation 12

The department and Authorised Officers should accept Victorian primary and secondary school issued identification cards, or the wearing of school uniforms, as proof of concession entitlement for primary and secondary school students.

In its response to my draft report, the department stated:

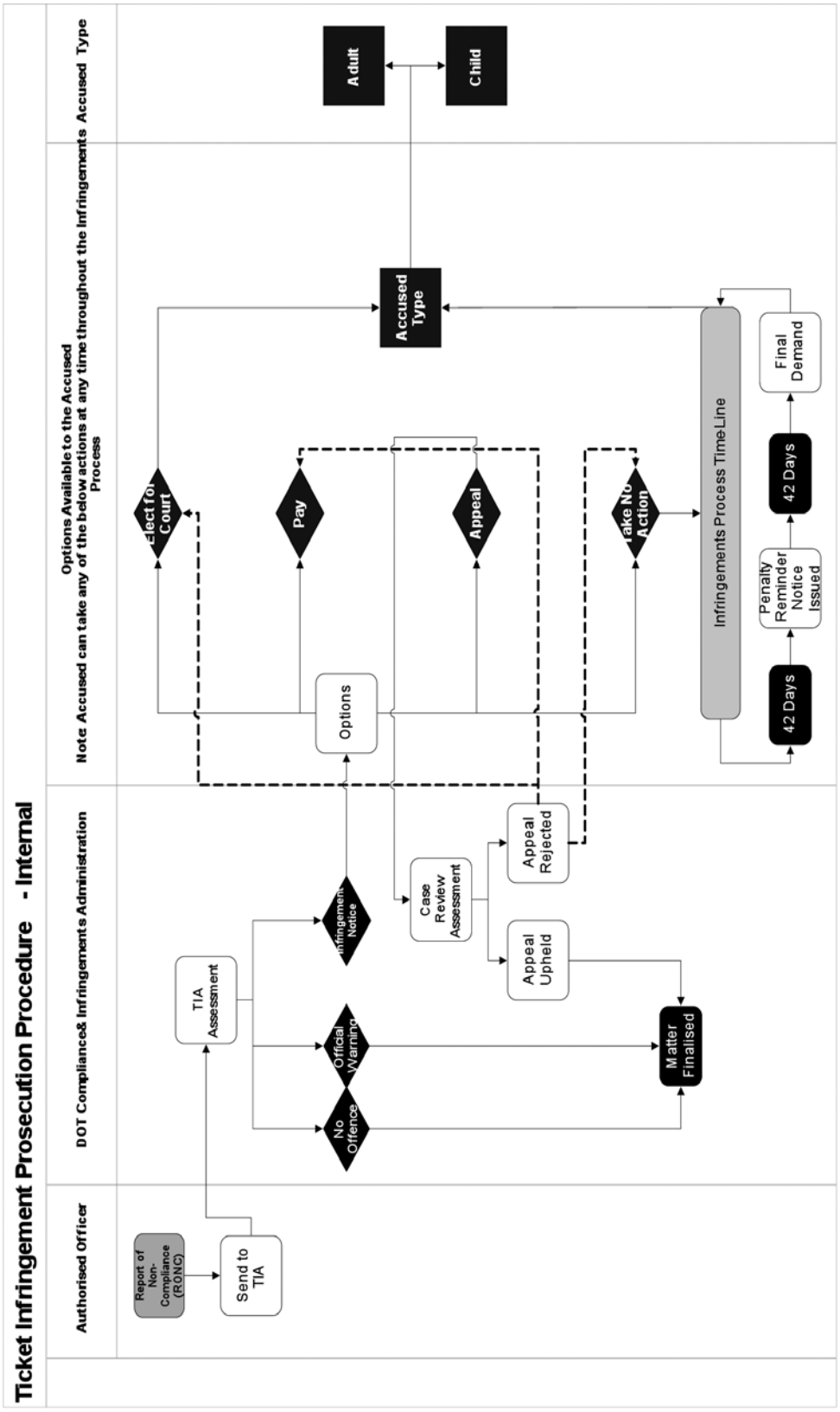
The department is in broad agreement with the conclusions and recommendations of the Victorian Ombudsman's own motion investigation into public transport fare evasion enforcement. As noted in the report, the department has also undertaken a review of ticketing compliance and enforcement. The key findings and recommendations of that review are expected to address the issues raised in this report and the consequential recommendations.

The Government's response to the department's review together with the report of the review are yet to be released.

List of abbreviations

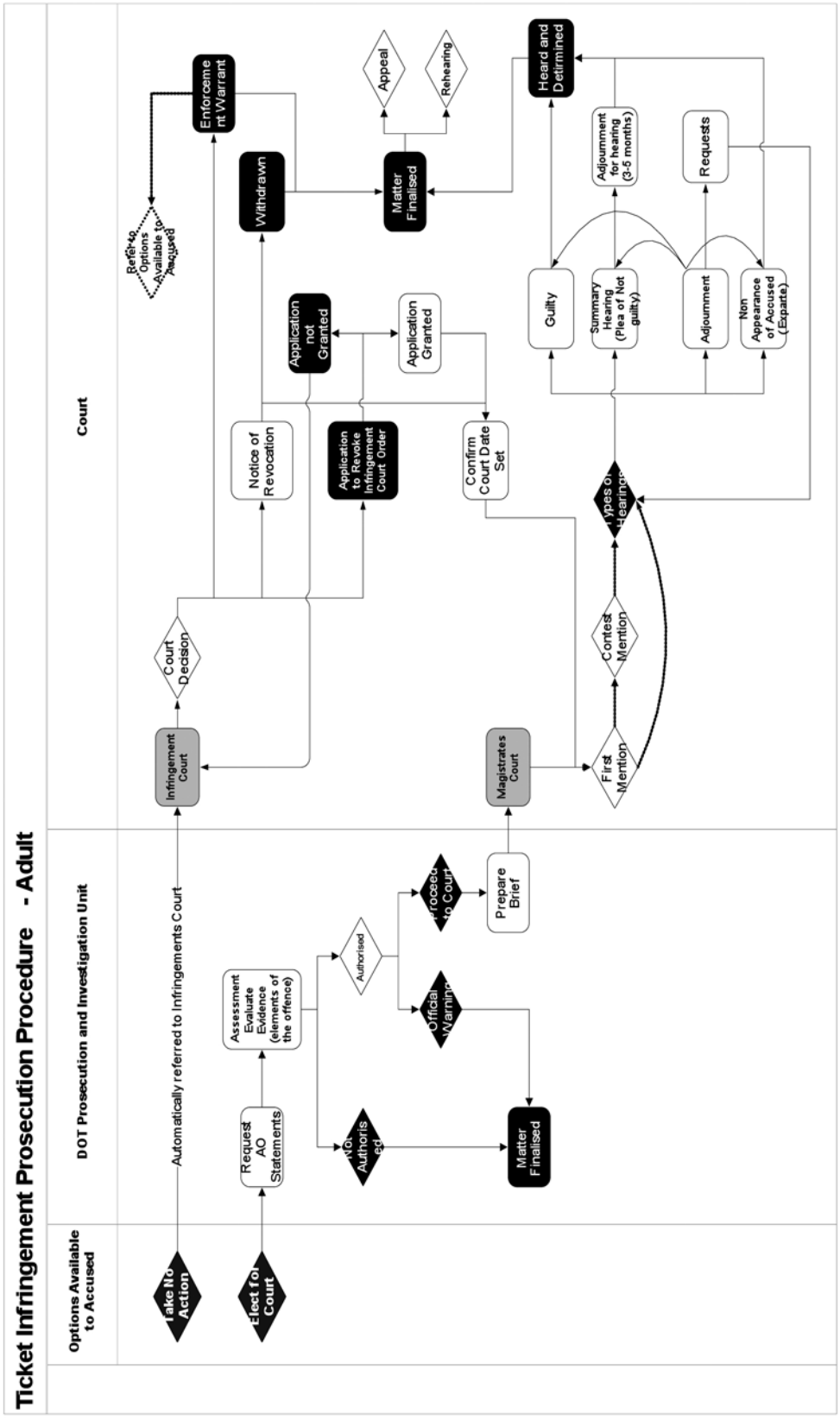
AO	Authorised Officers
department	Department of Economic Development, Jobs, Transport and Resources
OPP	Office of Public Prosecutions
PTO	Public Transport Ombudsman
PTV	Public Transport Victoria
RONC	Report of Non-Compliance
TIA	Transport Infringement Administration team of the department

Appendix A



Source: Department.

Appendix B



Source: Department.