VICTORIAN ombudsman

# Investigation into review of parking fines by the City of Melbourne

September 2020

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**The Victorian Ombudsman pays respect to First Nations custodians of Country throughout Victoria. This respect is extended to their Elders past, present and emerging. We acknowledge their sovereignty was never ceded.**

# 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* (Vic), I present to Parliament my *Investigation into review of parking fines by the City of Melbourne.*

Deborah Glass OBE
**Ombudsman**

16 September 2020

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# Foreword

*'It is not possible to tell the difference between an O and Zero on Victorian Number Plates … if it is not possible to tell the difference between the O and Zero then a customer would be of the genuine belief they have entered [it] correctly.'*

– Senior Prosecutions Officer to the Program Manager

Imagine your delight at finding a parking space in the city – back in the days when we could travel and the city was choked with traffic. You pay for your parking via the PayStay app. But you return to your car to find an infringement stuck to your windscreen. What went wrong, you wonder, until you realise you have confused the number 0 with the letter O in your registration. You apply for a review on the basis you have made an honest mistake and have, after all, paid for the parking. But it is rejected, and if you want to object you have to pursue the matter all the way to court.

That is the situation hundreds of people found themselves in over the past few years, when the City of Melbourne applied an overly rigid approach to parking errors. Not only upholding infringements on the zero/O error, but also in other situations where motorists made honest mistakes; in at least one case, where the council itself had made the mistake. The council's 'Decision Matrix' simply did not allow for the exercise of discretion.

Happily, this changed to some degree during my investigation.

But the lack of discretion – to allow common sense judgements – was both unfair and wrong. It is a theme I have commented on frequently over the years, and I am tabling this report to draw attention to it, and the consequences of doing it badly, yet again.

We estimate over 1,200 motorists were affected by a PayStay mistake, which the council could easily have checked when the driver requested a review. They also knew the number 0 and letter O were virtually indistinguishable on registration plates, and drivers would not be aware they had made an error.

Why did this happen? The allegation that the council was improperly raising revenue was not substantiated. The council was losing money taking these matters to court, although the practical outcome of inflexible decision making undoubtedly made a not unhealthy contribution to the Council's bottom line.

No, these actions were apparently driven by an entrenched, overzealous attitude of some in senior management in the parking branch, a mindset that the customer is usually wrong and drivers must be punished for their infractions, no matter how small the offence or how great the mitigation. This attitude continued for years, despite some council officers expressing concerns about it to management.

This mindset was further illustrated by the council rewording its Penalty Reminder Notice, ostensibly to encourage drivers to make payments as soon as possible, but against their own legal advice that the wording was misleading.

Ultimately, this investigation did not expose improper conduct as had been alleged, but a worryingly poor understanding by some in senior management of basic principles of fairness.

It was good to see many of the issues identified starting to be addressed during the investigation. The council has not shirked its responsibility for years of unfair decisions and has agreed to make amends, both on an individual and systemic level. I commend them for their response, and hope this report is a reminder to all who exercise discretion of the need to keep fairness at its heart.

Deborah Glass

**Ombudsman**

# Background

## The protected disclosure complaint

1. On 23 May 2019, the Independent Broad-based Anti-corruption Commission (IBAC) referred a matter to the Ombudsman for investigation pursuant to section 73 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic). IBAC had determined the matter to be a 'protected disclosure complaint' under the *Protected Disclosure Act 2012* (Vic).

2. Following legislative amendments effective from 1 January 2020, the Protected Disclosure Act was named the *Public Interest Disclosure Act 2012* (Vic), and a protected disclosure complaint is now known as a 'public interest complaint'.

3. The complaint alleged officers in the City of Melbourne ('Council') On-Street Support and Compliance Branch (or Parking Branch) reviewed or decided to prosecute parking infringements with the aim of raising revenue for the Council. It included allegations that:

    - the Prosecutions Coordinator misused his powers when reviewing and deciding to prosecute infringement notices
    - the Program Manager misused his powers when deciding to prosecute infringement notices.

4. The investigation also identified and considered issues regarding the Director of the Parking Branch arising out of the allegations.

## Jurisdiction

5. Members of Council staff are subject to the Ombudsman's investigative jurisdiction under the *Ombudsman Act 1973* (Vic).

6. The investigation was conducted under section 15C of the Ombudsman Act, which provides that the Ombudsman must investigate a public interest complaint, subject to certain exceptions.

## Methodology

7. On 5 August 2019, the Ombudsman notified the Minister for Local Government, the Chief Executive Officer of the Council, and the Lord Mayor, of her intention to investigate.

8. The investigation involved:

    - reviewing the following legislation, guidelines and policies:
        - *Local Government Act 1989* (Vic)
        - *Local Government Act 2020* (Vic)
        - *Infringements Act 2006* (Vic)
        - *Infringements Regulations 2016* (Vic)
        - *Road Safety Act 1986* (Vic)
        - *Road Safety Rules 2017* (Vic)
        - *Fines Reform Act 2014* (Vic)
        - Infringement Management and Enforcement Services Internal Review Guidelines, 2017, 2019 and 2020
        - Attorney-General's Guidelines to the *Infringements Act 2006* (Vic)
        - IMES's Annual Reports on the Infringements System, 2006-17.

- reviewing the following Council documents:
    - City of Melbourne Employee Code of Conduct (current, undated)
    - On-street Compliance Services – Parking Infringement Decision Matrix, July 2017 and October 2019
    - Prosecutions Team Checklist (Checklist), February 2019
    - Register of Legal Advice Provided to On-street Support and Compliance (Legal Advice Registry), from 1 July 2006 – present
    - Personnel records and emails of Council officers
    - A selection of Infringement Review and Prosecution files in the period 1 July 2018 and 1 July 2019
    - Infringement data for reviews conducted by the Council in 2016-17, 2017-18 and 2018-19
    - Parking revenue raised by the Council as reported in its Annual Reports in 2015-16, 2016-17, 2017-18 and 2018-19
    - Summary Income Statement City Operations, June 2019.

9. Four Council staff attended 'compulsory' interviews:
    - Prosecutions Coordinator
    - Program Manager
    - Director of the Parking Branch
    - Infringement Review Coordinator.

10. One provided a Statutory Declaration: Policy and Communications Adviser.

11. The Ombudsman was guided by the civil standard of proof, the balance of probabilities, in determining the facts of the investigation, taking into consideration the nature and seriousness of the allegations made and the gravity of the consequences that may result from any adverse opinion.

## Scope

12. This investigation examined the practices of Council's On-Street Support and Compliance Branch ('the Branch') prior to October 2019.

## Procedural fairness

13. This report includes adverse comments about the Program Manager and Director. In accordance with section 25A(2) of the Ombudsman Act, the investigation provided them with a reasonable opportunity to respond to a draft version of this report. This final report fairly sets out their responses.

14. A revised version of the draft report was subsequently provided to the CEO, who provided the Council's response on 28 July 2020.

15. In accordance with section 25A(3) of the Ombudsman Act, any other persons who are or may be identifiable from the information in this report are not the subject of any adverse comment or opinion. They are identified in the report, as the Ombudsman is satisfied that:
    - it is necessary or desirable to do so in the public interest, and
    - identifying those persons will not cause unreasonable damage to those persons' reputation, safety or well-being.

# City of Melbourne

16. The City of Melbourne is one of 79 local councils in Victoria operating under the Local Government Act.

17. The Local Government Act is the legislative framework that supports councils' key functions and powers. The new *Local Government Act 2020* (Vic) became law on 24 March 2020 and is being delivered in four stages. The new Act introduces a section detailing the integrity obligations of councils.

18. The City of Melbourne has its own legislation, the *City of Melbourne Act 2001* (Vic), which reflects its unique role as the council responsible for Victoria's capital city. This Act provides for electoral arrangements for the city.

19. The Council covers 37.7 square kilometres and has a residential population of 169,961. It is made up of a central business district and a number of inner suburbs, as identified in the map below. Council's budget for 2019-20 was $619 million.

**Figure 1: City of Melbourne boundaries**

*Source:* City of Melbourne website accessed in May 2020

## The Branch

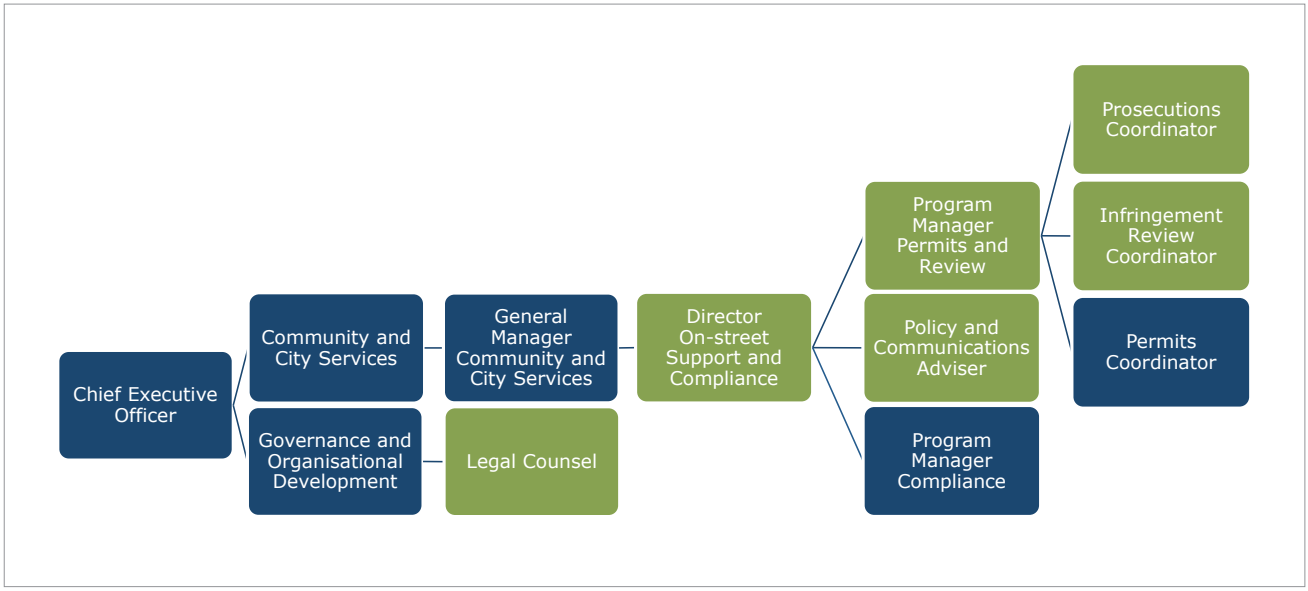
20. Council's street parking services are managed by the On-street Support and Compliance Branch, previously the On-street Compliance Branch. It is part of the Community and City Services Group (previously the City Operations Group) that manages Council's physical assets, maintains its infrastructure and delivers regulatory services.

21. Within the Branch, there are a number of teams. Relevant to this investigation are:

    - **Infringement Review Team:** considers applications for internal reviews of infringements and determines the outcomes in line with legislation and the Council's policies.
    - **Prosecutions Team:** prosecutes infringements in the Magistrates' Court on behalf of the Council. This team also processes driver nominations and has responsibility for improvement activities and projects.

22. Figure 2 below shows a section of the Council's organisational chart, identifying how the Infringement Review and Prosecutions Teams fit into Council's structure. The roles relevant to this investigation are highlighted in green.

**Figure 2: Part of the organisational structure of the Community and City Services branch at the Council, as at 30 March 2020**




*Source:* Victorian Ombudsman (incorporating information from City of Melbourne website as at 15 June 2020)

## Relevant staff

### Program Manager

23. The Program Manager for the Permits and Reviews teams has been employed in this role since January 2009. He manages three business areas – Infringement Reviews, Prosecutions and Permits. These areas are overseen by three Coordinators each of whom manages about 10 staff. As Program Manager, he is responsible for providing direction 'to deliver permits and review services in line with legislation and Council objectives'.

### Prosecutions Coordinator

24. The Prosecutions Coordinator reports to the Program Manager. He has been the Branch's Prosecutions Coordinator since April 2015. He manages nine staff including a Senior Prosecutor and Prosecutors. This team assesses infringement matters that may proceed to the Magistrates Court.

### Director

25. The Director of On-street Support and Compliance has oversight of the Branch. He has been in this role since July 2017 and reports to the General Manager of Community and City Services. He has 10 Program Managers who report to him, including the Program Manager in this investigation.

### Infringement Review Coordinator

26. The (then Acting) Infringement Review Coordinator oversees approximately 10 Infringement Review Officers who respond to requests for reviews of infringements issued by the Council. At the time of interview, she had been the Infringement Review Coordinator for 15 months, reporting to the Program Manager. Prior to this, she was an Infringement Review Officer and a Senior Infringement Review officer for several years.

### Policy and Communications Adviser

27. The Policy and Communications Adviser plays a key role in 'providing advice and contributing to Branch strategy development as well as policy and process review'. She reports directly to the Director of the Branch.

### Chief Legal Counsel

28. The Council's Chief Legal Counsel is part of the Governance and Organisational Development division. He provides advice to Council staff, including the Branch, as required. His advice is recorded in the Council's Legal Advice Register, a spreadsheet that records the following details:

    - the advice requested
    - by whom
    - the legal advice provided
    - any action taken in response to the advice.

## Conduct standards for Council officers

29. As Council employees, the Branch staff are required to comply with the conduct obligations in the Local Government Act and the Council's own Code of Conduct.

### Local Government Act

30. Section 95(1) of the *Local Government Act 1989* (Vic) sets out the conduct obligations of council staff:

> Council staff must in the course of their employment –
>
> (a) act impartially;
>
> (b) act with integrity including avoiding conflicts of interest;
>
> (c) accept accountability for results;
>
> (d) provide a responsive service.

31. In accordance with section 95AA, the Chief Executive Officer of each council must develop and implement a code of conduct for staff.

32. The new Local Government Act introduces changes to the conduct obligations of council staff that will commence on 24 October 2020.

## City of Melbourne Code of Conduct

33. The Council's Code of Conduct sets out the standards and behaviours expected of its employees.

34. The values described in the Code of Conduct are:

    - Integrity: Is honest and reliable in all dealings with others and conducts activities professionally and ethically.
    - Courage: Steps out of comfort zone and accepts responsibility for the consequences of actions.
    - Accountability: Takes personal responsibility for decisions and actions to achieve agreed outcomes.
    - Respect: Values the contribution and individuality of others and contributes to healthy working relationships.
    - Excellence: Aims to achieve the highest standard and best possible result in everything.

## Victorian Model Litigant Guidelines

35. Victoria has Model Litigant Guidelines, issued by the Department of Justice and Community Safety in 2001 and revised in 2011. They set the standards required of State agencies in their decision making involving legal proceedings.

36. When taking matters to court, State agencies are expected to behave as a 'model litigant'. They are required to act fairly, including:

    - acting consistently
    - paying legitimate claims
    - taking steps to avoid and limit the scope of legal proceedings.

37. The obligation to act as a model litigant requires more than acting honestly and in accordance with the law and court rules. It goes beyond the requirement for agencies' lawyers to act in accordance with their ethical obligations.

38. The Council advised the investigation that it voluntarily abides by the Model Litigant Guidelines.

# The infringements system

39. This investigation is about decisions made by Branch staff when reviewing and deciding whether to prosecute parking infringements. These reviews and decisions should be made in accordance with the legal and administrative framework in Victoria for parking infringements.

## Issuing a parking infringement

40. Parking rules in Victoria are made pursuant to the *Road Safety Act 1986* (Vic) and are set out in Part 12 of the *Road Safety Road Rules 2017* (Vic) ('the Road Rules').

41. The purpose of the Road Rules, and the parking rules in particular, is to ensure the equitable, free flow of traffic in public areas. If a driver parks their vehicle in a way that contravenes a Road Rule, they are liable for the penalty imposed by the Road Rule.

42. For example, Rule 167 provides:

> 167 No stopping signs
>
> A driver must not stop on a length of road or in an area to which a no stopping sign applies.
>
> Penalty: 3 penalty units.

43. Penalties are set in 'penalty units', a dollar amount fixed annually under the *Monetary Units Act 2004* (Vic). It matters not whether the driver intended to park contrary to the Road Rules, only that the offence occurred. This is known as a 'strict liability' offence.

44. Breaches of Road Rules are considered minor offences, and are generally managed within Victoria's infringements system rather than by the courts.

45. Parking infringements are issued by 'enforcement agencies', such as councils, authorised under the Infringements Act 'to take proceedings for the infringement offence'.

46. The Attorney-General's Guidelines 2006 provide that the purpose of the infringement notice system is to offer 'an alternative method for dealing with minor offences, giving the person to whom a notice is issued the option of paying a fixed penalty, rather than proceeding to a court hearing'.

47. Once a parking infringement notice is issued, the driver has 28 days to pay the penalty amount, or to dispute the infringement. Drivers can dispute infringements by:

    - seeking an internal review from the enforcement agency
    - taking the matter to court.

48. If they do not take any action, a Penalty Reminder Notice is sent, and they have a further 21 days to pay or dispute.

49. After this time, if the driver still does not pay or dispute the infringement, the infringement is registered with the Victorian Government's fines agency, Fines Victoria, for enforcement. Fines Victoria sits within the Victorian Department of Justice and Community Safety.

## Review of an infringement

50. If a driver wants an enforcement agency (such as a council) to review its decision to issue the infringement, they can write to the agency and ask for an internal review. The agency has 90 days to complete the review.

51. The Council states that Infringement Review Officers are given the authority to conduct reviews by virtue of section 3(1) of the Infringements Act, as employees of the Council. On one interpretation, this suggests that Infringement Review Officers make their decisions under an implied delegation, meaning they are each decision makers in their own right.

52. The grounds for review are set out in section 22 of the Infringements Act. They include:

    - the decision to serve the notice was contrary to law (eg the person received a parking infringement even though they complied with the law)
    - there was a mistake of identity
    - the person was experiencing 'special circumstances' at the time of the infringement (eg the person had a disability or serious addiction, or was experiencing homelessness or family violence, and could not control the conduct that constituted the offence)
    - the conduct should be excused having regard to 'exceptional circumstances' (eg a vehicle breakdown or an acute illness).

53. The purpose of an internal review in the infringement system is to ensure infringements can be withdrawn where:

    - the agency has erred in exercising its legal power
    - the notice was valid, but circumstances in the driver's life mean that enforcement of the infringement notice is not appropriate on fairness or equity grounds.

## What can a reviewer take into account when making a decision?

54. The Infringement Management and Enforcement Services (IMES) is a part of the Department of Justice and Community Services, and is responsible for the end-to-end management of the infringement system in Victoria.

55. Pursuant to the Infringements Act, the Director of IMES has issued Internal Review Guidelines ('Guidelines') to encourage the:

    > development of consistent decision-making processes and assist agencies in identifying the legal and practical requirements of an internal review process.

56. The Guidelines are gazetted and set out 'the obligations of enforcement agencies in performing the internal review function'. The IMES Director reports annually to the Attorney-General on the conduct of internal reviews by enforcement agencies.

57. The Guidelines guide enforcement agencies on the types of evidence an internal reviewer should consider in their decision, how to weigh up the information provided, and how to communicate their decision.

58. There are several outcomes open to a decision maker who has conducted an internal review under the Infringements Act:

    - confirm the decision to serve the infringement (the Council calls this 'proceeding' with the infringement)
    - withdraw the infringement and issue a formal warning
    - withdraw the infringement
    - refer the matter to court.

59. Of note, the Guidelines stress that internal review decision makers should exercise discretion in each case:

> Enforcement agency decision-makers are **required to exercise their discretion** in making decisions within a legal framework consisting of legislative provisions and the requirements of general administrative law.
>
> Good internal review decision-making requires agencies to consider a range of matters. Many of these are technical requirements to ensure decision-makers exercise their functions properly. But the **purpose** of internal review and the role it plays in the infringement system is also a factor that should be taken into account (emphasis added).

60. The Guidelines also emphasise:

> administrative law principles such as lawfulness, fairness, openness and efficiency apply to the making of [these] decisions.

## Election to go to court

61. A driver can also elect to have the matter heard in court. They can do this either as an alternative to an internal review or after an internal review has been conducted, if they are not satisfied with the outcome.

62. The investigation notes that as the Council abides by the Model Litigant Guidelines, if a driver elects to go to court, Council agrees to act fairly in handling these claims and to take steps to avoid or limit the scope of legal proceedings (as a 'moral exemplar').

# Infringements at the Council

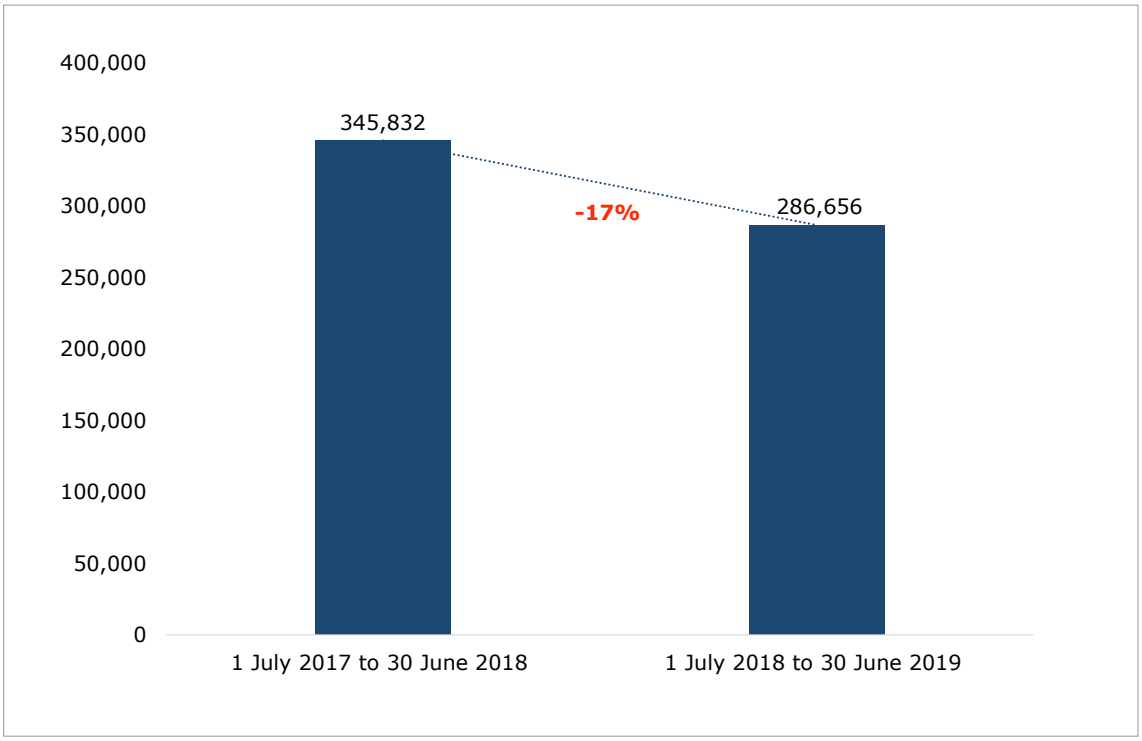
## Issuing of infringements

63. The Council's Parking Officers issued about 286,000 parking infringements in the 2018-19 financial year. This was a significant decrease compared to the previous year, as Figure 3 shows.

64. The Director of the Branch told the investigation there were two main reasons for the lower number of parking infringements:

- The introduction of smart meters, which make it easier for drivers to correctly pay fees (eg by using a card or the PayStay application) and for this to be verified. This removed the requirement to properly display a parking ticket.
- A reduction in the number of Parking Officers on patrol due to workers' compensation claims and a decision by many officers to work in pairs for security reasons.

**Figure 3: Parking infringements issued by the Council**



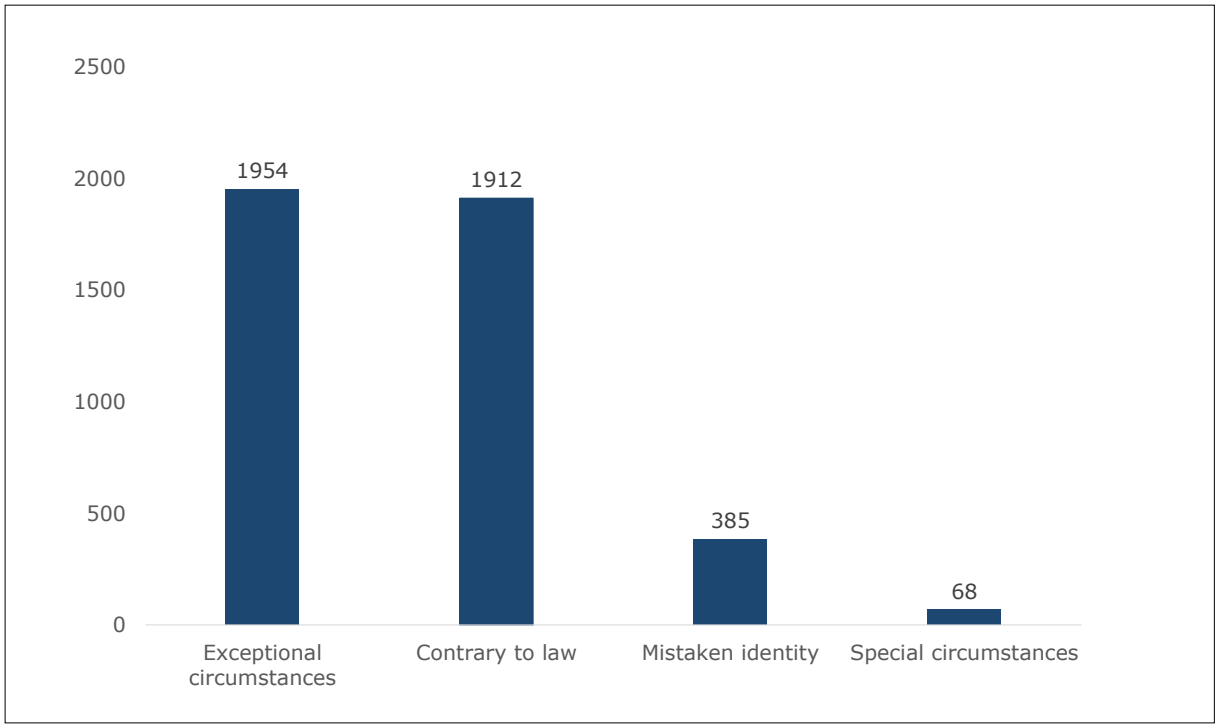

*Source:* City of Melbourne

## Internal review decisions

65. Of the 286,000 infringements issued by the Council in 2018-19, approximately 20,000 drivers (seven per cent) requested an internal review. The most common grounds were 'exceptional circumstances' and claims the infringement was 'contrary to law'.

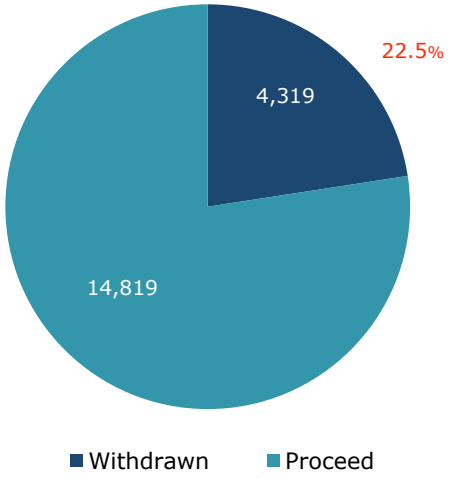
66. The Council withdrew approximately 22 per cent of infringements for which an internal review was requested. The remaining 78 per cent of decisions were 'proceeded' with.

**Figure 4: Most common grounds for internal review at Council, 2018-19**




*Source:* City of Melbourne

**Figure 5: Withdrawal rate for infringements reviewed, 2018-19**




*Source:* City of Melbourne

## How are internal review decisions made at the Council?

67. The Council has developed key documents to assist its Infringement Review and Prosecutions Officers with their decision making: a Parking Infringement Decision Matrix and a Legal Advice Register.

### The Decision Matrix

68. The IMES Guidelines appropriately allow enforcement agencies to develop policy documents to guide decision makers:

> Enforcement agencies may choose to structure the decision-making process by producing a set of questions for decision-makers to consider whether there is sufficient evidence to allow the application to be granted. These questions may be designed to meet administrative law requirements.

69. The Council's Decision Matrix describes scenarios for when the grounds for review defined in the Infringements Act would apply. It also provides examples for when grounds not defined in the Infringements Act, such as 'exceptional circumstances', could apply.

70. There have been several iterations of the Decision Matrix dating back to 2006. The Council aims to review it once a year.

71. Both the current 21 October 2019 and 1 July 2017 version of the Matrix describe 180 scenarios where a driver might apply for an internal review, ranging from a broken-down vehicle to death of a family member. The Matrix tells Infringement Review Officers when they can withdraw or proceed with infringements.

## Is the Matrix obligatory?

72. The investigation asked the Council's Program Manager if the Infringement Review and Prosecutions Officers are required to use the Decision Matrix for every decision they make. He said:

> some staff won't have to refer to it for every decision – for newer staff they may … it forms the basis of their decision but that does not mean they must follow it one hundred per cent of the time.

73. However, in an email to Infringement Review staff on 10 July 2017, the previous Prosecutions Coordinator stated:

> The matrix is a very important decision making and policy document that **must be followed**. If you don't follow it, you put the organisation and yourself at risk (eg acting beyond the scope of your work) (emphasis added).

74. In his response to a draft version of this report, the Prosecutions Coordinator said, starting from his early days in the role, the Program Manager:

> … made it clear the Decision Matrix was the sole point of reference to consider when reviewing cases for prosecution.

75. The Prosecutions Coordinator said he initially followed the Program Manager's direction that 'all matters should be resolved at court', but this changed as he gained confidence in his role.

76. The Council's former CEO explained in a letter to the Ombudsman dated 25 July 2018 that the Matrix ensures:

- we treat applicants for internal review of parking infringements consistently
- review decisions are made consistent with relevant legislation and
- our officers are not individually or inappropriately called up to apply subjective **discretion** (emphasis added).

## Does the Matrix allow for discretion?

77. The IMES Guidelines say decision makers are 'required' to exercise discretion when reviewing infringements. However, prior to 21 October 2019, the Council's Decision Matrix gave little discretion to Infringement Review Officers.

78. In his interview with the investigation, the Director said:

> one of the questions I asked … if somebody externally came in and said to an internal review officer 'Do you have discretion?' 'What do you think the answer would be?' … some would say 'absolutely' and some would say 'no, I don't'.

79. For the majority of the scenarios described in the Matrix in place prior to 21 October 2019, an Infringement Review Officer was only able to make the decision mandated by the Matrix.

80. For example, if they were satisfied that significant personal hardship existed at the time, the July 2017 Matrix allowed the decision maker to 'withdraw' the fine or withdraw the fine 'with caution', after seeking authorisation from their coordinator. The options are shown in Figure 6.

**Figure 6: The steps identified in the Council's Decision Matrix for making a decision on 'compassionate grounds'**

Decision steps ↓

| | |
|---|---|
| **Category** | Compassionate grounds |
| **Scenario** | Significant personal hardship existed at time of offence |
| **Grounds for decision** | May or may not be related to parking session<br>Eg: close family member passed away suddenly/ recent suicide of family member/ recently lost home and livelihood in fire |
| **Requirements for decision** | Independent third party verification in writing required. Coord discretion as to what specific documents can be provided.<br>Note: Tailored caution may be given where appropriate (Coord discretion). |
| **Proceed** | |
| **Withdraw with caution** | |
| **Withdraw** | |
| **Authorisation required** | Coordinator (not required in all cases – see investigation steps) |
| **Investigative steps required** | 1) Check if applicant has been previously cautioned 2) Prior to any WIP, consider seeking Coord agreement as to what info is required 3) Review provided documents. If death of family member occurred on day of PIN (and, for example, in close proximity to where death occurred), WD without Coord authorisation. If on another day or at another location, obtain Coord approval to WD by assigning SR to Coord [IR Team Coord to add notes authorising WD and confirming whether caution is appropriate]. |

*Source:* City of Melbourne

## When is approval required?

81. When asked 'who is responsible for the individual decisions' made in the Branch, the Director said: 'the individual Review Officers'.

82. However, despite having the authority to make review decisions, officers were required by the July 2017 Matrix to seek authorisation from a Coordinator for their decisions on 33 of the 182 scenarios listed. Eighty per cent of the scenarios (26 of the 33) that required a Coordinator to approve the decision were 'withdrawal' decisions.

83. The Infringement Review Coordinator explained in her interview with the investigation:

> Our Decision Matrix is very complex, and there are some lines where we will withdraw fines but where it requires Coordinators' authorisation.

## Changes made to the Matrix during the Ombudsman's investigation

84. In October 2019, during the investigation, the Council changed its Decision Matrix to give officers more discretion in their decision making.

85. The Director explained that when the Council reviewed the Decision Matrix, it decided to make it clear that Infringement Review Officers and Prosecutions Officers have 'reasonable discretion'.

86. He said they have did this in two ways. First, they included a banner on the top of each page:

> *Staff may also exercise discretion if they believe this is warranted by unique circumstances related to the infringement offence or the personal circumstances of the applicant. Relevant factors in this decision may include the offence type, circumstances surrounding the offence and expectations of what would be considered a 'reasonable' outcome to each case.*

87. Second, they included a new scenario category in the Decision Matrix for 'exceptional circumstances' cases when 'the reviewer believes discretion should be used'. This scenario, which the Director referred to as the 'have a heart clause', requires the reviewer to 'consider applicable evidence' and record the reasons for their discretion in the case notes. The Director said this clause was introduced in response to:

> having watched the Victorian Ombudsman's look at things, I think it's the 'have a heart' approach … had come through.

88. However, despite this new 'have a heart' discretion being added into the October 2019 Decision Matrix, the requirement for Infringement Review and Prosecutions Officers to make the decision mandated in all 180 other scenarios remains the same as in the July 2017 Decision Matrix.

### Legal Advice Register

89. Branch staff also have regard to advice from Council's Chief Legal Counsel. This advice is recorded in the Legal Advice Register.

90. The Register contains all advice provided by the Chief Legal Counsel in response to requests made by Branch staff for parking and parking-related issues. The Prosecutions Coordinator explained that the Register sits behind the 'Decision Matrix and management guidance that's provided to … staff to assist in making case decisions'. Page one of the Register says:

> The Register will be emailed monthly to the Director and other officers in the branch as nominated by the Director from time to time.

91. In practical terms, the Prosecutions Coordinator acts as the custodian of the Legal Advice Register for the Branch. He is responsible for seeking advice from the Chief Legal Counsel on behalf of the Branch and documenting the advice received. The Prosecutions Coordinator said:

> [the Chief Legal Counsel] emails the Legal Register at the start of every month to [the Program Manager, Director] and myself.

## Prosecution decisions

92. Approximately 1,000 drivers elect to have their matter heard in court each year. The Prosecutions Coordinator said about 80% of the infringements referred to court have already been through an unsuccessful internal review process with an Infringement Review Officer. In other cases, the driver elects to go straight to court.

93. Council Prosecutions Officers decide whether to pursue an infringement in court. Prosecutions Officers can undertake a review of an infringement by virtue of section 3(1)(b) of the Infringements Act which defines an 'enforcement agency' to include an officer who 'takes proceedings'. Their ability to represent Council in court derives from their appointment as 'authorised officers' under the Local Government Act. This gives them the ability to 'administer and enforce a law which relates to the functions and powers of the Council'.

### How does the Council decide whether to prosecute?

94. Like Infringement Review Officers, Prosecutions Officers are required to follow the steps detailed for each offence in the Decision Matrix.

95. In both the 2017 and 2019 Decision Matrix, Prosecutors are required to follow the 'outcomes' mandated by the Decision Matrix for each offence type and need to seek their Coordinator's authorisation (usually the Prosecutions Coordinator) to withdraw an infringement in most cases where withdrawal is an option. The 2019 Decision Matrix does allow them to use the 'have a heart' clause if they believe the scenario warrants discretion.

96. Prosecutions Officers, or on occasion the Senior Prosecutions Officer, have extra requirements because of the nature of the court process. They sometimes need additional evidence to that listed in the Decision Matrix. To guide them in making sure they have the required information, they use a Prosecution Checklist.

97. The Checklist is less prescriptive than the Decision Matrix and works as a reminder to Prosecutions Officers of all the factors they should consider.

### What happens at court?

98. When a matter is scheduled for hearing, the Parking Officer who issued the infringement will sometimes need to attend court to give evidence. Other forms of evidence such as system records and photographs are prepared for submission.

99. The Prosecutor, and on occasion the Senior Prosecutions Officer, appears on behalf of Council before a Magistrate or Judicial Registrar. The driver also attends, usually without a lawyer. They normally need to allow at least four hours for their matter to be called up before the court.

100. The investigation confirmed the majority of parking matters Council takes to court are found 'proven and dismissed' by the Magistrate or Judicial Registrar.

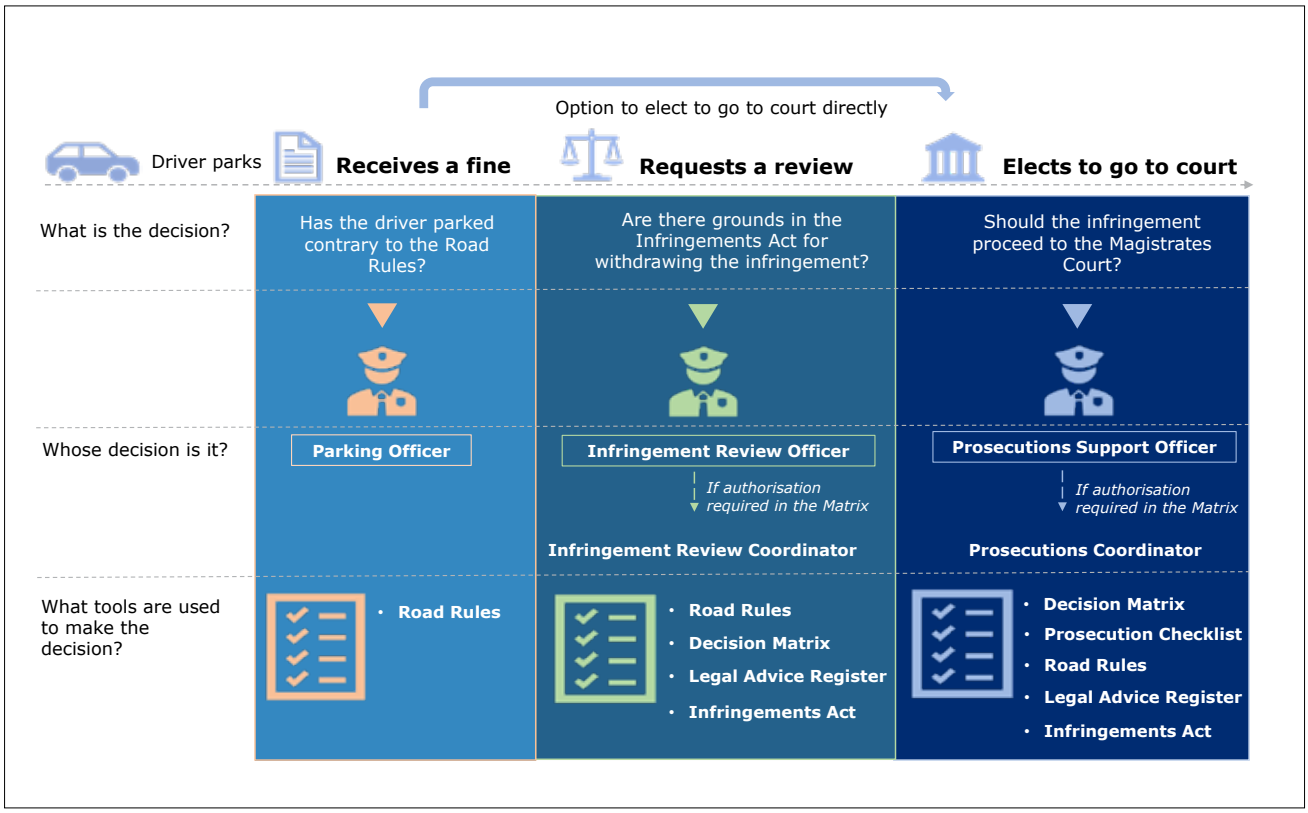
101. This refers to section 76 of the *Sentencing Act 1991* (Vic) which allows a court to find a charge proven, but dismiss the case, sometimes without recording a conviction or imposing a further penalty.

102. If the court doesn't impose a penalty, Council will often seek to recover some of its costs in taking the matter to court. This cost will usually be between $84.40 and $130.

103. The current penalty for a standard parking fine issued by Council is $83. A driver issued with an $83 infringement whose matter is found to be 'proven and dismissed' in court, is not required to pay the $83 infringement but may be required to pay up to $130, being the cost of the court appearance.

104. Figure 7 shows the decision making responsibilities of Infringement Review and Prosecutions Officers at the Council and the tools they use to make their decisions.

**Figure 7: Decision making in the Branch**




*Source:* Victorian Ombudsman (incorporating information from City of Melbourne)

# Council's decision making

105. The protected disclosure complaint alleged Council officers misused their internal review and prosecution powers to raise revenue for the Council. The discloser provided several examples where the Council continued to pursue infringements that were arguably unfair.

106. The investigation reviewed a random sample of reviews conducted by the Branch between 1 July 2018 and 1 July 2019, before the introduction of the new Decision Matrix in October 2019. The sample included:

    - 100 reviews randomly sampled
    - 50 reviews where the outcome was 'proceed'
    - 50 reviews where the outcome was 'withdraw'
    - 50 reviews where the driver elected to have the matter heard in court
    - 50 reviews where the driver had used PayStay and elected to have the matter heard in court
    - 50 reviews where the fine was withdrawn after the driver elected to have the matter heard in court.

107. These 350 infringement reviews showed that in approximately 10 per cent of reviews where the fine was upheld, the driver had made an error but had otherwise paid for parking or made reasonable attempts to comply with the Road Rules.

108. The investigation focused on three examples of these scenarios, which involved cases where a driver:

    - paid the parking fee, but accidentally put the wrong car registration into the PayStay application
    - incurred the infringement because of a Council signage error
    - used an unexpired ticket given to them by another driver (known as 'ticket passing').

109. These scenarios exemplified a recurring preference by Council officers to adopt an overly rigid approach to drivers' conduct when there was a clear and reasonable basis for exercising discretion.

## Driver errors using the PayStay app

110. The Council's 2017 and revised October 2019 Decision Matrix identify scenarios in which drivers have evidently tried to comply with the Road Rules but have made a simple error. In many cases, in the former Decision Matrix, the only outcome available to the Infringement Review Officers and Prosecutions Officers was to 'proceed' with the infringement.

111. Some of these scenarios involve drivers making simple errors when using the PayStay app to pay parking fees. These errors include drivers:

    - mistaking the number zero for the letter O when entering their vehicle registration number into the app (the zero/O error)
    - mixing up other letters and numbers when entering their vehicle registration number, such as mistaking the number 1 for the letter I
    - putting the wrong parking zone number into the app
    - choosing the wrong vehicle registration number, where they have multiple registration numbers registered in the app.

112. In the 2017 Matrix which was in place until October 2019, the outcomes Officers were required to follow for these scenarios are outlined on the next page.

| Figure 8: Approach to PayStay errors in the 2017 Matrix | | |
|---|---|---|
| **Scenario No.** | **Scenario** | **Outcome** |
| 19.1 | **Paid for another zone**<br>eg accidentally entered wrong 8-digit zone number when starting session / paid for an adjacent or non-adjacent zone | **Proceed** |
| 19.2 | **Selected or entered wrong registration**<br>Multiple vehicles registered on PayStay account (eg driver mistakenly selected the family's other car on the day) OR<br>Incorrect vehicle registered on PayStay account from beginning (eg driver mistakenly registered ABC123 instead of ABC132) OR<br>Driving another vehicle not listed on their account (eg driving a hire car while regular car being serviced/driving friend's car/ recently sold vehicle) | **Proceed** |

*Source:* City of Melbourne

113. Emails sourced by the investigation show that of the 450 reviews the Infringement Review team conducted weekly from 1 July 2018 to 30 June 2019, about 30 each week related to the wrong zone error and about 30 each week related to the wrong registration errors. These errors comprised about 13 per cent of the reviews conducted.

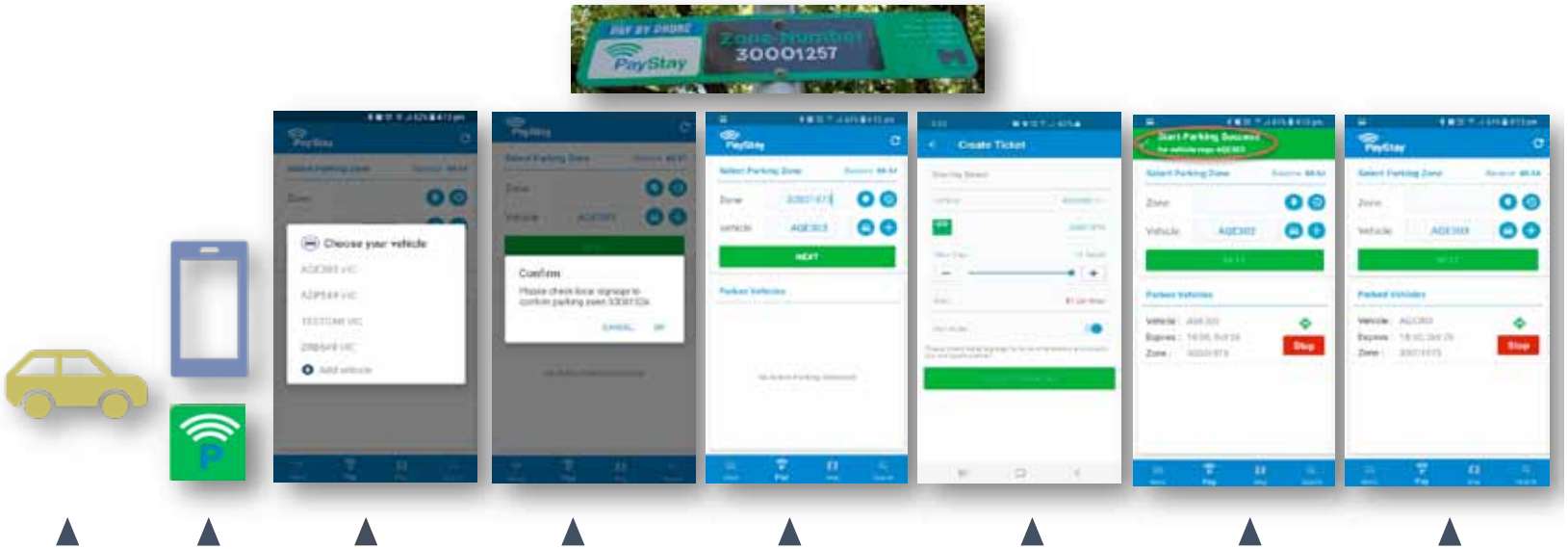
114. Of the wrong registration errors made by drivers, the most common error was the zero/O error. The investigation looked at Council's handling of that issue. These decisions have a long and complicated history.

## How PayStay works

115. The Council started allowing drivers to use the PayStay app to pay for parking fees in 2014. When using the app, drivers need to enter the parking zone their car is parked in, followed by their vehicle registration number. They are then prompted to pay for the parking session by entering their credit card details into the app.

116. Figure 9 (on the next page) shows the steps a driver is required to take before they can pay for parking using the PayStay application.

Figure 9: How the PayStay application works




| Driver finds a park. | Driver launches PayStay app to start a parking session. | Once the PayStay app has launched, the user selects 'Vehicle' to choose which of their registered vehicles they are parking. Or they can add a new vehicle. | The user types in the zone number for the parking space they wish to use, or uses the GPS button to obtain the nearest zone or the recent zones history button. | The user selects 'Next' to proceed to the 'Create Ticket' screen. | The 'Create Ticket' screen details the location/pricing information of the selected zone. The user is prompted to start a session by selecting the 'Start Parking' button. | Upon selecting 'Start Parking', a session is automatically available for review and enforcement, via the PayStay Council portal. The user can see when the session will expire. |
|---|---|---|---|---|---|---|

*Source:* Victorian Ombudsman (incorporating information from 'PayStay/PinForce Workflow' document, prepared by Database Consultants Australia, 5 September 2019)

## What is the PayStay zero/O error?

117. This error occurs when a driver mistakes the number zero for the letter O in their number plate. As the Senior Prosecutions Officer explained to the Program Manager in an email in 2018:

> It is not possible to tell the difference between an O and Zero on Victorian Number Plates … if it is not possible to tell the difference between the O and Zero then a customer would be of the genuine belief they have entered [it] correctly.

118. To complicate matters, in Victoria, the alpha-numerical order of number plates changed in August 2013. Prior to August 2013, a Victorian number plate had the alpha-numerical order ABC-123. An example of a number plate prior to August 2013 is provided below.

119. In that number plate there is the letter O and the number zero. The shape and size of the zero and the letter O appear identical; and unless the driver had easy recall of the alpha-numerical order, they could easily be mistaken and enter details incorrectly into PayStay.

120. Vehicles registered in Victoria after August 2013 were allocated number plates with an alpha-numerical order 1AB-1CD. An example of a number plate issued after August 2013 is provided below.

121. In this number plate, the letter O appears between the 7 and the D, but it is not difficult to see that many drivers would mistake this for the number zero.

## Why are drivers fined for this error?

122. Drivers who make this error are issued an infringement by Council for contravening Road Rule 207(2).

123. The investigation understands Council Parking Officers issue infringements because when they enter the correct vehicle registration into the app there is an automatic system check of the PayStay application for the registration, but no payment is recorded for that vehicle. For example, a driver might incorrectly input 1EJ 70D (the number zero) instead of correctly entering 1EJ 7OD (the letter O) into the app. The Parking Officer sees the registration plate 1EJ 7OD (the letter O) and enters that into the app, but no payment appears. They then issue an infringement for contravening Road Rule 207(2).

124. Parking Officers can double check by entering the parking zone number into the app, which would show if someone has paid the parking fee using another vehicle registration. But the Director of the Branch told the investigation it was up to Parking Officers to decide whether to take that extra step.

**Figure 10: Road Rule 207**

**207 Parking where fees are payable**

(1) This rule applies to a driver who parks on a length of road, or in an area, to which a *permissive parking sign* applies if information on or with the sign indicates that a fee is payable for parking by buying a ticket or putting money into a parking meter.

**Note**
***With*** is defined in the dictionary.

(2) The driver must—
(a) pay the fee (if any); and
(b) obey any instructions on or with the sign, meter, ticket or ticket-vending machine.

Penalty: 2 penalty units.

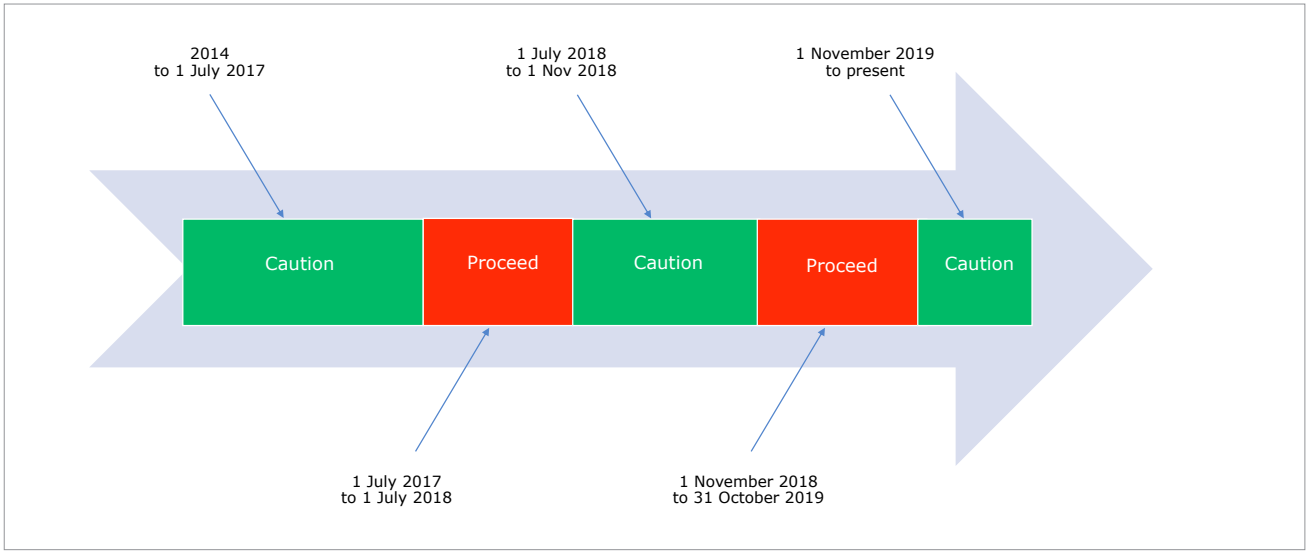
*Source: Road Safety Road Rules 2017* (Vic)

## Council's response to disputed fines

125. If a driver disputes an infringement, Infringement Review Officers and Prosecutions Officers can log into the PayStay portal and easily confirm whether the driver has mixed up the zero and letter O.

126. Over the last four years, the Council has changed its position several times on whether to withdraw or uphold these infringements. Figure 11 shows the change in approach the Council has taken to PayStay zero/O error infringements.

**Figure 11: Council's approach to PayStay zero/O errors on infringements where internal review or court election requested**




*Source:* Victorian Ombudsman (incorporating information from City of Melbourne)

127. The reasons provided by Council for this changing approach are summarised below.

**Table 1: Reasons for Council's approach to PayStay zero/O errors**

| Time frame | Approach | Reasons for this approach |
|---|---|---|
| **2014 – 1 July 2017** | **Caution** | Council's former CEO advised the Ombudsman on 25 July 2018 that Council cautioned drivers who made errors in entering details into PayStay from the introduction of the smart meters in 2014 until 1 July 2017. This was to allow drivers time to become accustomed to the new technology. |
| **1 July 2017 – 1 July 2018** | **Proceed** | Council says that as of 1 July 2017, it decided drivers were being given sufficient prompts within the app to check their registration before starting a parking session.<br>The investigation understands that the prompts in the PayStay application in place from 2016 onwards said: 'Please ensure you enter the correct registration and do not mistake #0 and letter O'. |
| **1 July 2018 – 1 Nov 2018** | **Caution** | From 1 July 2018 to 1 November 2018, Council reverted back to 'cautioning' drivers again for a brief time. It says it did this to allow PayStay time to complete some actions that would 'strengthen the message'.<br>Specifically, PayStay engaged in a data-cleansing exercise where they emailed approximately 9,000 drivers who had incorrectly entered their registration details to request that they log into their account to check their registration and correct the error. |
| **1 Nov 2018 – 31 Oct 2019** | **Proceed** | From 1 November 2018 to 31 October 2019, Council changed its approach back to 'Proceed' again.<br>The Policy and Communications Adviser told the investigation that it did so because 'we were satisfied that PayStay had implemented multiple steps along the way where a driver was alerted to their error and had a chance to rectify it.<br>'Importantly, PayStay had also proactively contacted all of the drivers with a possible error in the registration linked to their account'. |
| **1 Nov 2019 – present** | **Caution** | On 1 November 2019, Council changed its position back to 'Caution'. At interview, the Director of the Branch said the reason for the change was the realisation that 'some drivers didn't know their registration number'.<br>The Program Manager said the change in approach was made because on reflection, it appeared the actions PayStay had completed from July 2018 to November 2018 didn't have the effect the Branch thought they would have. |

*Source:* Victorian Ombudsman (incorporating information from City of Melbourne)

## The decisions to uphold the fines

128. Evidence to the investigation shows that the Coordinators and Infringement Review Officers had no or little input into the decision to start upholding the PayStay zero/O infringements in July 2017. The decision was made by the authors and custodians of the Decision Matrix: the Director, Program Manager and Policy and Communications Adviser.

129. The 2017 Decision Matrix mandated the following approach for the review and prosecution of PayStay registration errors (see Figure 12 below).

130. As shown below, there was no discretion for Infringement Review or Prosecutions Officers to provide a caution or withdraw these infringements. Nor were they encouraged to investigate whether the driver had paid for the correct time parked but with an incorrect registration, which could have been checked easily on the PayStay portal. Prosecutions Officers also obtain reports for both correct and incorrect vehicle registrations, enabling them to identify a payment made for a different registration.

131. The same process occurred for the 1 November 2018 change.

**Figure 12: The steps identified in the 2017 Decision Matrix for making a decision on 'PayStay wrong registration'**

Decision steps

| | |
|---|---|
| **Category** | Paystay |
| **Scenario** | Selected/entered wrong rego. |
| **Grounds for decision** | Multiple vehicles registered on PayStay account (e.g. driver mistakenly selected the family's other car on the day) OR<br>Incorrect vehicle registered on PayStay account from beginning (e.g. driver mistakenly registered ABC123 instead of ABC132) OR<br>Driving another vehicle not listed on their account (e.g. driving hire car while regular car being serviced/driving friend's car/ recently sold vehicle)<br>AND Driver had multiple opportunities to check rego. |
| **Requirements for decision** | PayStay confirms paid for wrong rego at PIN issue time. |
| **Proceed** | |
| **Withdraw with caution** | |
| **Withdraw** | |
| **Authorisation required** | Verify applicant's payment of another rego. |

*Source:* City of Melbourne

132. The Policy and Communications Adviser told the investigation:

> I am the author of the decision matrix, but any decisions made to change the matrix are made by [the Program Manager, Director] and myself after meeting with the teams that are going to be impacted … – usually the infringement review and prosecutions teams primarily.

133. Emails from this time show that the Infringement Review and Prosecutions Coordinators were not involved in the meetings to discuss the change. The first time they reportedly became aware of it was in an email the Policy and Communications Adviser sent on 16 October 2018 (see Figure 13 below).

## Concerns amongst Council officers

134. The 1 November 2018 change to the Decision Matrix did not allow the Infringement Review Officers and Prosecutions Officers any discretion to make decisions based on individual circumstances. The Matrix required them to uphold these infringements.

135. The decision to uphold or 'Proceed' on these infringements caused stress to some Infringement Review and Prosecutions Officers.

136. The Policy and Communications Adviser said:

> A lot of the team members didn't like that we were proceeding on these infringements because they found that these were the hardest letters to write, the hardest phone calls to take and least rewarding cases to prosecute. We totally understood that – dealing with upset drivers can of course be difficult.

137. The Prosecutions Coordinator said this issue was:

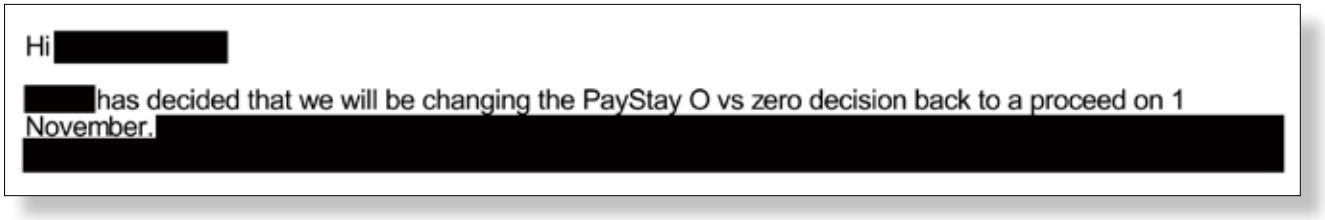
> a source of tension between me and my team over time, I kept pushing and pushing, but I know my position.

138. He said he knew of at least one staff member who had left the Branch as a result of the stress caused by having to enforce this position.

139. He said he had tried to express his team's concerns to the Program Manager:

> I have been battling this with [him] for ages - I just think it's morally wrong. These people have used a service we provide. It never had algorithms in it to prevent people from entering the number plate incorrectly – I don't think the algorithms are strong enough now …

**Figure 13: Email from Policy and Communications Adviser to Infringement Review and Prosecutions Coordinators, advising them of Director's decision, 16 October 2018**


Hi [redacted]

[redacted] has decided that we will be changing the PayStay O vs zero decision back to a proceed on 1 November.

140. The Infringement Review Coordinator told the investigation she also developed concerns over time about the inability of drivers to differentiate between zeros and Os, although she could not recall the time she came to this view. She thought it may have been early 2018. She said she had asked a driver to send her their registration papers and after seeing those, she was satisfied it wasn't possible for drivers to tell the difference between zero and the letter O.

## Several staff expressed concerns about proceeding on these infringements, including the Chief Legal Counsel

141. The investigation identified five emails in which Branch staff and the Chief Legal Counsel raised concerns about upholding these infringements.

### November 2017

142. The Prosecutions Coordinator first expressed his concerns in an email to the Chief Legal Counsel on 30 November 2017. He said he was 'seeing around five cases a week' where drivers were taking these infringements to court.

143. The Chief Legal Counsel responded on 4 December 2017.

**Figure 14: Legal advice provided to the Prosecutions Coordinator, 4 December 2017**

**Legal advice the subject of legal professional privilege**

[redacted]

I refer to your email of 30 November 2017.

As you have noted rule 207(2) of the *Road Safety Road Rules 2017* provides that where there is a permissive parking sign in association with a ticket machine, the driver must pay the fee and '*obey any instructions on or with the sign, meter, ticket or ticket-vending machine*'.

In the circumstances described in your email, the driver has paid the fee (albeit for the wrong vehicle). The question is whether the driver has obeyed instructions on or with the ticket-vending machine.

It appears that a driver who selects the wrong vehicle could argue all of the requirements on the ticket-vending machine have been complied with. The contrary argument would be the reference to PayStay and downloading the mobile app includes by implication following the correct process using that app. In effect the PayStay instructions on its website are with the ticket-vending machine. I suspect that argument would be looked at with some scepticism by the Court.

I am not registered with PayStay but the principle is similar to eBay and PayPal where a default address appears on screen but a person can have any number of other addresses that can be selected. I admit I have forgotten to change my default address on more than one occasion.

I agree there is a risk in enforcing against a person who has paid but selected the wrong vehicle.

How many cases have occurred? What happened with the infringements? Has anyone made the same error twice? Given there is objective proof that the correct amount of money was paid, I query whether it might not be best to withdraw the infringement if challenged on this basis for at least the first mistake.

As to how to change the signs, to include a specific clause in respect to nominating the correct vehicle rego is an option but it might be easier from a logistical perspective to require compliance with the PayStay terms and have a link to the Council website on the sign.

[redacted] Chief Legal Counsel | Governance and Legal

144. The Chief Legal Counsel questioned whether:

> Given there is objective proof that the correct amount of money was paid … it might not be best to withdraw the infringement if challenged on this basis for at least the first mistake.

145. His advice was entered on the Legal Advice Register, but it is unclear whether it was brought to the attention of the Program Manager or Director at the time.

146. The Director stated in his interview he was not aware of the advice.

### October-November 2018

147. When the decision 'Proceed' on zero/O errors was introduced again on 1 November 2018, the Prosecutions Coordinator was critical of the change. In an email to the Policy and Communications Adviser on 31 October 2018, he questioned whether PayStay's proposed changes to prevent driver errors were adequate:

**Figure 15: Excerpt from Prosecutions Coordinator's email, 31 October 2018**

If we really want to be seen delivering an excellent cashless payment service to our customers and see fewer infringements issued for this type of offending then the inclusion of an active dialog box at the start of a session (to confirm correct details entered) is a change in my view which is absolutely necessary. It would also strengthen the prosecution of cases where we could show they actively progressed an incorrect transaction rather than passively as at present.

What timeframes will apply to the Add vehicle enhancements?

Lastly have (or will) any further email campaigns been undertaken (until the enhancements are live) since the first cut of data was used to contact new or existing customers who have suspect registrations? There may be a small number who may have made an error registering for the first time/adding a further vehicle be undertaken since that data cut. If there's been no further data cuts then it seems unfair that those customers who won't have had the previous email warning and also won't have had the previous opportunity of being cautioned.

I remain less than convinced with this decision to go live before all the necessary enhancements have been put in place.

148. The Senior Prosecutions Officer raised similar concerns directly with the Program Manager:

**Figure 16: Senior Prosecutions Officer emails his concerns to the Program Manager, 1 November 2018**

Hi [redacted]

I have some concerns about the proposed change in policy to be implemented as of 1 November.

From the email below my understanding is that from a point in time (this date has not been provided) a database search was conducted of PayStay Victorian registration numbers to identify potential errors with registration plate entry. 8,832 potential errors in plates were captured and attempts made to contact the account holders to review their accounts. The user's identified at that point in time have now had a warning/prompt to amend their accounts. Fair enough.

However, on current figures there are around 3,000 new vehicle registrations (Australia wide I think) added each week which amounts to approximately 13,000 new registrations a month. None of these customers will be signing up any differently than the accounts that were held in the database at the point in time where the database was searched. Therefore, all of the new customer that have signed up since this point have not and will not receive any email prompts that the others received.

**Main Points:**

- It is not possible to tell the difference between an O and Zero on Victorian Number Plates - this includes on the registration papers provided by Vicroads – Please refer to photo below
- **The existing warning on the Vehicle Registration sign up screen has not worked in the past and if it is not possible to tell the difference between the O and Zero then a customer would be of the genuine belief they have entered correctly**
- **There will be around 26,000 new registration added by December and these customers will not have had the same benefits as the customers identified as the point in time search**
- **The PayStay system has not changed in any way since we changed our policy so it stands to reason the same errors that occurred with registration entry will continue to occur**
- **There is a potential fix scheduled for some time in December**
- **Customers who attend the City and type in their registration to PayStay for the first time and type in the wrong registration in the belief that it's correct will most likely receive a fine.**

**By changing our policy in the first place we acknowledged there was a problem so given there has not been any change in process for vehicle registrations at PayStay there does not appear to be any case to warrant a change in our policy.**

149. The Policy and Communications Adviser responded to the Prosecutions Coordinator's 31 October email on the same day, copying in the Program Manager (see Figure 17 below).

150. There is no written response from the Program Manager to this email or to the concerns raised by the Prosecutions Coordinator or Senior Prosecutions Officer. The following day, Council went ahead with the decision to start upholding the infringements.

151. At interview, investigators asked the Program Manager: 'What do you recall your response being, if any to the Policy and Communication Adviser's email?' He said:

> given our Director was keen to proceed, my response would be, 'Let's proceed, given that if, if we already did the data cleansing, the number of instances where new people come onboard would be very little. Let's review and see what happens'... [That] would be what I would likely to have been thinking at the time, or responded.

152. It is apparent that the Director was the ultimate decision maker in the decision to 'Proceed' with these infringements from 1 November 2018. The Policy and Communications Adviser said: 'as the manager of the branch, [the Director] always signs off on changes to the matrix'.

**Figure 17: Policy and Communications Adviser's response to the Prosecutions Coordinator, which was cc'd to the Program Manager, 31 October 2018**

Hi [redacted]

You've raised issues that I'm not in a position to resolve. We can put these suggestions forward to PayStay, but they are a private company and not obliged at adopt them. Even if DCA agreed to make these changes and we placed our work on hold while DCA completed the development work, it would rely on users updating their app version, which we also cannot force them to do in any kind of timely matter.

[redacted] I feel the email campaign to date, the Ombudsman's position, the updated screen shots and information about upcoming enhancements are sufficient in order to change the decision back, but [redacted] does not agree. I am aware that [redacted] view is to proceed. Can you please clarify your position ASAP on go/no go to help us reach a way forward? Note the change was proposed to revert back tomorrow.

Thanks

153. When the Program Manager forwarded the Prosecutions Coordinator's email raising concerns about the change to the Director, the Director responded on 1 November 2018 (see Figure 18 below).

### July 2019

154. On 24 July 2019, the Senior Prosecutions Officer again voiced his concerns about prosecuting drivers who made a PayStay error. He was dealing with a case involving a registration error, where the driver chose the wrong vehicle registration number from the multiple registration numbers already registered in their app. He sought advice from the Chief Legal Counsel on the matter (see Figure 19 below).

**Figure 18: Email from the Director to the Program Manager, 1 November 2018**

Thanks

So I have spoken to two other phone app providers and had them demonstrate their product. They are worse than PayStay and have a o and 0 issue as well with the small client base.

I will continue in pursuit of what [redacted] is suggesting but he is trying to fool proof other people's products for less than 1000 files a year, which PayStay itself is doing 1500 plus transactions a day... I am going to get this number as I see it monthly in the contract meeting and I want to say 8000 a day which is more like it .... I think you get the picture... [redacted] Nevertheless important to him, but not going to happen and not supported by me.

It's good we implemented today.

**Figure 19: Senior Prosecutions Officer seeks the Chief Legal Counsel's advice, 24 July 2019**

The brief details of the offence are that the accused paid for registration [redacted] instead of [redacted] (the vehicle that was parked). Infringement was issued for (702E) 'Parked - Meter Expired Road Rule 207(2)'.

It is not disputed that the accused paid for the correct zone at the time and that the registration paid for was [redacted] However, the accused states that as they have paid the fee for the area they have fulfilled the requirements of the rule therefore the fine should be withdrawn.

At the mention hearing counsel for the accused advised that his client's interpretation of Road Rule 207 is that unless we can make out every aspect of the charge it cannot be found proven.

The main points raised were:

- the accused has followed the instructions on the sign and paid the fee
- the wording of sub rule RR 207(2)(b) provides commas between *sign, meter, ticket or ticket vending machine* therefore the commas act like an 'or' rather than an 'and' so if he has obeyed instructions on the sign (correct zone) he does not need to follow the instructions on the meter, ticket or ticket-vending machine having entered the correct zone number
- *(2)(b) obey any instructions on or with the sign, meter, ticket or ticket-vending machine.*

155. Consistent with his previous advice, the Chief Legal Counsel advised: 'there is a risk in enforcing against a person who has paid but selected the wrong vehicle' (see Figure 20 below).

156. It is unclear what, if any weight, this advice was given by the senior decision makers and managers in the Branch. When investigators asked the Director whether he was aware of this advice, he said he was not.

**Figure 20: Legal advice provided to the Senior Prosecutions Officer, 29 July 2019**

It appears clear the payment was made but erroneously applied to the wrong vehicle/zone.

As I noted in my email of 4 December 2017:

- there is a risk in enforcing against a person who has paid but selected the wrong vehicle
- in that case, given there was objective proof that the correct amount of money was paid, I queried whether it might not be best to withdraw the infringement if challenged on this basis for at least the first mistake.

In respect to your questions:

1. The required amount was paid so simply arguing 'the fee' was not paid will be very difficult. In effect we are claiming the person voluntarily paid a sum to Council.

2. I read each of the provisions in rule 207(2)(b) as being requirements that must be followed and not as alternatives. To read it as the accused suggests, would mean a vehicle could park in accordance with the ticket irrespective of the sign.

3. I agree it can be pressed to the Court that the person did not obey the instructions, but given the correct amount of payment was made and Council is in the financial position it should be, I would expect a Magistrate would see imposing a penalty as unfair. So on prospects, my view would be legally fair but practically, not brilliant. You need to be able to defend the system and how it operates to show the Council has to act consistently with all drivers.

4. I agree it would be worth limiting the case to the legal points. If nothing else, it saves Court time.

### Branch officers' compliance with the Decision Matrix

157. At interview, the Prosecutions Coordinator said he expressed his concern on several occasions about prosecuting certain matters, only to be told by the Program Manager: 'if I give you a reasonable work instruction to prosecute a case you will prosecute it'.

158. The Coordinator indicated that he felt he had no option but to comply with the direction, despite his concerns:

> I uphold the current policy as expected of me at this time – but I (and others) want us to revert to the previous policy.

159. The investigation notes that prosecutors owe a duty to the court to act fairly and ethically, and in the interests of the administration of justice. This duty will invariably outweigh their duty to their client. At interview, the Prosecutions Coordinator described the conflict between this pressure to proceed and his 'duty to the court':

> [The Program Manager] said, 'if I give you a reasonable work instruction to prosecute a case you will prosecute it' and I said, 'no you can't say that'. The first time he said that to me I didn't say anything back. This time, I said 'no, you can't say that, I have a legal duty to the court'.

## Program Manager's and Director's explanations

160. Investigators asked the Program Manager and the Director why they decided to uphold these types of infringements from 1 July 2017 to 1 July 2018, and again from 1 November 2018 to 1 November 2019, in spite of the concerns raised.

161. In the case of the first period between 1 July 2017 - 1 July 2018, the Director said the Branch started upholding these infringements because the practice of cautioning drivers who made these errors was not consistent with the approach taken with other driver errors in the Decision Matrix. He said this caused concern for some Branch officers:

> [the team] felt that … we should be consistent overall, so it was changed to a 'Proceed'.

162. This is consistent with the explanation provided by the former CEO to the Ombudsman on 25 June 2018, when he said:

> the decision was made for the 2017/18 financial year [that] we would cease considering this error made by drivers as a valid reason for withdrawing the infringement … There are also equivalent 'errors' by drivers in other circumstances that attract a fine.

163. The explanation for why Council decided to start upholding these infringements again in November 2018, after a period of withdrawing them, is less clear.

164. The Policy and Communications Adviser, Program Manager and Director all stated they thought it was reasonable to start upholding these infringements again because PayStay had done enough between 1 July 2018 and 1 November 2018 to assist drivers in avoiding the error.

165. The Program Manager said:

> There may be only so much you can do to assist customers. We try different things, right? So, by doing the data cleansing, by getting PayStay to improve on their prompts … There are a number of things that we wanted to put in place … or have started to put in place or have put in place. We try and do all that work. Some of that work has not been all that effective, right?

166. The Director said he thought drivers knew their vehicle registration and he had only just come to realise they do not. He said:

> There was an assumption at that time that people understand their registration, and that an 'O' is an 'O', and '0' is a '0'.
>
> I'm now a believer that people don't understand their registration … I was always of the belief that people understood their registration … maybe that was a naïve view.

## The Ombudsman was misquoted

167. Emails sourced in the course of the investigation show the Ombudsman was misquoted in emails sent by the Policy and Communications Adviser prior to the 1 November 2018 change back to 'Proceed'.

168. The adviser's 16 October 2018 email said: 'this decision has been discussed with the Victorian Ombudsman in person and she **supports** it' (original emphasis). The adviser reiterated this in a further email on 31 October 2018 (see Figure 21 below).

169. The Ombudsman did meet with the Director, former CEO and Manager Governance and Legal on 11 October 2018. The meeting was requested by Council, for the purpose of understanding the Ombudsman's role in the oversight of use of discretion in decision making about infringements.

170. The Ombudsman did not offer an opinion in support or otherwise of how Council should manage the persistence of the problem where parking users accidentally pay for parking incorrectly using PayStay. The Ombudsman's purported position reflected in the email is entirely at odds with the Ombudsman's view.

171. When investigators asked the Policy and Communications Adviser about the statements she made in her emails, she said the Director had told her the Ombudsman supported the change:

> I can't remember the exact words, but my overwhelming memory of the conversation was that she was in agreement. After all of that had been explained to the Ombudsman, she indicated that she thought that it was a fair decision because the drivers had multiple opportunities along the way.

172. At interview, the Director disagreed with the Policy and Communications Adviser's recollections of this conversation. He said: 'I don't believe that that's a statement that I made to [her] in relation to that'.

173. He also confirmed that 'in the meeting, I don't believe the Victorian Ombudsman said "I fully support it"'.'

**Figure 21: An excerpt from the Policy and Communication Adviser's email, 31 October 2018**

[redacted] met with the **Victorian Ombudsman** on 11 October about a range of issues, where this issue was discussed. After hearing about PayStay's recent campaign to proactively contact drivers, the Ombudsman understands why we are reverting back to the previous decision, and has said that she **fully supports** this move.

174. The Director also said the first time he became aware of the emails quoting the Ombudsman's support was in October 2019 as part of this investigation. He said he 'didn't recall seeing [the emails] at the time', and he was 'surprised' to read the emails.

175. However, the investigation notes the Policy and Communications Adviser's 31 October 2018 email was forwarded to the Director by an Infringement Review Officer at the time it was written.

176. When the investigation became aware that the Ombudsman had been misquoted as supporting the Branch's change, contact was made with the General Manager to correct the incorrect impression. The General Manager heads the Branch and the Director reports to her.

177. The General Manager responded to the investigation on 6 November 2019:

> I raised with [the Director] of On-street Compliance Services, the matter of officers misconstruing the Ombudsman's opinion of how PayStay O vs zero should be dealt with … He was not aware of that email and … was very surprised … however [the Director] has (since) reiterated the Ombudsman's position to all his infringement review staff and has ensured that in the decision making process matrix, that her position is clear.

178. However, in their interviews, the Program Manager and Prosecutions Coordinator said they were not aware the Ombudsman had been misquoted.

179. The Prosecutions Coordinator told the investigation:

> we had an email that said we've had discussions with the Ombudsman, the Ombudsman is comfortable with the checks we are doing which involved getting the supplier [PayStay] to do some sort of data cleanse exercises.

180. The Program Manager told the investigation:

> There was the meeting and my understanding is this data cleansing exercise was discussed with the Ombudsman … and when we do that … we should be good.

## What impact did the Ombudsman's 'misquote' have on the 1 November 2018 change?

181. When asked about the impact the incorrect characterisation of the Ombudsman's comments had on the decision to start proceeding on these fines again, the Director said: 'I don't think it was much of a factor at all'.

182. However, the Director says he was not aware of the misquote at the time. Evidence from Branch staff who thought the Ombudsman did support the change at the time suggests it was important.

183. In an email on 16 October 2018, the Prosecutions Coordinator took pains to check with the Policy and Communications Adviser:

> Do we have any confirmation in writing from the Ombudsman that confirms this support? If not can reverse confirmation on this point be sent?

184. After the adviser responded that she would have to 'check with [the Director]', the Prosecutions Coordinator replied: 'Thanks, the information about PayStay's campaign and the Ombudsman would definitely help us'.

185. The investigation understands that the Prosecutions Coordinator was receiving a 'degree of pushback' from his team about the change and thought that further information about the PayStay campaign and confirmation of the Ombudsman's support would 'resolve their concerns'.

### Impact on drivers

186. The investigation was unable to confirm the exact number of infringements issued to drivers who made the PayStay zero/O error prior to October 2019. This is because these infringements formed part of a larger pool of infringements issued to drivers who breached Road Rule 207(2), which is a common Road Rule violation.

187. The investigation estimates there were likely to be at least 1,200 drivers who had their infringements upheld in these periods, being about 700 in the 2017-18 period and 500 in the 2018-19 period. The number of drivers who took these matters to court is likely to be less than 200 in total.

188. The individual impact on drivers who received these fines should not be understated. Even though the infringements upheld over the past three years may be a small proportion of the overall revenue generated from parking fines, a fine of $83 may be a considerable expense to some. Drivers who elected to take these matters to court are likely to have incurred further expense.

## Was this practice fair?

189. The Council's approach to upholding these types of fines at internal review between July 2017 and July 2018 and again from November 2018 to November 2019 was not fair.

190. Council was aware that drivers were challenged in distinguishing between the number zero and the letter O when entering their registration, and that they would not be aware they had made an error. The Branch could also have verified that drivers issued with these fines had in fact paid the correct fee and parked legally when a review was requested.

191. Although Council had received the parking fee and drivers had seemingly made an honest mistake that could be easily verified, the Matrix did not allow the reviewers discretion to take this into account. This was inconsistent with the IMES Guidelines.

192. The Council changed its approach to PayStay zero/0 infringements four times over four years. The Program Manager described this 'flip-flopping' approach:

> It's not black and white you know, I accept … that from an Ombudsman perspective, if a person had paid, they have paid. I can accept that. I don't necessarily argue against that. But there have been a lot of conversations within the organisation about, what should we do? And the decision was made to do this at a point in time and then a decision was made to do something else at a point in time, and then a decision was made to … change it again.

193. The emails and evidence given by Branch staff at interview show that several Council staff expressed concerns about the 'Proceed' decisions on these infringements over the years, including the Chief Legal Counsel.

194. Senior management in the Branch did not sufficiently explain to the investigation why they maintained their position to uphold these fines, despite the concerns raised.

195. The reasons the Program Manager and the Director gave the investigation differed slightly, but the common element was that they thought there were enough warnings in the PayStay application to prevent drivers from making the error. They thought if a driver went on to make the error, the conduct should be treated consistently with other 'driver error' approaches in the Decision Matrix and the fine upheld.

196. From a driver's perspective, when they park in the Council area and make a payment using the PayStay application, they are making a payment to the Council and not a third-party company.

197. The Director's suggestion that Council has limited control over PayStay's functioning is not supported by other evidence sourced in the investigation. There are numerous examples in the emails the investigation reviewed of Council asking PayStay to make changes to the system and the app to accommodate issues as they arose. At interview, the Director described one such interaction:

> We asked PayStay to do the work, they did the work, they wrote out to a number of people. They, you know, provided us with the percentage of people they'd written to, percentage who had opened the email, percentage of people that had responded, etcetera.

198. Further, when explaining why he was happy the Council proceeded on these infringements, the Director said, 'People should know their registration, or there was an assumption people know their registration between O and 0', despite acknowledging earlier in his interview that 'it's really hard to tell the difference'.

199. The Program Manager told the investigation that he agreed to proceed on these infringements because his Director was 'keen to proceed', and he considered the Branch had put enough measures in place to stop drivers from making the error. However, he did not apparently respond to any of the concerns raised by the Prosecutions Coordinator and Senior Prosecutions Officer in their emails at the time. This means it is difficult to verify if this was his view at the time the decisions were being made.

200. The Program Manager did suggest in his interviews that if a driver made a mistake or error, they should be ultimately responsible for a fine, even if information sourced later meant it was unreasonable to uphold it:

> If you ask me whether if someone paid for parking and then they're still getting an infringement purely because they have paid the wrong meter, is that fair from a customer's perspective? I would say no, that's not fair. That's not fair … I will add though, they made a mistake.

201. Overall, the explanations provided by the Program Manager and Director for why they proceeded on the PayStay zero/O errors are not aligned with the evidence and do not explain why they continued to dismiss concerns raised by staff and the Chief Legal Counsel. It is also disappointing that the Ombudsman's concerns about this issue were instead represented to the Council as an endorsement.

## Council signage errors

202. The protected disclosure complaint provided several examples of decisions where the Council had made an error (or contributed to an error made by a driver), but still refused to withdraw the infringement. The Council usually relied on a legal or technical argument.

203. The investigation looked at one stark example where the Council issued an infringement to a resident who parked in contravention of a construction permit sign after Council delayed removing the sign.

204. The resident paid for a construction permit for three spaces for vehicles to complete building works on her home. When the building works were completed, she called the Council on 12 May 2016 to request the sign be removed so she could use the parking space for herself again. The sign was not removed for several days.

205. When the resident returned to her home on 17 May 2016 and found very limited parking elsewhere, she parked in one of the three construction parking spaces. She left a note on her dashboard stating the construction sign was in the process of being removed, quoting the work order reference number. Nonetheless, she received an infringement for contravening Road Rule 185(1) (see Figure 22 below).

206. The resident requested a review of the infringement, but the Council upheld it, so she requested the matter be heard in court.

207. The complaint alleged the Prosecutions Coordinator deliberately ignored recommendations from his team to withdraw the infringement, even though the Council was at fault for not removing the construction sign in a timely manner. It was implied that this decision was unfair and was motivated by a desire to increase Council revenue.

208. The investigation reviewed Council records which showed that the first Prosecutions Officer who reviewed the file recommended the infringement be withdrawn, noting:

> the lack of any infringement history and the proactive steps [the resident] had taken to rectify the issue.

209. The Prosecutions Officer noted that his recommendation had not been 'taken'.

210. The Prosecutions Officer emailed the Prosecutions Coordinator:

> personally I do not feel that it is a matter that should proceed to court and I would not be prepared to prosecute it. Consequently, can another prosecutor be given that one to action instead.

211. The Prosecutions Coordinator then allocated the matter to the Senior Prosecutions Officer, who also recommended the infringement be withdrawn.

**Figure 22: Road Rule 185(1)**

**185 Stopping in a permit zone**

(1) A driver must not stop in a permit zone unless the driver's vehicle displays a current permit issued by the person or body responsible for the care and management of the permit zone that permits the vehicle to stop in the zone.

Penalty: 2 penalty units.

**Note**

***Driver's vehicle*** is defined in the dictionary.

(2) A ***permit zone*** is a length of a road to which a *permit zone sign* applies.

Permit zone sign

*Source: Road Safety Road Rules 2017* (Vic)

212. In an email to the Prosecutions Coordinator on 23 August 2016, the Senior Prosecutions Officer said:

> In the circumstances, given [the resident] contacted [Council] to cancel the permit zone sign, there is no apparent reason to maintain the sign, six days have passed since [the resident's] contact to [Council], from a reputational perspective I would be inclined to withdraw the charge.

213. The records show that the matter was then allocated into the Prosecutions Coordinator's name on 23 August 2016. No action was taken until nine months later, when the Prosecutions Coordinator withdrew the infringement with the note 'enforcement action incorrect as no mark up for 15-minute grace period given'. This was a reference to a lack of evidence to show the Parking Officer had given the resident a 15-minute grace period, which was standard Council practice.

214. When investigators asked the Prosecutions Coordinator about this, he said:

> If reserved parking signs are in place and they are not valid, it remains the responsibility of the driver to check the signage even if the actual purpose of the signage is no longer required … I acknowledge that it was done [that is, his decision to withdraw the infringement] after the event but I believe I have taken the correct action.

215. When asked why he did not follow the recommendations of his Prosecutions Officers to withdraw the infringement at the time, he said:

> I try to take the correct course of action. I do it within the policy guidelines … Can I be clear, the City of Melbourne's policy would be that if a driver parks, it is their responsibility to always check the signage every time … but I agree entirely that it is the Council's responsibility to maintain its signage accurately and have in place the necessary measures to do it expeditiously.

216. He said the nine-month delay in closing off the matter was not the result of any intentional decision by him. He said they had a long backlog of matters awaiting assessment and he had been trying to reduce that backlog over time.

## Was this approach fair?

217. The investigation considers that the decision by the Council to uphold this infringement at internal review was neither fair nor reasonable. This fine was issued in 2016. However, the Prosecutions Coordinator's evidence suggests that Council's approach in this scenario has remained the same. This means that if a driver contested a similar fine today, it is likely the driver would be held responsible, even if the Council caused or contributed to the error by its delay, unless the reviewer used discretion under the 'have a heart' clause.

218. The decision to proceed with the fine when the Council could verify that the resident had called to request the sign's removal, was harsh and punitive. The resident was parking outside her own residence and was not in any way trying to avoid her responsibilities to park legally.

219. Further, when the resident requested the matter be heard in court, two Prosecutions Officers requested approval to withdraw the infringement because the resident had no infringement history, had taken proactive steps to rectify the issue, and Council had in fact been delayed in removing the sign.

220. When explaining why he didn't approve the withdrawal, the Prosecutions Coordinator said the Prosecutions Officers were taking a 'moral position rather than a legal position', by which it is assumed he means they were considering concepts of 'fairness' and 'reasonableness'. This refusal to approve withdrawal ignores Council's self-stated model litigant approach.

221. In his response to the Ombudsman's draft report, the Prosecutions Coordinator said:

> I … accept at that point in time, I was strongly bound by the direction being placed on me by [the Program Manager] as my line manager and the importance he attached to the Decision Matrix. However, I did eventually get to the right position and chose not to proceed the specific matter to court.

222. The investigation recognises this.

## Ticket passing

223. The investigation also identified a discussion between several members of senior management in the Branch about whether to infringe people passing their parking tickets (which have time remaining on them) onto other drivers when they are leaving a parking space. This is called 'ticket passing':

**What is ticket passing?**

Ticket passing is the practice of one driver (Driver 1) handing an unexpired ticket to another driver (Driver 2) to use the remaining time. It is usually a conscious, altruistic act by Driver 1, but can also occur if Driver 2 happens upon an unexpired meter and makes use of the unexpired time left by Driver 1 without Driver 1's knowledge.

It can also occur when taxi drivers' queue in meter parking awaiting access to a taxi zone. One taxi driver pays for the meter and the following drivers line up and move along one by one without paying their own individual fee.

### Branch concerns

224. Emails show the Policy and Communications Adviser asked the Prosecutions Coordinator on 12 February 2019 if the Council had a position on whether ticket passing was legal.

225. She said she had noticed a media article about the issue at another Council, and wanted to brief the Lord Mayor in case she was asked about it in an upcoming radio interview.

226. The Prosecutions Coordinator responded that he could not find any previous legal advice on the issue. He said he understood that a breach of Road Rule 207(2) occurred in this situation 'because the person who parks their vehicle and then receives the parking ticket … doesn't pay the fee themselves' as required by the Road Rules.

227. However, he went on to state:

> this in my view falls within the de minimis principle of law. Especially where meters and machines do not wipe unused credit when another driver wishes to pay.
>
> What is the de minimis principle? An abbreviated form of the Latin Maxim de minimis non curat lex, "the law cares not for small things". A legal doctrine by which a court refuses to consider trifling matters.

228. The Prosecutions Coordinator emailed the Program Manager to ask if the Council should be withdrawing these infringements. The Program Manager asked him to get legal advice. The Chief Legal Counsel provided this advice on 13 February 2019 (see Figure 23 below).

229. The Prosecutions Coordinator forwarded this advice to the Program Manager, who then contacted Council's compliance area to suggest that 'a [standard operating procedure] be developed that guides officers what to do (or not do)'.

### Impact on drivers

230. Emails suggest the Council issued 354 infringements for this offence between 2000 and 2017. The infringements were issued to Driver 2, or the person who had not paid the fee.

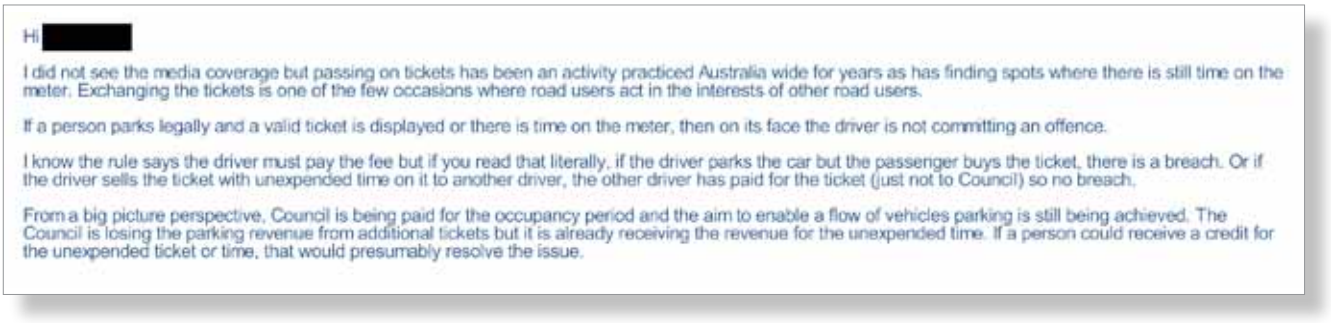
231. The investigation accepts that the number of drivers who were and are impacted by ticket passing infringements is extremely few, compared to the number of infringements issued by the Council every year. With the increased use of PayStay as a payment method and the use of physical tickets in decline, ticket passing is likely to be a rare occurrence in the future.

## Was this approach fair?

232. While not directly the subject of complaints to the investigation, it is evident that the infringements issued for 'ticket passing' were unfair. This is because drivers who received these fines had parked legally and displayed a valid ticket and the Council did not suffer financial loss from this practice.

233. In this instance, this was recognised by the Branch officers in the emails identified, although the practice has been mostly discontinued.

**Figure 23: Legal advice on 'ticket passing' provided to the Prosecutions Coordinator, 13 February 2019**



Hi [redacted]

I did not see the media coverage but passing on tickets has been an activity practiced Australia wide for years as has finding spots where there is still time on the meter. Exchanging the tickets is one of the few occasions where road users act in the interests of other road users.

If a person parks legally and a valid ticket is displayed or there is time on the meter, then on its face the driver is not committing an offence.

I know the rule says the driver must pay the fee but if you read that literally, if the driver parks the car but the passenger buys the ticket, there is a breach. Or if the driver sells the ticket with unexpended time on it to another driver, the other driver has paid for the ticket (just not to Council) so no breach.

From a big picture perspective, Council is being paid for the occupancy period and the aim to enable a flow of vehicles parking is still being achieved. The Council is losing the parking revenue from additional tickets but it is already receiving the revenue for the unexpended time. If a person could receive a credit for the unexpended ticket or time, that would presumably resolve the issue.

## Other decisions: Penalty Reminder Notices

234. The investigation identified another case where Council officers themselves raised concerns about the fairness and ultimate legality of a Council decision.

235. This case involved a July 2019 project to change the format and wording of the Council's Penalty Reminder Notices. These are the notices Council sends out 21 days after an infringement has been issued to remind the driver to make the payment.

### Penalty Reminder Notice Project

236. The purpose of Penalty Reminder Notices is defined in Division 4 of the Infringements Act:

> 29(1) An enforcement agency may serve a penalty reminder notice on a person on whom an infringement notice was served if it appears to the enforcement agency that an infringement penalty has not been paid –
>
> (a) within the period for payment specified in the infringement notice

237. Once a driver receives a Penalty Reminder Notice, they have a further 28 days to pay the fine, nominate another driver, or ask for a review of the fine before it is registered with Fines Victoria.

238. Prior to July 2019, the Branch issued Penalty Reminder Notices that contained the following information (see Figure 24 on the next page).

**Figure 24: City of Melbourne Penalty Reminder Notice, prior to July 2019**

An infringement notice was issued but our records indicate that the penalty of $81.00 has not been paid. A penalty reminder notice fee of $25.10 has now been added to the penalty.
Your options before the due date are:

1. **Pay the full amount to settle the matter**

2. **Request a payment plan or arrangement**
   You may have the right to apply to pay the penalty specified in this notice under a payment plan or arrangement. You can access information about eligibility for payment plans and arrangements on our website.

3. **Request a review**
   You or a person acting on your behalf may do so by applying on our website at www.melbourne.vic.gov.au/contestfine or in writing to City of Melbourne, GPO 780, Melbourne VIC 3001. You may view any photos of a parking fine at www.melbourne.vic.gov.au/viewyourfine

4 **Elect to have the matter heard in court**
   To have the matter heard and determined in court (or in case of a child, the Children's Court), send your written court election request to prosecutions@melbourne.vic.gov.au or to Prosecutions Team, City of Melbourne, GPO Box 780, Melbourne VIC 3001. Alternatively, you can complete Part 2 of the form on the reverse side and return it to us.

5. **Nominate the driver**
   You can nominate the person who was in charge of the vehicle at the relevant time online at www.melbourne.vic.gov.au/drivemomination. Alternatively, you can complete Part 1 on the reverse side stating the name and address of the responsible person, together with their driver licence number or date of birth and return to us.

If you do not understand this document:
- you may obtain information from the Director Fines Victoria or the Registrar of the Children's Court as the case may be
- you should seek advice from a lawyer or Victoria Legal Aid

**REMINDER** Failure to act by the due date may result in further enforcement action being taken and further costs being incurred under the *Fines Reform Act 2014*; or in the case of a child, Schedule 3 of the *Children, Youth and Families Act 2005*

**Infringement Details**

| | | | |
|---|---|---|---|
| **OFFENCE:** | Parked - Fail to pay fee and obey instructions on sign/meter/ticket etc. Road Rule 207 (2) (Meter Expired) | | |
| **PLACE:** | Queen Street | **OFFENCE CODE:** | 702E |
| **OFFENCE DATE:** | 23 Apr 2019 | **OFFENCE TIME:** | 13:07:00 |
| **PENALTY AMOUNT:** | $81.00 | **PENALTY REMINDER NOTICE FEE:** | $25.10 |
| **ISSUING OFFICER:** | [redacted] | **VEHICLE REGISTRATION:** | [redacted] |

*Source:* City of Melbourne

239. Of note, the Council's previous Penalty Reminder Notices advised drivers the penalty had 'not been paid' and that 'failure to act by the due date may result in further enforcement action being taken and further costs being incurred' (circled in Figure 24 on the previous page).

240. In June 2019, the Director asked the Branch to create a new version of the Penalty Reminder Notice, which would be more direct and encourage recipients to act faster.

241. Two possible versions were created. The two versions were referred to as a 'soft version' (below) and an 'assertive version' (next page).

**Figure 25: The 'soft' version of the Penalty Reminder Notice**

CITY OF MELBOURNE
GPO BOX 244 MELBOURNE VIC 3001
ABN 55 370 219 287

melbourne.vic.gov.au/parking

CITY OF MELBOURNE

Sam Sample
1 Sample St
SAMPLETOWN VIV 3000

**PENALTY REMINDER NOTICE**

| | |
|---|---|
| Notice date | 9 January 2019 |
| Infringement notice | 104378820 |
| Infringement penalty | $159.00 |
| Penalty reminder notice fee | $25.10 |

**Amount due**
**$184.10**
**by 20 September 2019**

After the due date this will increase to $314.30*
*Increase adjusted each July

An infringement notice was issued but our records indicate that it has not been paid. Payment is now overdue and a penalty reminder of **$25.10** has been added.

Failure to pay this notice may result in escalating costs and further enforcement actions being undertaken.

**OFFENCE DETAILS**

| | |
|---|---|
| Infringement offence: | STOPPING – CONTRARY TO A NO STOPPING SIGN |
| Vehicle registration: | UHV XXX |
| Offence date: | 28 FEB 2019 |
| Offence time: | 07:25 |
| Issuing officer: | Name Surname |
| Offence location: | Market Street |

You may view any photos of a parking fine at melbourne.vic.gov.au/view-your-fine

**YOUR OPTIONS**

**Pay**
Pay the full amount to settle the matter. You may be eligible for a payment plan or arrangement. Information regarding payment plans can be accessed on our website.

**Nominate the driver**
You can nominate the person who was in charge of the vehicle at the relevant time online at melbourne.vic.gov.au/drivernomination

**Request a review**
You or a person acting on your behalf may do so by applying on our website at melbourne.vic.gov.au/contestfine or in writing to City of Melbourne, GPO Box 780, Melbourne VIC 3001.

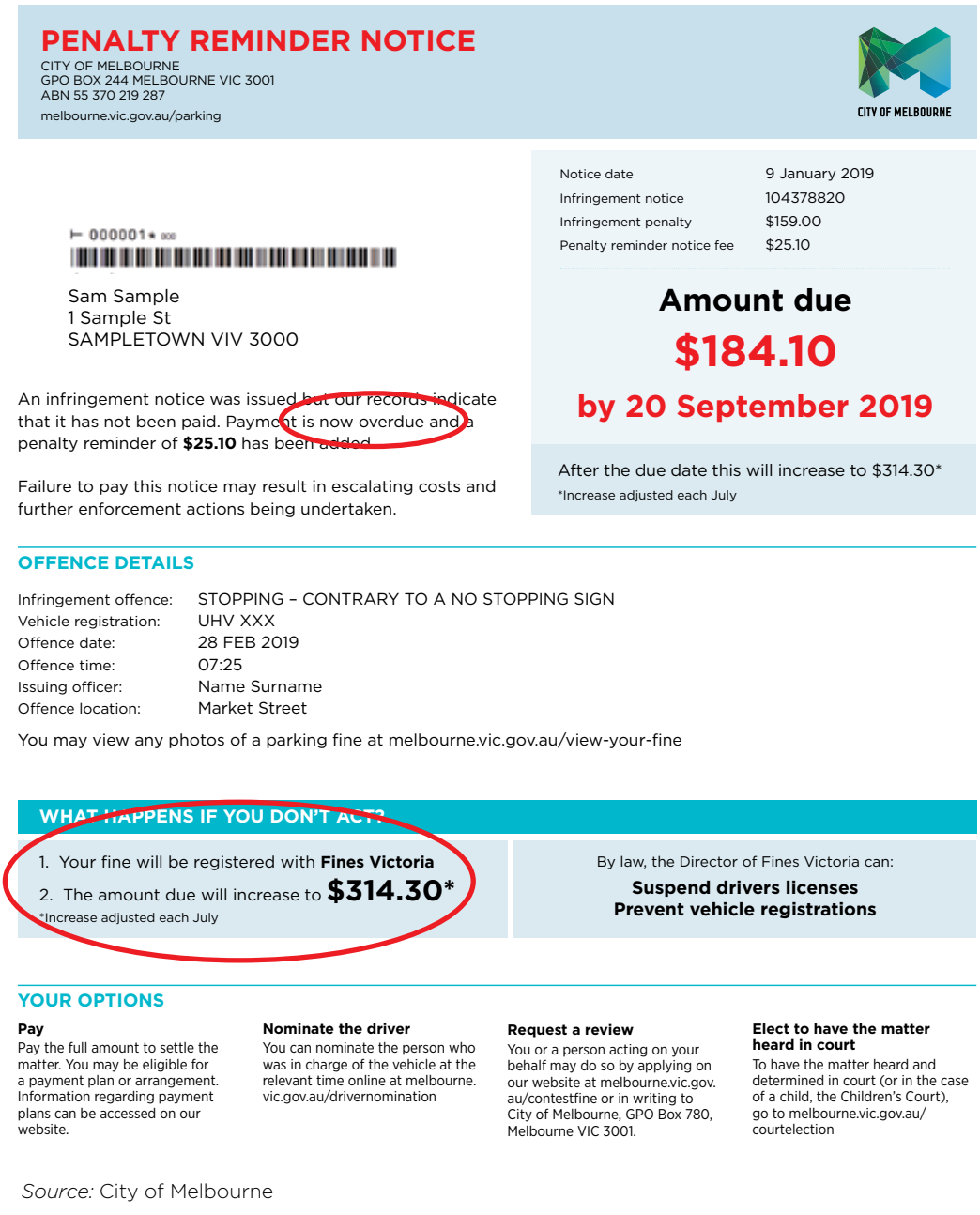
**Elect to have the matter heard in court**
To have the matter heard and determined in court (or in the case of a child, the Children's Court), go to melbourne.vic.gov.au/courtelection

*Source:* City of Melbourne

242. Both new versions said: 'Payment is now overdue'. The 'assertive version' also included the statement: 'What happens if I don't act? Your fine will be registered with Fines Victoria'.

243. The investigation understands the Branch originally intended to test the versions by issuing 1,000 copies of each version to different drivers. The Branch intended to analyse the response and payment rates, and then decide which version would be used.

**Figure 25 (continued): The 'assertive' version of the Penalty Reminder Notice**



**PENALTY REMINDER NOTICE**

CITY OF MELBOURNE
GPO BOX 244 MELBOURNE VIC 3001
ABN 55 370 219 287
melbourne.vic.gov.au/parking

CITY OF MELBOURNE

Sam Sample
1 Sample St
SAMPLETOWN VIV 3000

| | |
|---|---|
| Notice date | 9 January 2019 |
| Infringement notice | 104378820 |
| Infringement penalty | $159.00 |
| Penalty reminder notice fee | $25.10 |

**Amount due**
**$184.10**
**by 20 September 2019**

An infringement notice was issued but our records indicate that it has not been paid. Payment is now overdue and a penalty reminder of **$25.10** has been added.

Failure to pay this notice may result in escalating costs and further enforcement actions being undertaken.

After the due date this will increase to $314.30*
*Increase adjusted each July

**OFFENCE DETAILS**

| | |
|---|---|
| Infringement offence: | STOPPING – CONTRARY TO A NO STOPPING SIGN |
| Vehicle registration: | UHV XXX |
| Offence date: | 28 FEB 2019 |
| Offence time: | 07:25 |
| Issuing officer: | Name Surname |
| Offence location: | Market Street |

You may view any photos of a parking fine at melbourne.vic.gov.au/view-your-fine

**WHAT HAPPENS IF YOU DON'T ACT?**

1. Your fine will be registered with **Fines Victoria**
2. The amount due will increase to **$314.30***

*Increase adjusted each July

By law, the Director of Fines Victoria can:
**Suspend drivers licenses**
**Prevent vehicle registrations**

**YOUR OPTIONS**

**Pay**
Pay the full amount to settle the matter. You may be eligible for a payment plan or arrangement. Information regarding payment plans can be accessed on our website.

**Nominate the driver**
You can nominate the person who was in charge of the vehicle at the relevant time online at melbourne.vic.gov.au/drivernomination

**Request a review**
You or a person acting on your behalf may do so by applying on our website at melbourne.vic.gov.au/contestfine or in writing to City of Melbourne, GPO Box 780, Melbourne VIC 3001.

**Elect to have the matter heard in court**
To have the matter heard and determined in court (or in the case of a child, the Children's Court), go to melbourne.vic.gov.au/courtelection

*Source:* City of Melbourne

## Concerns amongst Council officers

244. Emails show the two wording changes were of concern to the Chief Legal Counsel and the Prosecutions Coordinator.

245. On 28 June 2019, the Prosecutions Coordinator emailed the Chief Legal Counsel and asked him to review the versions for compliance with the Infringement Regulations. The Chief Legal Counsel advised that day on the new versions:

**Figure 26: Initial comments from the Chief Legal Counsel on the two new versions of Penalty Reminder Notice, 28 June 2019**

Hi [redacted]

In respect to the difference between the two versions, my comments follow based on the changes from the 'soft' version to the 'more assertive' version

1. Moving of the title penalty reminder notice – no issue in itself.

2. Conversion of certain text to red – no issue in itself.

3. Both versions of the PRN refer to the payment being 'overdue'. Is that in the current PRN? The word Overdue indicates a legal duty to pay has not been met, when in fact a person has a right to decide not to pay. I am more concerned about the word in association with the more assertive version as together, the appearance is a duty to pay. Is the word overdue used in the Act and/or regulations?

4. The main change appears to be reducing the size of 'your options' and adding in a section 'What happens if you don't act'. My concerns are:

a. The options appear after the larger text on the consequence of no action. It would be more logical and justifiable to ID the options and then say the consequence of not acting.

b. The wording means the Council will lodge the infringement and, if it does not, the statement becomes misleading. Does the Council 100% of the time lodge infringements where a PRN is issued and no response received?

246. In response, the Prosecutions Coordinator advised the Chief Legal Counsel that Council 'do[es] not register infringements in all cases' with Fines Victoria, although it is their intention to do so when they can.

247. The investigation understands that between one and five per cent of infringements cannot be registered with Fines Victoria, mostly because the drivers are registered interstate.

248. The Chief Legal Counsel then provided additional advice to the Prosecutions Coordinator (see Figure 27 below).

249. Of note, the Chief Legal Counsel states it is 'wrong' to describe the payment as 'overdue', as the driver has not breached any legal obligation to pay at this point of the process.

250. He also says that the use of the word 'will' instead of 'may' in relation to registering with Fines Victoria is 'apt to mislead' and could be seen as a threat to a vulnerable applicant.

**Figure 27: Further advice from the Chief Legal Counsel on the Penalty Reminder Notices**

Thanks [redacted]

As I thought the two versions of the new PRN are substantially and fundamentally different to that currently used.

In addition to the concern I had:

- with word 'overdue' which is stronger than still owing and implies a duty to pay has been breached (wrong)
- with the inaccurate claim that the infringement 'will' be lodged,

the additional sections entitled 'Notice of Final Demand' and 'Enforcement Warrant' are apt to mislead a person as to the nature of the document and appear a threat to a vulnerable recipient.

It is hard to say this is simply a reminder notice arising from an infringement: 'penalty reminder notice' when either of these additional sections are included and, in my view, the use would be at risk of challenge by the Ombudsman as exceeding the intent of the legislation. I would note advice 212 in the register referring to a potential second reminder notice applies to the issues I have raised above in that the changes suggested are apt to mislead. FYI, I attach the full advice from [redacted] dated 18 August 2004.

This risk is especially the case when the Ombudsman has just issued a damning report of the activities of Fines Victoria and its behaviour as well as it being common knowledge that issues with the operation of Fines Victoria means its ability to enforce is seriously compromised.

251. The Chief Legal Counsel also identifies the risk that the letter may be viewed as exceeding the legislative purpose of a Penalty Reminder Notice, which is to remind drivers who may have overlooked their obligations.

252. The Prosecutions Coordinator forwarded the Chief Legal Counsel's advice to the Program Manager on 2 July 2019, and the Program Manager forwarded it to the Director on the same date.

## Response to staff concerns

253. The investigation did not identify any response from the Program Manager or Director to the Chief Legal Counsel's concerns. The next email investigators could source on the matter was on 17 July 2019 from the Business Improvement Coordinator to several recipients, including the Prosecutions Coordinator and Program Manager (see Figure 28 below).

**Figure 28: Email from the Business Improvement Coordinator announcing the 'assertive' Penalty Reminder Notice will be used, 17 July 2019**

Good morning all
[redacted] has provided direction to [redacted] on what he wants for the final version of the new Penalty Reminder Notice.
FYI I've mocked up the changes on the attached spreadsheet which mainly relate to the first page:

- Changes to the 2 paragraphs of text under the address (circled in red)
- Change "Your Options" to "Your Options To Act" (circled in red)
- Switched the position of the 'Your Options' section to be above 'What Happens If You Don't Act' (indicated)

The other change is that the word "will" is to be used in place of "may" throughout the document.
I haven't mocked up the back page as there is no change from the attached pdf that [redacted] circulated – i.e. it still has the word "will" throughout the text.
[redacted] has asked for us to proceed with this as the new production template – there will be no A/B testing of a "softer" version.
thanks

254. The Prosecutions Coordinator expressed his concern that the decision was contrary to the advice of the Chief Legal Counsel in an email to the Program Manager (see Figure 29 below).

**Figure 29: Email from the Prosecutions Coordinator to the Program Manager, 17 July 2019**

[redacted]

I note the direction you have been given by [redacted] and which you have passed verbally to [redacted]

I note the direction is contrary to the reply given by [redacted] at item 4 b of his email dated 28 June. I have copied that point 4 below and had attached [redacted] original email for completeness.

**Item 4**

The main change appears to be reducing the size of 'your options' and adding in a section 'What happens if you don't act'. My concerns are:

a. The options appear after the larger text on the consequence of no action. It would be more logical and justifiable to ID the options and then say the consequence of not acting.

b. The wording means the Council will lodge the infringement and, if it does not, the statement becomes misleading . Does the Council 100% of the time lodge infringements where a PRN is issued and no response received?

Can you please confirm that [redacted] or yourself have informed [redacted] in writing of this decision to proceed with a penalty reminder notice that includes a statement he considers misleading.

If so I will proceed to close this matter off on the Legal Register with [redacted] If not then I ask that action be taken to inform [redacted] accordingly by yourself or [redacted] Alternatively I can send this email to [redacted]

Regards

[redacted] | Prosecutions Coordinator | On-street Compliance Services

255. The Program Manager responded on 31 July 2019, confirming the 'management decision' to use the 'assertive' version of the notice (see Figure 30 below).

256. This email effectively put an end to the discussion and Council started issuing the 'assertive version' of the Penalty Reminder Notice shortly thereafter.

257. The investigation asked the Program Manager why he did not take the legal advice on board. He said:

> I don't think that we got specific legal advice, to be concerned about that, but from my perspective, it's not about misleading customers. It's about, we will do … what the legislation provides us to do.

258. As to the concerns raised by the Chief Legal Counsel about the impact of this language on vulnerable people, the Program Manager told investigators:

> I still stand by it. Giving people information upfront to say, 'If you don't act here, this could ultimately happen'. And that's the legal process. To me, giving transparent information to people upfront is a good thing. Now if there are people who are vulnerable, there are processes and systems and organisations that help people with vulnerability.

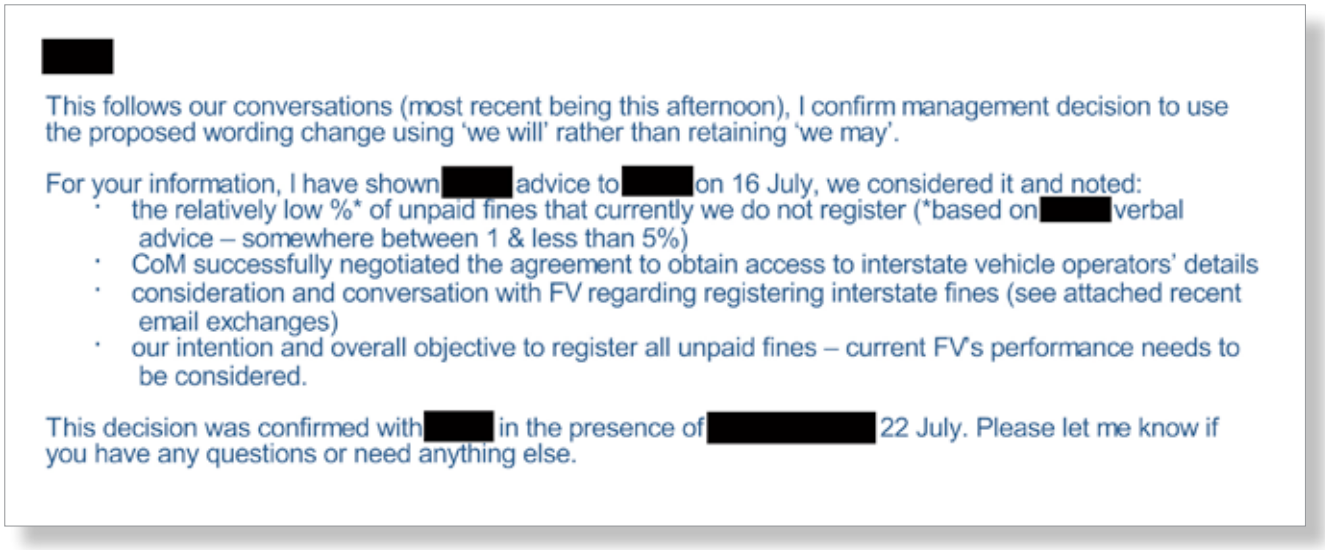
259. At interview, the Director recalled the Program Manager coming to him about the issue. He indicated that he wasn't aware that the use of the word 'will' was misleading because the Program Manager told him they always register fines.

260. On the use of word 'overdue', the Director said he probably put that word in the new versions himself but wasn't aware that it was wrong.

261. The Director denied being made aware of the Chief Legal Counsel's advice at the time. When investigators noted that the Program Manager forwarded the advice to him by email on 1 July 2019, he said:

> I don't recall [the Program Manager] showing me the advice, I absolutely recall the conversation and … and me asking [him] when would [we not do it?] … He probably did … and I probably said 'it's okay, right', and then gone with that. And, you know, I can't take back that decision, that's a decision that I made at that time.

**Figure 30: Email from the Program Manager confirming management decision to use the 'assertive' version, 31 July 2019**



[redacted]

This follows our conversations (most recent being this afternoon), I confirm management decision to use the proposed wording change using 'we will' rather than retaining 'we may'.

For your information, I have shown [redacted] advice to [redacted] on 16 July, we considered it and noted:

- the relatively low %* of unpaid fines that currently we do not register (*based on [redacted] verbal advice – somewhere between 1 & less than 5%)
- CoM successfully negotiated the agreement to obtain access to interstate vehicle operators' details
- consideration and conversation with FV regarding registering interstate fines (see attached recent email exchanges)
- our intention and overall objective to register all unpaid fines – current FV's performance needs to be considered.

This decision was confirmed with [redacted] in the presence of [redacted] 22 July. Please let me know if you have any questions or need anything else.

262. Following the Director's interview, he contacted the investigation to advise the Council had changed the Penalty Reminder Notice on 20 December 2019, to address these issues. However, the Prosecutions Coordinator said he was not advised of the change to the Penalty Reminder Notice until reading about it in the Ombudsman's draft report.

## Was this approach fair?

263. There was nothing wrong with the Council revisiting the wording of its Penalty Reminder Notice to encourage drivers to make payments as soon as possible. A clearly worded reminder can inform a driver of their rights and reduce further costs that could occur if a fine ends up being enforced.

264. However, it is important that the wording of the Notice be accurate, not misleading and not in excess of its legislative purpose. This is so drivers are not discouraged from exercising their rights of review.

265. The legal advice was that the proposed wording was 'wrong' and 'misleading', but the Council proceeded with it anyway. By the time the Council made changes to the Notice in line with the legal advice, the misleading Notice had been in circulation for at least three months.

## Council's response

266. In response to this section of the report, the Council's CEO agreed that the issuing of the amended version of the Penalty Reminder Notice was 'particularly troubling' as it was issued even though this was contrary to legal advice.

267. The CEO made a distinction between the Branch 'acting contrary to legal advice' in relation to the Penalty Reminder Notice and 'taking a different position to the legal advice' which, he submitted, was done in the 'ticket passing' and 'PayStay' approaches.

268. Nonetheless, he acknowledged the failure in all cases was a failure to either be aware of legal advice or to give it proper weight when making a final decision. To address this issue, the CEO said he intends to improve communication within the Branch and between the Branch and the Legal branch.

# What motivated Council's approach?

269. The protected disclosure complaint alleged Council officers were motivated to make the sorts of decisions described in this report to increase Council revenue.

270. Specifically, it alleged there was overt pressure by senior management in the Branch to uphold more fines and take more matters to court, to offset the loss of revenue from a decrease in parking infringements.

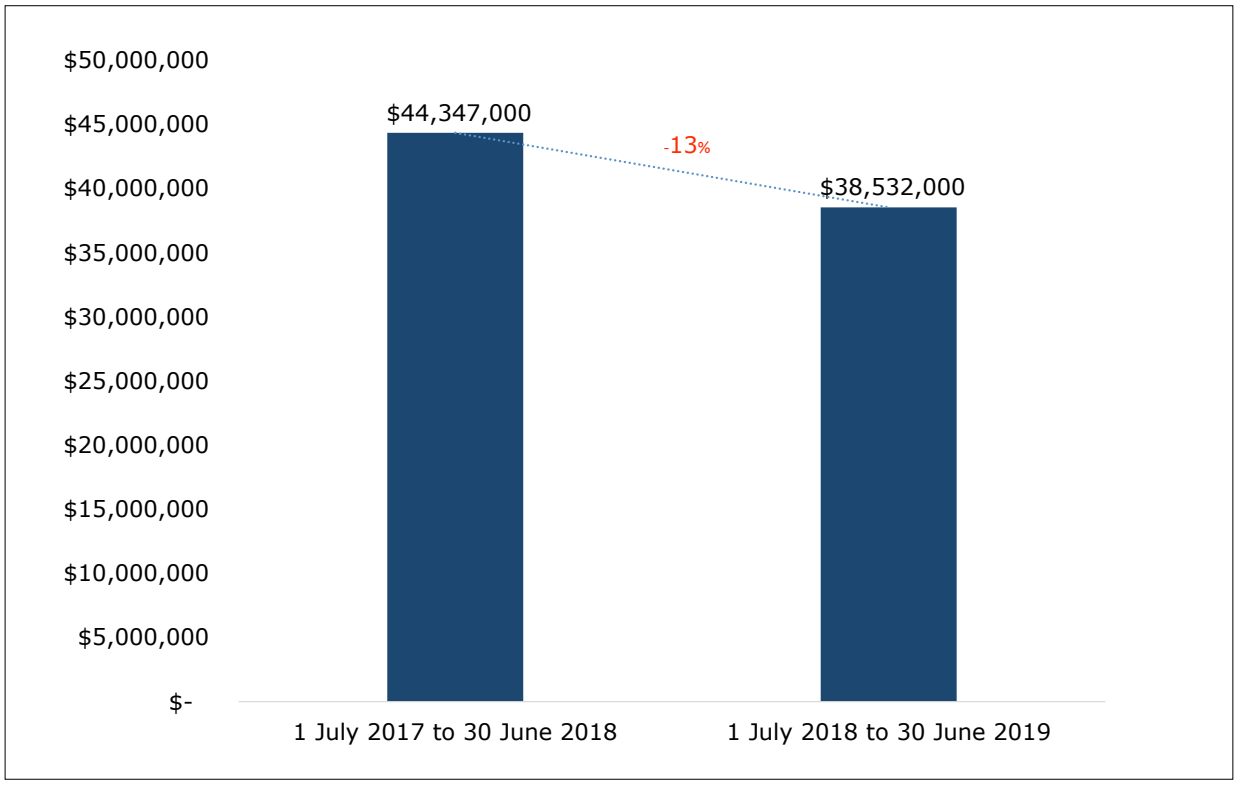
271. The investigation found that overall revenue from infringements had declined. The evidence does not suggest that improper revenue raising was a driving force for the decision making practices.

## Alleged revenue raising – the evidence

### Revenue from parking fines is trending downwards

272. The investigation confirmed the Council's revenue from parking infringements dropped in 2018-19. This was due to a 17 per cent reduction in the number of parking fines issued in 2018-19, compared with the previous year. As a consequence, the income generated from parking fines also decreased. Figure 31 shows the income from parking fines reduced by 13 per cent between 2017-18 and 2018-19.

**Figure 31: Income from parking fines between 2017-18 and 2018-19**




*Source:* City of Melbourne

273. Council income and expenditure statements show parking infringement revenue is the largest source of income generated by the Branch. In 2018-19 parking infringements comprised, in round numbers, $38 million of the $45 million in income generated by the Branch. The other income streams were from other infringements (littering, animal management etc) and grant monies for school crossings.

274. However, the Branch was still operating at a surplus despite the drop in parking infringement revenue. The Branch's expenses in 2018-19 totalled $37 million. The underlying financial position of the Branch in 2018-19 was therefore a net surplus of $8 million in round numbers (being $45 million in income less $37 million in expenses).

## The evidence does not show directives to increase revenue

275. The Director says the Council's Finance Team asks for commentary if the Branch's forecast revenue drops by $50,000 or more.

276. But he said that there is never any negative impact on the Branch as a result:

> Last year I provided commentary every month … as to why we weren't meeting budget … or forecast and … I didn't really hear back from anyone on that. But when you look at the overall City of Melbourne finances there were other areas in other branches that were well in excess, so the organisation's revenue lines were well up. So, I didn't have anyone come to me and go … 'What are you doing about that?'

277. The available evidence does not suggest that the Director directed staff in the Branch to make any specific decisions in response to financial pressures.

278. When the investigation asked the Director how big a factor parking fine revenue is for him when he makes decisions about how the Branch will operate, he said:

> It's a big line in there, it's just about making sure that people are doing their job … the majority of the Branch are there because of Parking Infringement Notices.

279. He also said the Branch's leadership team discusses their budget at monthly meetings. However, as to what impact the Branch's financial position would have on the decision making of the Program Manager and Prosecutions Coordinator, the Director said:

> I'm not aware of any [impact] that it would have on [their] decision making.

280. The Director said that while the Program Manager and Prosecutions Coordinator set their budgets annually, he does not review the detail of these with them:

> I couldn't tell you whether they're over or under in the prosecutions for the last couple of years, because that's something up to [them] to manage.

281. He also explained that similar to his own reporting obligations, there are no negative implications if there is a variance between their forecast and actual revenue:

> I look at the overall financial statements that … come in. If they're tracking all right, that's good. If they're not, [the Program Manager] would provide commentary that would go into Finance that would roll up into the over $50,000 commentary.

282. The Program Manager also said the reduction in parking infringement revenue has not impacted his decision making:

> I never get told by the organisation, by my superiors … in order to manage the budget … we need to raise the revenue, as specific [to], case by case decisions, right?

283. The Program Manager said:

> it's never about financials. I've had no pressure from anyone within the organisation … to make decisions only based on the financial outcome and I don't do that myself. And I receive no directions, instruction, pressure to do that.

284. The Prosecutions Coordinator corroborated this, stating, 'there's no pressure on me to perform financially in the court space'.

## Council decision making data

285. Council data on internal review and prosecution decisions supports the officers' evidence that declining revenue has not affected decision making.

286. If the allegation that Council decision makers were pressuring teams to make decisions that would improve the overall financial position was true, the data should show fewer decisions made in favour of drivers and fewer infringements withdrawn.

287. The withdrawal rate (the percentage of infringements withdrawn by the Branch) actually increased slightly from 19.7 per cent in 2017-18 to 22.5 per cent in 2018-19 (see Figure 32 at right).

288. Like withdrawal rates, the number of matters that proceeded to court annually remained consistent over those two financial years.

289. Council officers also explained that Council loses money when it prosecutes infringements in court. The Director said 70 per cent of all matters taken to court are 'proven and dismissed'. This means that for those matters, the Council usually receives $130 in court costs. The Program Manager estimated it costs the Council $264 for each appearance.

**Figure 32: Withdrawal rate in 2017-18**

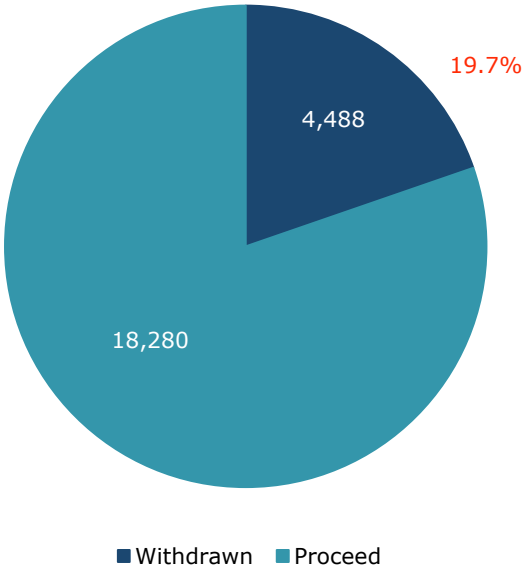
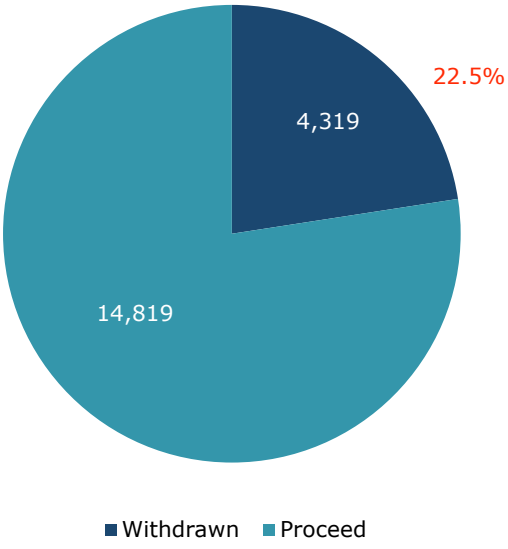



**Figure 32: Withdrawal rate in 2018-19**




*Source:* City of Melbourne

290. This means that every time a standard parking infringement matter goes to court the Council is losing revenue of approximately $134 per appearance.

291. The Program Manager said that the Council continues to prosecute matters despite the costs because:

> My job is to maintain … the integrity of the infringement system … That's why matters go to Court. If that's the right decision, to go to Court, then they'll go to Court.

## Poor understanding of administrative law principles

292. As decision makers exercising power under the Infringements Act, Branch officers are required to consider the law, reasonableness and all relevant considerations when making their decisions.

293. They are also required to consider the Road Rules, the Infringements Act and the role of internal review in the infringements system.

294. If agencies issue infringements incorrectly or enforcement is not appropriate on fairness or equity grounds, the internal review and prosecution processes provide a mechanism by which a fine can be withdrawn.

295. A core principle of administrative law is that neither a policy nor a guideline, such as the Council's Decision Matrix, can circumscribe or fetter the exercise of discretionary power:

> A policy can guide decision making, but it must not prevent a decision maker exercising discretion. It cannot constrain them to reach a particular decision; nor can it prevent them taking all relevant considerations into account. Policy must not be applied inflexibly.
>
> The decision maker must be prepared to consider whether it is appropriate to depart from the policy in an individual case. Otherwise, the policy is effectively a rule, which is inconsistent with discretionary power.[1]

296. The evidence indicates that the Branch's senior management has a different understanding of this principle.

297. The Program Manager's responses to questions asked by investigators suggest he has a very rigid perspective. This is evidenced in his interview:

> These are criminal offences. Criminal offences generally attract imprisonment … as an outcome. The infringement system was introduced … to … financially punish an individual who breaks the law.

298. He explained his understanding of the purpose of internal review:

> there are specific provisions within the Infringement Act, and there are five grounds in which the legislation provides where an enforcement agency can withdraw fines … What I need to be clear though … It's what we call absolute offences. Are you aware of those concepts? … So from that perspective, a person's intention to park illegally, in most cases is not that relevant, all right, that's the space we work within.

299. The Program Manager's characterisation of parking offences as 'absolute offences' is incorrect. Parking infringements are 'strict liability' offences. Strict liability offences provide a limited defence of 'honest and reasonable mistake of fact' whereas absolute liability offences do not.

300. In addition to this mischaracterisation of parking offences, the Program Manager struggled to explain what other factors, besides the legal framework, are relevant to his role as an administrative decision maker.

1 Administrative Review Council Decision Making: LAWFULNESS Best-practice Guide, 1 August 2007, 8.

301. While the IMES Guidelines emphasise the need for discretion, the Program Manager said:

> If the law says proceed or, or [we] can have a proceed decision, we can't apply discretion.

302. When investigators asked the Program Manager about applying 'fairness' as a criteria for decision making, he stated:

> To me consistency is very important, right … [P]art of being fair is to be consistent … If the situation is identical, right, with all … relevant attributes to be relatively the same, then the decision should mostly be the same, right.

303. He explained that he considered fairness to be a subjective concept, mostly invoked by drivers who wanted their fines withdrawn:

> So, the word 'fair' is used a lot, by mostly our customers, so those that want their fine withdrawn. They often have a different perspective of what is fair.

304. The Director also took an inflexible view of the infringements system.

305. In his interview he said he understood the purpose of the infringements system to be to:

> uphold the infringements that are issued up front and to provide people an opportunity if they believe the infringement was incorrectly issued, an avenue to appeal.

306. On the specific grounds on which a driver can request an internal review, he said internal review:

> gives everyone the opportunity to plead their case … to make an argument that there was an error, or something was done contrary to law.

307. The Director did acknowledge:

> fairness was a part of decision making but it probably wasn't the highest point in terms of the matrix development that had come through.

308. By contrast, the Prosecutions Coordinator said he understood the purpose of the Infringements Act was not to punish people arbitrarily in all circumstances.

309. The Infringement Review Coordinator also showed an insightful understanding of the purpose of internal review. She told interviewers the:

> purpose is to give the person who received the fine an opportunity to have their matter looked at and possibly withdrawn without having to go to court.

## Inflexible policies and lack of discretion

310. By developing an approach that effectively did not allow for discretion, it appears the Director and Program Manager wanted to ensure that all internal review decisions were consistent, and there was little or no scope for variation based on individual circumstances.

311. Branch officers told the investigation that this inability to exercise discretion when they felt it was warranted caused them a significant amount of stress.

312. The Prosecutions Coordinator said the inflexible nature of the Decision Matrix meant staff felt they had no ability to exercise judgement and apply common sense:

> I hate the word Decision Matrix because a Decision Matrix tells you exactly where to go - there's no freedom, there's no application of common sense. I know it exists, you obviously have to have oversight of infringement review decisions … but it's draconian.

313. It appears that the Infringement Review and Prosecutions Officers are effectively delegated to make review decisions under the Infringements Act. A fundamental principle of administrative law is:

> if an authorised officer has power to make a decision that involves discretionary judgment, only that officer can exercise that power or make that judgment. They can take into account the advice or recommendations of others, but it is their responsibility to exercise the discretion and make the decision.[2]

314. A 'decision matrix' or set of guidelines that directs, or purports to direct, delegated decision makers as to what decision to make, or prevents them from exercising their discretion, is inconsistent with this principle.

315. An email to the Lord Mayor reviewed by the investigation suggests this lack of common sense and fairness was a concern of a member of the public, as well (see Figure 33 below).

**Figure 33: Email from member of the public to Lord Mayor, 21 June 2019**

Sent: Friday, 21 June 2019 8:19 PM
To: Sally Capp - Lord Mayor of Melbourne
Subject: Morally bankrupt

A few weeks ago my husband parked in The city of Melbourne using Pay Stay. On returning to the car he discovered he had attracted a parking ticket. He contacted the infringement office giving the Pay Stay details and requesting that the parking infringement ticket be withdrawn. Instead he received a letter back saying yes, he had indeed paid, but for the wrong spot! For this reason the fine of $81 still stands. This may, or may not have been the case. My husband thinks not however, if he had paid for the wrong spot, this clearly wasn't his intention. Nor was he trying to avoid paying for his parking as acknowledged by the infringement notice department. This is just a grab for cash that we can ill afford. I believe the City of Melbourne is morally bankrupt in its decision. He paid to park and if and error was made, the fact that he paid for a space shows clear intention to do the right thing. He certainly didn't plan to pay for a spot someone else had parked in and presumably, The City of Melbourne received two payments for the same spot at the time my husband was parked! Whatever happened to common sense and decency. May you all sleep well tonight.

2 Administrative Review Council Decision Making: LAWFULNESS Best-practice Guide, 1 August 2007, 6.

## Culture and resistance to feedback

316. The evidence also raises questions about Branch attitudes and responsiveness to feedback from staff within the Council.

### Attitudes to drivers

317. A Council officer told the investigation:

> the City of Melbourne has a very ultra view of people who commit parking offences and holds them to account to the law which I found abhorrent.

318. When the investigation asked why the Council proceeded with fines when they could verify that the driver had paid for parking, the Program Manager said:

> I can see it from the customer perspective, but did they also make an error themselves? They did. Because if they didn't make the error …

### Responsiveness to feedback from staff

319. Senior management also appeared to disregard the opinions and feedback of their staff regarding the PayStay zero/O decision and the Penalty Reminder Notice Project.

320. The Program Manager denied there was a culture in the Branch where feedback about the Decision Matrix was discouraged. He said:

> If there are people who don't agree with the content of it, then I would think that they should feel, and I would hope that, we have an environment where they feel comfortable embracing those.

321. The Director stated in his interview:

> I think everyone's happy to raise concerns, and I'd like to think that … people can do that.

### Response to legal advice

322. The investigation asked the Program Manager why Council did not appear to heed advice from its Chief Legal Counsel about the risks of enforcing some infringements, such as the PayStay zero/O infringements.

323. He initially said he did not consider the November 2017 email from the Chief Legal Counsel to be 'legal advice'.

324. When investigators pointed out that the email was headed 'Legal advice, the subject of legal professional privilege' and was entered into the Legal Advice Register, he conceded it might be considered legal advice. However, he said:

> The advice … does not mention if we were to continue to do that, it would be illegal … [I]t's legal advice, but the point that he's making, my reading of it is, this, this is not saying … 'If we did not withdraw these fines … we are not complying with the legislation'.

325. The Program Manager reaffirmed this view several times in his interview. He said Council should 'follow legal advice … in 99% of the cases, particularly if the advice is saying 'You are acting illegally'.

326. But he said 'my thinking is also, lawyers provide advice. The business then makes the decision.' While this is true, an organisation should have sound reasons not to follow its legal advice. The investigation found no such reasons were evident.

## What motivated these decisions?

327. Evidence gathered in the investigation did not identify instances of Branch officers being pressured to raise revenue.

328. On the question of whether the decisions under the Ombudsman's scrutiny were motivated by revenue raising, the investigation was persuaded by the consistency of the evidence given by the Director, the Program Manager and the Prosecutions Coordinator - particularly in light of the fact they gave differing views on many other issues discussed in their interviews.

329. Council data supports the evidence that declining revenue has not affected decision making. The data shows that the number of infringements withdrawn at internal review increased and the number of matters proceeding to court remained consistent.

330. The investigation acknowledges there are likely to be a number of reasons why withdrawal rates increased slightly over those past two financial years. However, the fact there was no decrease in favourable outcomes to drivers across all infringements corroborates the view that senior managers were unlikely to be giving directives to increase revenue by pressuring review officers to withdraw fewer fines.

331. Further, as prosecuting an infringement in court costs more than the value of the infringement, a directive to increase revenue in the Branch would be unlikely to result in higher levels of prosecution. The evidence suggests that Branch management zealously sought to proceed to prosecutions, despite there being no financial gain to the Council to do so.

332. For these reasons, the available evidence does not suggest that revenue raising was driving the poor decision making of senior management in the Branch.

333. The evidence shows the Council's decision making was the result of three major factors within the Branch:

- Limited understanding of administrative law principles that should guide decision making, as set out in the IMES Guidelines
- An inflexible Decision Matrix which effectively prevented Infringement Review and Prosecutions Officers from exercising their decision making discretion
- Management's apparent disregard for concerns raised by Branch officers and the Chief Legal Counsel.

## Council's response

334. After reviewing the Ombudsman's draft report, the Council was pleased that the investigation did not find improper revenue raising was motivating senior management in the Branch.

335. The Council submitted that the previous Ombudsman's investigation into parking infringement notices in 2006 had encouraged a strong focus on objective decision making in the Branch and the creation of structures and processes to reduce the risks of subjective decision making. In relying too heavily on these structures, the Council acknowledged 'the pendulum has swung too far' away from reasonable discretion being exercised. It agreed the balance between consistency of decision making and flexibility in individual cases needs to be adjusted.

336. The Council disagreed that the failure to follow the legal advice given by the Chief Legal Counsel in the PayStay matter was wrong, however. The CEO submitted he accepts there was a failure to follow up on and reconcile different opinions given by the Legal branch, but 'in many cases an informed decision … could still have been to proceed with the infringement'.

337. The Council expressed concerns about the evidence showing the Ombudsman was misquoted as supporting the PayStay approach. It suggested, however, that 'this may be the result of people hearing what they want to hear' rather than any deliberate misrepresentation.

338. Council acknowledged the Branch's cultural and attitudinal issues revealed in the investigation. The CEO said Council will focus on:

    - clearer communication within the Branch and with the Legal branch
    - enabling an environment where concerns such as those raised by the Prosecutions Coordinator can be raised in a safe, non-judgemental manner and be respectfully discussed and explored
    - ensuring objective discretionary thinking is included in these processes while still ensuring people who receive infringements are treated equitably.

339. The CEO said that when he commenced in the role in January 2019, he began a cultural change program to transition the Council to a culture of greater openness, accountability and respect. He stated that the ongoing work of this program will be used as a tool to embed the learnings from the Ombudsman's investigation into the Branch.

# Conclusions

## The conduct of individuals

340. The complaints alleged improper conduct by two senior Council staff; and the actions of their Director came into the frame during the investigation. The evidence did not support the allegations about the Prosecutions Coordinator. He spoke out against several of the unfair approaches adopted by his superiors. While he ultimately accepted the outcome of these decisions, the investigation accepts he felt he had little choice but to do so.

341. While the Program Manager also did not engage in improper conduct, the evidence shows he lacked a fundamental comprehension of discretionary decision making around enforcement of infringements. His harsh perception of drivers who infringe parking rules is at odds with the legislation and the community's understanding of such infringements as being minor offences for which a fine, rather than court attendance, is an appropriate remedy.

342. His rather rigid approach appears to have had a not insignificant impact on some staff and the culture of the Branch. It would have inevitably impacted members of the public who unsuccessfully challenged the Branch's decision making.

343. In his response to the Ombudsman's draft report, the Program Manager said:

> Thank you for the opportunity to review the draft report. While I have found some comments to be inaccurate, I have accepted many.
>
> I do not intend to make any specific responses except to state that I thank the Ombudsman (and her team) for your work.
>
> Moving forward, I'll continually reflect and take into account specific comments made about me … while performing my role.

344. The investigation notes the Director accepted responsibility for his decisions and those of the Branch. The investigation welcomes the changes the Director instigated to the Decision Matrix in October 2019 to allow greater discretion in the Branch's decision making - although there is still some way to go.

## Final comment

345. The investigation concludes the key issue in the investigation was not about particular of codes of conduct, but problematic attitudes and culture which appear to have been generated or endorsed by senior management of the Council. The prescriptive Decision Matrix in use prior to October 2019 was a manifestation of this.

346. The Branch's argument in support of the prescriptive guidance was one of consistency. But in mandating the outcomes for each infringement with no allowance for discretion, the Matrix was contrary to the IMES Guidelines and administrative decision making principles. Even when there was a reasonable basis for reviewers to consider whether the outcome was fair in the circumstances, it appears there was little option for them to do so.

347. In adopting many of the practices identified in this report, the Council acted inconsistently with its own legal advice and the principles of good administrative decision making expected of a public body.

348. While the investigation did not find these practices were improperly motivated by financial considerations, the practical outcome of inflexible decision making about infringements would undoubtedly have made a contribution to the Council's bottom line.

349. Based on the evidence obtained during the investigation, the Council:

- unfairly upheld PayStay zero/O error fines at internal review between July 2017 and July 2018 and from November 2018 to November 2019. When the driver requested a review of a fine, the Branch was able to verify that the driver had paid the correct fee and parked legally. So it was unfair to uphold the penalty imposed on these drivers.
- failed to act in the spirit of the Victorian Model Litigant Guidelines by taking PayStay error fines to court between July 2017 – July 2018 and from November 2018 – November 2019.
- wrongly issued Penalty Reminder Notices from August to December 2019 that contained statements which its Chief Legal Counsel considered were 'wrong' and 'misleading'.

# Recommendations

Council responded constructively to the investigation. Joint discussions between the Council and the Ombudsman's office gave rise to four recommendations pursuant to section 23(2A) of the Ombudsman Act:

### Recommendation 1

That Council's Chief Legal Counsel undertake a review of the 21 October 2019 Decision Matrix to ensure consistency with the principles of administrative law and decision making.

**Council's response:**

*Accepted*

### Recommendation 2

That the Council provide training to relevant staff on the principles of administrative decision making and use of the revised Decision Matrix.

**Council's response:**

*Accepted*

### Recommendation 3

That the Council establish an arrangement under which:

- it undertakes a review of all PayStay zero/O error fines issued during 1 July 2017 – 1 July 2018 and 1 November 2018 – 30 October 2019 where an internal review was rejected
- it refund the infringement where the Council now considers the infringement would have been withdrawn if the revised Decision Matrix had been in place at the time of the review.

**Council's response:**

*Accepted*

### Recommendation 4

That the Council conduct an independent review of the behaviours, processes, systems, reporting structures and governance of the Branch, including implementing a process to monitor the use of discretion in reviewing infringements.

**Council's response:**

*Accepted*

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