

INFRINGEMENTS

Infringement notices and fines are issued for many minor public transport, public space, parking and traffic offences. Many people experiencing homelessness and other forms of disadvantage accrue significant unpaid infringement notices. This chapter discusses the legal framework within which fines are issued and describes the options available to deal with and challenge fines.

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1. Introduction to Dealing with Infringements

Infringement notices, or ‘on-the-spot’ fines, are issued for many minor public transport, public space, parking and traffic offences. Agencies that issue infringement notices include Victoria Police (public space, public transport and traffic offences), the Department of Infrastructure (public transport offences), city councils (parking and public space offences) and tollway operators such as CityLink (tollway offences).

Many people experiencing homelessness and other forms of disadvantage accrue significant unpaid infringement notices. In some cases, this is attributable to the person’s housing status – a person is far more likely to incur a fine for drinking in public if they have no private residence in which to drink. In other cases, this is attributable to the causes underlying a person’s homelessness – a person who is mentally ill and is the subject of an administration order may simply have no money with which to purchase a ticket for public transport.

Enforcement of unpaid infringement notices occurs pursuant to registration of the notice with the Infringements Court. The Infringements Court was established under the *Infringements Act 2006* (Vic) (**the Act**) and is the successor to the Penalty Enforcement by Registration of Infringement Notice (**PERIN**) Court, which was established pursuant to Schedule 7 to the *Magistrates’ Court Act 1989* (Vic). Before the establishment of the PERIN Court, enforcement of an unpaid infringement notice required prosecution in the Magistrates’ Court by way of charge and summons. The Act operates retrospectively and applies to all fines and infringement notices, whether issued before or after the Act came into effect on 1 July 2006. Similarly, all infringements that were within the PERIN Court system at this date have been treated since 1 July 2006 as falling within the Act (see Part 15 of the Act).

The infringements system gives a person who has been issued with an infringement notice a chance to pay the penalty for the offence set out in the notice and thereby avoid any court proceedings (referred to as **expiating the offence**). If the penalty is not paid within 28 days of the issue of a penalty reminder notice (which is issued 28 days after the infringement notice and adds additional costs), then the notice can be registered with the infringements registrar. Following registration, an enforcement order is issued in respect of the penalty. The penalty is then treated as if it were a fine imposed by a court. For example, the penalty can be enforced by way of seizure of property or person following the issue of an infringement warrant.

The infringements system is governed not only by the Act, but also by the Attorney-General’s guidelines for the operation of the Act. These guidelines make it clear that the fundamental purposes of the Act include providing an efficient and expeditious mechanism for dealing with minor offences and improved protection for individuals under the system, as well as for those with special circumstances.

2. Steps in the Infringement Notice Enforcement Process

The general steps in the enforcement of infringement notices are as follows:

1. Official warning or infringement notice is issued

- An issuing officer may serve a person with an infringement notice or with a written official warning (section 8) if it is apparent that the person has special circumstances. The Act makes this discretionary. However, if issuing officers are to exercise such discretion, then they must be guided by their agency's code of conduct and guidelines. Even if an official warning is issued, this does not prevent the warning from being withdrawn in order for the agency to issue an infringement notice or commence proceedings with respect to the offence (sections 10 and 11).
- An infringement notice may be served on a person by delivering it personally to the person, posting it to the person's last known address, or affixing it to any vehicle involved in the commission of the offence (section 12).
- Payment of the penalty fixed in the notice within 28 days results in expiation of the offence. The enforcement agency may also accept late payment as long as the details of the penalty have not yet been lodged with the infringements registrar (section 15). Some enforcement agencies may extend the 28-day period with a phone call, but others may require the request to be in writing.
- Non-payment within the period results in the issue of a penalty reminder notice, which adds additional costs to the original penalty.

2. Penalty reminder notice is issued

- Payment of the penalty and costs fixed in the penalty reminder notice within 28 days (or such longer time as specified in the notice) results in expiation of the offence.
- Non-payment within 28 days results in registration of the infringement penalty with the infringements registrar of the Infringement Court. A notice may only be lodged within six months of the date of the offence, although this time is extended in certain circumstances, such as where the fine was the subject of a payment plan on which the person subsequently defaulted or where the decision to issue the infringement notice has been the subject of internal review (section 55).

3. Infringements registrar issues an enforcement order which adds additional costs to penalty in courtesy letter

- Payment of the penalty and costs fixed in the enforcement order results in expiation of the offence.
- Non-payment within 28 days results in the issue of an infringement warrant, which adds an additional fee to the penalty and costs fixed in the enforcement order and allows further enforcement action.

4. Infringements registrar issues an infringement warrant

- An infringement warrant authorises the sheriff or other person to whom the warrant is directed (such as a police officer, the Commissioner under the *Corrections Act 1986 (Vic)*) to enter and search any premises occupied by the person and seize personal property. If the person's property is seized, then it can be sold at public auction to pay off outstanding fines. Before a search is executed the sheriff must give seven days notice in writing.
- Further enforcement powers may be exercised against the person to detain, immobilise or sell a motor vehicle, suspend a driver's licence or vehicle or trailer registration, or make an order for the attachment of earnings or debts. The powers to suspend a driver's licence or detain a motor vehicle may be exercised whether or not the infringement relates to driving.
- As a last resort, the sheriff may place a charge over real property and sell the property in certain circumstances.
- If the person is impecunious, then the sheriff may arrest the person and either release them on a community work permit or take them before the Magistrates' Court where the court may sentence the person under section 160 of the Act.
- An infringement warrant becomes null and void if not executed within five years from the date of issue (section 94) and the enforcement order also expires at this time (section 62). However, an enforcement order can be reinstated for one further five-year period on the infringements registrar's own motion or on application of the enforcement agency. Upon reinstatement the fine becomes recoverable as if there had been no expiry (section 63).

3. Steps When Assisting a Client with Unpaid Fines

The general steps to take when assisting a client with unpaid fines are as follows:

1. Obtain details of all outstanding fines (see section 4 below).
2. Obtain details of the client's financial, social, housing, physical and mental state and circumstances to determine the most appropriate course of action (see section 5 below).
3. In relation to fines that are at **infringement notice or penalty reminder notice stage** (see section 6 below):
 - apply to the enforcement agency for internal review or withdrawal of the fines;
 - apply to the agency for time to pay or payment by instalments;
 - object to being dealt with under the infringements system and apply to have the matter referred to open court; or
 - pay in full.

4. In relation to fines that are at **enforcement order or infringement warrant stage** (see section 7 below):
 - if the client did not commit the offence, has a valid reason for committing the offence or has 'special circumstances' that resulted in the commission of the offence, then apply for revocation of the enforcement orders and warrants;
 - if the client only became aware of the fines within the last 14 days, then apply to the infringements registrar for cancellation of the infringement notices (however, note that the infringement notices may be re-issued even if the application for cancellation is successful); or
 - apply for variation of costs and/or time to pay or payment by instalment.
5. In relation to **fines imposed in open court** under the *Sentencing Act 1991* (Vic) (see section 9 below):
 - if the fines were imposed ex parte and the client has a valid reason for non-appearance, then apply for a re-hearing;
 - apply for conversion to unpaid community work;
 - apply for time to pay or payment by instalments; or
 - appeal to the County Court.

These steps and options are each considered in greater detail below.

4. Obtaining Details of Outstanding Fines

In most cases, clients do not present with complete documentation in respect of fines. So you will probably need to obtain this information from both the enforcement agencies (if the fine is less than 56 days old) and the infringements registrar (in relation to fines that have been registered with the infringements registrar or were imposed in open court).

For this purpose, you need to seek the following information and documentation from the client:

- full name (including middle name);
- any previous names or aliases;
- current address and any contact phone numbers;
- previous address(es);
- date of birth;
- licence number;
- photocopy of identification documents;
- details as to where, when and what types of fines or infringement notices they may have incurred; and
- a signed authority to act form.

Once you have collated this information and documentation you should send a letter requesting details of all outstanding fines to the enforcement agencies (for any fines less than 56 days old) and to the infringements registrar (for all other fines) at the following address:

Infringements Registrar
Infringements Court
PO Box 14487
Melbourne City Mail Centre VIC 8001

The infringements registrar will generally respond to such a request within four weeks with details of all outstanding fines, including court-imposed fines.

5. Obtaining Details of Client's Circumstances

To determine the most appropriate course of action in relation to the client's outstanding fines, you should obtain the following information and documentation from the client:

- Details of the alleged offences and any factors relevant to the client's committing the offences or inability to pay.
- Details of any mental or intellectual disability, disorder, disease or illness, homelessness, or drug or alcohol addiction that may have resulted in the client's inability to understand that the conduct in question constituted an offence, or inability to control the conduct that constituted the offence. If any such condition exists, then you should obtain details of the nature of the condition, the status of the condition at the time of the offences, the current status of the condition and any steps taken to address the condition (such as rehabilitative treatment).
- Details of the client's weekly income and expenses (such as accommodation, food, electricity, gas, telephone, transport, medical and miscellaneous expenses).
- The contact name of any case worker, housing worker, drug and alcohol counsellor, general practitioner, support worker and/or psychologist who may be able to provide a letter of support, and authority to contact any such person with a request for a letter or report.

6. Dealing with Infringement Notices and Penalty Reminder Notices

6.1 Overview

The options for dealing with infringement notices and penalty reminder notices that have not yet been registered with the infringements registrar are as follows:

1. Write to the enforcement agency requesting an internal review of the decision to serve an infringement notice, pursuant to section 22 of the Act (see section 6.2 below).
2. Write to the enforcement agency seeking a withdrawal of the outstanding infringement notices pursuant to section 18 of the Act (see section 6.3 below).

3. Write to the enforcement agency asking for a payment plan to be put in place, or for an extension of time for the person to pay or both (see section 6.4 below).
4. Elect to have the matter of the infringement offence heard and determined in the Magistrates' Court pursuant to section 16 or section 30 of the Act (see section 6.5 below).
5. Pay in full.

Some of these options are discussed in detail below.

6.2 Application for internal review by enforcement agency

A person who has been served with an infringement notice, or another person acting on that person's behalf, may apply in writing for internal review of the decision to serve the infringement notice. An internal review may be requested on the ground that:

- the decision was contrary to law or involved a mistake of identity;
- 'special circumstances' apply to the person; or
- the conduct for which the infringement notice was served should be excused on the ground of exceptional circumstances.

The ground on which the application is made must be specified in the application.

What constitutes 'special circumstances'?

Under the Act, **special circumstances** is defined as:

- a mental or intellectual disability, disorder, disease or illness; or
- a serious addiction to drugs, alcohol or other volatile substance; or
- homelessness.

Homelessness is defined in section 7 of the *Infringement Regulations 2006* (Vic). For the purposes of the Act, a person is homeless if:

- the person is living in crisis accommodation; or
- the person is living in transitional accommodation; or
- the person is living in any other accommodation provided under the *Supported Accommodation Assistance Act 1994* (Cth); or
- the person has inadequate access to safe and secure housing within the meaning of section 4 of the *Supported Accommodation Assistance Act 1994* (Cth).

This definition may also include people living in rooming houses and caravan parks without any security of tenure.

A connection between homelessness (and any other special circumstance) and the commission of the offence must be shown.

What constitutes 'exceptional circumstances'?

Exceptional circumstances is not defined in the Act. However, it is likely to cover broader circumstances than those that amount to 'special circumstances'. Some factors may include:

- personal circumstances, whether permanent or temporary, including poverty, age, debilitating life events such as serious acute illness, language or literacy difficulties and cultural differences, which can affect a person's capacity to control their actions or understand the offence they have committed;
- the relative gravity of the offending conduct; and
- whether the offence is a first offence, or is the first offence committed in a time period determined by the agency (or first offence of a similar nature).

Making the application for internal review

An application for special circumstances or exceptional circumstances will be decided on the basis of the written application and any supporting documentation provided by the applicant.

Supporting documentation may include a report or letter from the person's case worker, case manager, social worker, doctor, psychiatrist, psychologist or accredited treatment agency (in the case of a person suffering from drug or alcohol addiction). The documentation should be less than 12 months old (although this is not necessary in the case of a medical report setting out details of an acquired brain injury).

When making an application on a client's behalf, you should provide sufficient documentation to support the client's case. In some cases, such as where the same client has previously supplied documentation in support of another application, it may not be necessary to supply such documentation again. You should check with the particular agency as to their requirements about what information must be provided.

The agency may also request additional information from the applicant and suspend the review for up to 35 days while awaiting such information. If the person does not provide the requested information within 14 days, then the agency must review the decision without that additional information (section 23).

If an application is made on the basis of special circumstances, then the agency may either withdraw the infringement notice (including by serving an official warning in its place) or decline to withdraw the notice and refer the matter to the Magistrates' Court where it will be dealt with under the *Sentencing Act 1991* (Vic). If the agency refuses to withdraw the matter, then the infringement notice may be sent to the Special Circumstances List of the Magistrates' Court (for discussion of the operation of this list, see section 8.3 below). If an application is made on another basis, then the agency may also decide to waive some or all of the prescribed costs, approve a payment plan or withdraw the notice without referring the matter to the Magistrates' Court (section 25). If the agency confirms the decision to issue an infringement notice, then the fine must be paid by the due date in the infringement notice or within 14 days after the person has been sent notice of the outcome, whichever is the later (section 26).

Any enforcement action is suspended while the agency is reviewing the decision. The enforcement agency has 90 days to make its decision (with a further period of up to 35 days allowed if the agency seeks further information from the applicant) and the infringement notice is deemed to be withdrawn if the agency does not advise the client of the outcome of its review within seven days of the end of this prescribed period (section 24). It is important to calculate this time period carefully, particularly where additional information has been sought.

A person may apply for internal review even if they have already paid some or the entire amount of the fine. In such a case, if the review results in withdrawal of the infringement notice, then the amount paid will be refunded (section 18(5)).

Note that, pursuant to section 27 of the *Road Safety Act 1986* (Vic), a person may notify VicRoads if they are concerned about another person's ability to drive. If an application is made to the Victoria Police on the ground that special circumstances apply to a client, then the police may elect to notify VicRoads of any condition disclosed in the application that may affect the client's ability to drive (for example, any psychological conditions). If this occurs, then VicRoads may require the client to provide a supplementary medical report to confirm that, despite the client's condition, they are able to safely drive a car.

6.3 Application for withdrawal of infringement notice

An enforcement agency may withdraw an infringement notice on the ground that an official warning should be served on the person rather than an infringement notice, or that the matter should be abandoned (section 18).

There is no express provision for a person to apply for withdrawal of the fine under section 18. Accordingly, in many cases it may be more appropriate to apply for internal review of the decision to serve an infringement notice (see section 6.2 above). However, given that the grounds for withdrawal differ between the two provisions, it may be useful to request withdrawal pursuant to section 18, either in addition to or instead of an application for internal review, depending on what grounds for withdrawal are relevant to the client's circumstances.

6.4 Application for payment plan

An agency must make a payment plan available to a person upon request if that person holds any of the following cards: a Centrelink Health Care Card, Pensioner Concession Card or Department of Veterans' Affairs Concession Card.

The enforcement agency also has discretion to offer an instalment plan to any other person, such as on the basis of severe financial hardship. The Attorney-General's guidelines provide that agencies should, when exercising their discretion, take into account unavoidable financial hardship that results in a person being unable to pay the fine in full in the payment period. Guidelines may be released setting out minimum payments that may be made under a payment plan, although none have been to date. The minimum payments may distinguish between people who are automatically entitled to a payment plan and those who may be offered a plan at the agency's discretion. You should check the agency's policy in this regard as each agency may formulate its own guidelines.

In practice, an application for a payment plan should specify when the person will be able to pay the first instalment (or the entire amount in the case of an extension of time to pay), and should include a request for written confirmation of whether or not the application has been accepted.

If a person misses their first payment under a payment plan, then the plan is cancelled and is of no effect (section 48(2)).

A person defaults on a payment plan if they fail to make a payment within 14 days after it is due. In the event of a default, further enforcement action can be taken against the person.

6.5 Election to have the matter heard in open court

A person may elect to have the matter heard in open court rather than have the fine enter the infringements system. If a penalty reminder notice has been served, then this election must be in writing and be served upon the enforcement agency (section 30). Having the matter heard in open court gives a person the opportunity to put forward their individual circumstances. However, there are risks in electing to have the matter heard before a Magistrate, especially because a case brought before the court under section 16 or section 30 would not be heard on the Special Circumstances List (for discussion of the operation of this list, see section 8.3 below). There is a risk that higher penalties will be imposed, a conviction recorded against the person or liability for court costs imposed. Alternatively, the court may convert the fines to community work, reduce the amount of the penalty or allow the person to pay by instalments.

7. Dealing with Enforcement Orders and Infringement Warrants

7.1 Overview

The options for dealing with infringement notices that have been registered with the infringements registrar, resulting in the issue of enforcement orders or infringement warrants, are as follows:

1. If the offence involved a motor vehicle and the client was not the driver of the vehicle at the time of the offence and can nominate another driver, then assist the client to apply for revocation of the enforcement order (see section 7.2 below).
2. Write to the infringements registrar seeking cancellation of the infringement notice pursuant to section 37 of the Act, on the basis that the person was not aware that an infringement notice had been served upon them (see section 7.3 below).
3. If there are sufficient grounds for revocation, then assist the client to apply for revocation of the enforcement orders or warrants (see section 7.4 below).
4. If the client has 'special circumstances' that resulted in their inability to understand that the conduct in question constituted the offences or their inability to control that conduct, then apply for revocation of the enforcement orders or warrants (see section 7.5 below).

5. If 1, 2,3 and 4 don't apply, then assist the client to apply for a payment order (see section 7.6 below) or, if a seven-day notice has been served, an attachment of earnings order or attachment of debts order (see section 7.7 below).

If none of the above steps is taken, then there is a range of enforcement action that may be taken against the client (see section 7.7 below).

7.2 Application for revocation if the client was not the driver of the vehicle

Under section 65, a person against whom an enforcement order has been made may apply to the infringements registrar for the enforcement order to be revoked on the basis that the person was not the driver of the vehicle to which the infringement offence related, and that the person has nominated another driver (section 66(4)).

An application under section 65 must be in writing and must set out the grounds on which revocation is sought.

7.3 Application for cancellation of infringement notice if the client was not aware that the notice had been issued

An application under section 37 may be made to the infringements registrar on the ground that the infringement notice was not personally served on the person and the person was not aware that an infringement notice had been served on them. The application must be made to the infringements registrar within 14 days of the person's becoming aware of the infringement notice and must be accompanied by a written statement setting out the grounds on which cancellation is sought.

Once this application is made, the infringement process is stayed and the matter is referred to the Magistrates' Court for hearing. If the notice is cancelled because the court is satisfied that the person was not aware of the notice, then this does not prevent the enforcement agency from serving a new infringement notice on the person in respect of the same offence, but it will clear any additional costs that have already been imposed and any warrants that have been issued. It will also mean that the fine returns to the enforcement agency stage, which gives the person an opportunity to seek internal review of the decision by the enforcement agency, if appropriate.

7.4 Application for revocation if there are sufficient grounds

Pursuant to section 65 of the Act, any person against whom an enforcement order has been made may apply to the infringements registrar for revocation of the enforcement order on the basis that there are sufficient grounds for revocation. This is likely to include where the person did not commit the offences or had a valid reason for committing the offences (which were grounds for revocation under the old PERIN system). Furthermore, section 66(7) of the Act provides that nothing in section 66 limits the power of the infringements registrar to revoke an enforcement order on any basis. It may therefore be possible to argue that your client's enforcement orders should be revoked on some other ground.

An application for revocation under section 65 can be made at any time until an infringement warrant has been issued and executed (that is, an application can still be made if a warrant has been issued but neither property or the person has yet been

seized) or until other enforcement action, such as the making of an attachment of earnings order, has been taken.

An application under section 65 must be in the form of a written statement from the person setting out the grounds on which the revocation is sought.

In most cases, if you are acting on behalf of a client who is applying under section 65, it will be appropriate to send a letter in support of the application. This letter should request that a copy of all correspondence in relation to the matter be sent to you.

Applications for revocation under section 65 must be sent to:

Infringements Registrar
Infringements Court
PO Box 14487
Melbourne City Mail Centre VIC 8001

You should confirm this correspondence address before sending an application. The application will be granted if the registrar is satisfied that there are sufficient grounds for revocation.

If an enforcement order is revoked under section 65, then the matter is referred to the Magistrates' Court for hearing and determination. However, the enforcement agency may, within 21 days of being notified of the revocation, request the infringements registrar not to refer the matter to the court (section 69). If this occurs, then the infringement notice will also have been withdrawn and the matter will effectively come to an end.

What if the registrar refuses to revoke the matter?

If an enforcement order is not revoked under section 65, then the person may, within 28 days, have the application for revocation referred to the Magistrates' Court for hearing and determination (section 68). If the application is made more than 28 days after the date of the notice but within three months, then the registrar has the discretion to refer the matter to the Magistrates' Court. An application under section 68 cannot be made later than three months after the notice is received.

At the hearing, the Magistrate may revoke the enforcement order and determine the matter of the alleged offence if they are satisfied that non-payment could result in imprisonment (that is, if they are satisfied that the person has no assets and inadequate income to pay the fines) or if justice otherwise requires that the case be dealt with on its merits: *Zaffiro v Springvale City Council* (unreported, Supreme Court of Victoria, Byrne J, 28 March 1996) (although note that this authority may be distinguishable because it was decided under the PERIN Court system).

7.5 Application for revocation if the client has 'special circumstances'

The Act does not expressly provide that the fact that 'special circumstances' apply to a person is a sufficient ground for the infringements registrar to revoke an enforcement order and refer the matter to the Magistrates' Court for determination. However, section 65(1)(c) contemplates that an application under section 65 may be made on behalf of a person to whom special circumstances apply. The Attorney-General's guidelines also refer to the making of an application under section 65 as a way for people with special circumstances to be diverted out of the infringements system to the Magistrates' Court.

Accordingly, if a client has special circumstances, you may apply for revocation on their behalf on the ground of special circumstances under section 65.

The definition of 'special circumstances' is discussed at section 6.2 above.

An application for revocation under section 65 can be made at any time before enforcement action, such as the seizure of property or garnishing of wages, being taken.

An application for revocation under section 65 may be made by a person acting on the applicant's behalf, such as a lawyer or case worker. The application does not need to be accompanied by a statutory declaration.

The application should be in the form of a letter that sets out:

- that the application for revocation is being made under section 65 on behalf of the client;
- details of the client's mental illness, disability or disorder, addiction and/or homelessness;
- details as to how the condition resulted in the client's inability to understand that the conduct constituted an offence or inability to control the conduct;
- details of any rehabilitative or restorative treatment undertaken by the client;
- details of the client's weekly income and expenses;
- details as to how payment of the outstanding amounts would exacerbate the client's condition or occasion mental, physical, financial or social hardship; and
- that the enforcement orders should be revoked and referred to the Magistrates' Court for determination so as to enable orders to be made that address the underlying causes of the offences.

If as a legal practitioner, you are making an application for revocation on behalf of a client, it is also extremely important to provide support letters for the application. The Infringements Court imposes relatively restrictive guidelines around these support letters. As it currently stands within the Infringements Court, an application for revocation on the basis of special circumstances must be accompanied by (information taken from Infringements Court correspondence):

- **(for revocation on the basis of mental illness or drug/alcohol addiction):** a letter no more than 12 months old from a treating psychiatrist or GP. It should address the following points if possible:
 - Full nature/diagnosis of the client's medical/mental health issues;
 - How the condition affects the client's daily life;
 - Any treatment and medication that the client has undertaken or is currently undertaking;
 - The duration of the medical/mental health issues.
- **(for revocation on the basis of homelessness):** a letter no more than 3 months old from an agency funded under the Supported Accommodation Assistance Act 1996

(Cth), a registered practitioner or psychologist, or a health service provider. It should address the following points if possible:

- Current living arrangements (if any);
- The type of homelessness and 'reasons' for being homeless;
- Whether the person was homeless at the time of committing the offences and how their homelessness contributed to the offences;
- Does the person suffer from any other illness (mental disorder, drug or alcohol addiction);
- Is the person taking medication;
- Is the person currently undergoing any treatment/rehabilitation;
- How long it is envisaged that the person will 'remain homeless'.

Any further reports you send from, for example, youth workers, rehabilitation facility workers, registered psychiatric nurses, will not be sufficient on their own to establish a person's special circumstances. They will be treated as secondary documents for the purposes of the revocation application. The above documentary requirements are often difficult to comply with as medical practitioners are not always willing to write free reports. Similarly, you may be unable to get reports about a client's homelessness that are less than 3 months old. You should address these documentary difficulties in your application.

You should send applications for revocation under section 65 to:

Infringements Registrar
Infringements Court
PO Box 14487
Melbourne City Mail Centre VIC 8001

You should confirm this correspondence address before sending the application.

If an enforcement order is revoked under section 65, then the matter is referred to the Magistrates' Court for hearing and determination on the Special Circumstances List (see section 8.3 below). However, the enforcement agency may, within 21 days of being notified of the revocation, request the infringements registrar not to refer the matter to the court (section 69). If this occurs, then the infringement notice will also have been withdrawn and the matter will effectively come to an end.

If the infringements registrar decides not to revoke the order, then you may apply to the infringements registrar under section 68 of the Act to have the application for revocation referred to the Magistrates' Court. The infringements registrar must refer the application to the court as long as the application for referral is received within 28 days after the person is notified that the infringements registrar will not revoke the enforcement order. If it is received more than 28 days but less than three months after this notification, then the registrar has discretion to refer the application for revocation to the court. See section 7.4 above for further details.

7.6 Application for payment order

Section 76 of the Act provides that a person may apply to the infringements registrar for a payment order. A payment order may provide that the time for payment be extended or that the fine be paid by instalments or both.

While a payment order is in force and the person is complying with the order, execution of the enforcement order is stayed and, if an infringement warrant has been issued, the warrant may be recalled or may remain issued but unenforceable (section 77(5)). If the person defaults under the payment order by failing to make a payment within 28 days of it being due, then an infringement warrant may be issued against them (section 78).

Generally, an application for a payment order may be made in person or in writing. A written application on behalf of a client must include the person's full name and current address, a description of their financial circumstances and the reason for making the application. Guidelines may be released setting out minimum payments that may be made under a payment order, but none have been to date. You should check the registrar's policy in this regard.

You should send applications for a payment order to:

Infringements Registrar
Infringements Court
PO Box 14487
Melbourne City Mail Centre VIC 8001

In most cases, if you are acting on behalf of a client who is applying under section 76, then it will be appropriate for you to send a letter in support of the application. This letter should request that a copy of all correspondence in relation to the matter be sent to you.

If you intend to apply for a payment order on behalf of a client, then you should consider first applying for revocation under section 65 on the basis of the client's financial hardship. Even if the infringements registrar determines that there are not sufficient grounds to revoke the enforcement order, they may decide that there are sufficient grounds for varying the additional costs and fees imposed on top of the fines (see section 67 of the Act). This means that when an application for a payment order is subsequently made, the outstanding amount will be significantly less. However, section 67 does not apply if the application is made by a person to whom special circumstances apply, or on such a person's behalf (section 67(3)), so the enforcement fees will not be waived on the ground of a person's special circumstances.

7.7 What happens if the client takes no action?

If a client has been issued with an infringement warrant and takes no action, then further enforcement action may be taken against them.

Execution of infringement warrant

An infringement warrant may not be executed until the person has been served with a seven-day notice warning them of the enforcement action that may be taken (section 88). A seven-day notice must be served personally on the person (section 162(2)(a)).

However, during this seven-day period, personal property may be seized and removed from the person's property if a demand for the amount under the warrant has been made and the person executing the warrant reasonably believes that removal is necessary to prevent the property from being removed or disposed of. If this action is taken, then a written statement of reasons must be given to the person and the infringements registrar (section 89).

Upon the expiry of the seven-day notice, the sheriff or other authorised person (such as a police officer) may execute the warrant by entering any residential or business property occupied by the person, seizing personal property and selling it. This action cannot be taken if the person has made an application for a payment plan or revocation of the enforcement order (section 90).

Note that section 105 of the Act states that a person cannot prevent their vehicle from being detained, immobilised or sold, even if they can show that their vehicle is their primary mode of transport.

Detention, immobilisation or sale of motor vehicle

Part 7 of the Act allows the sheriff or a police officer to do anything necessary to detain or immobilise a motor vehicle of which the person is a registered operator. This may occur when a police officer intercepts the car being driven, or the car is found parked. This action may be taken as long as an infringement warrant has been issued, whether or not a seven-day notice has also been served.

If the person takes action during the prescribed period (the prescribed period is yet to be announced but will presumably appear in the regulations), such as paying the fine, entering into a payment plan or having the fine revoked, then the motor vehicle must be released (section 100). If the amount owed remains outstanding at the end of the prescribed period, then the sheriff may sell the vehicle (section 101). Moneys from such a sale may be applied to the amount outstanding under the warrant (after the costs of impounding and selling the vehicle have been paid) (section 104).

Suspension of drivers' licences or vehicle and trailer registrations

Under Part 8 of the Act a sheriff may direct VicRoads to suspend or not renew a driver's licence or vehicle registration or not to transfer a registration, whether or not the infringement was a motor vehicle offence. This action can be taken only if a seven-day notice has been issued and the person has failed to pay the fine or taken other action. Furthermore, before such action is taken, a notice of intention to suspend the licence or registration must be served on the person personally (section 162(2)(d)).

Sanctions under Part 8 may be lifted only if other action is taken to satisfy the outstanding fine, such as paying off the fine in full, becoming subject to a payment order, having the fine revoked, having sufficient personal property seized or entering into an

attachment of earnings order or attachment of debts order, or if the infringement warrant expires.

Attachment of earnings or debts order

Under Part 10 of the Act the infringements registrar may make an attachment of earnings order or an attachment of debts order as long as the amount outstanding under the infringement warrant is not less than the 'prescribed amount', and a seven-day notice has been served and has expired. An attachment of earnings order may be made only if the registrar has sufficient details of the person's financial circumstances, so the registrar may issue a summons for oral examination before making an order (see below) or may request details from the person's employer. An attachment of debts order may only be made if the debtor is in Victoria.

A person who fails to comply with the order (for example, an employer or debtor) is guilty of an offence. It is also an offence for an employer to terminate or alter a person's employment on the ground that the employer has to comply with an attachment of earnings order in relation to that person.

Summons for oral examination

Section 120 of the Act permits the infringements registrar to issue a summons requiring a person to attend an oral examination if the registrar does not have sufficient information to make a payment order, an attachment of earnings order or an attachment of debts order. A summons for oral examination must be served personally on a person (section 162(2)(b)).

A person who is issued with a summons may be arrested if they fail to appear before the infringements registrar (section 121). If a person is arrested, then the sheriff has discretion to release them if the person undertakes to attend the oral examination at the time and place specified in the arrest warrant. If this does not occur, then the person will be dealt with under the arrest provisions of the *Magistrates' Court Act 1989* (Vic).

Charges over, and sale of, real property

Charges over real property are a last resort. However, the court may order a charge to be placed over land of which the person who owes money under an infringement warrant is owner or co-owner. Such an order may be made on application of the sheriff, but only if seizure of personal property is not a reasonably practicable means of satisfying the warrant, or if enforcement action under a warrant or under Part 8 of the Act has not been successful or is impossible or inappropriate, and the amount owed is not less than the prescribed amount.

A court may remove a charge if the amount outstanding has been paid, the person has died, the charge has expired or otherwise should be removed or in all the circumstances it is no longer appropriate for the charge to remain on the land. If the charge remains on the land for more than three months and the amount owed under the warrant is still outstanding, then the sheriff may apply for an order permitting the sale of the property (section 143) after having notified the owner or owners of the land of their intention to do so (section 144).

7.8 What happens if the client is arrested?

A person may be arrested under an infringement warrant if they do not have sufficient personal property to cover the amount owed under the warrant. If a person is arrested, then they must be brought before the Magistrates' Court within 24 hours or be released on bail.

If a person has been arrested under an infringement warrant, then they may be eligible for a community work permit under Part 12 of the Act. The person will be eligible for a community work permit if:

- the outstanding fine does not exceed an amount equivalent to the value of 100 penalty units (\$11,12.00). This rate is applicable for the year 1 July 2007 – 30 June 2008 and will vary each financial year according to the definition of 'penalty unit' under section 5(3) of the *Monetary Units Act 2004* (Vic);
- the person elects to perform unpaid community work; and
- the person is suitable for a community work permit.

If a person is released on a community work permit, then they will effectively work off the outstanding amount of the fine at a rate of 0.2 penalty units (\$22.02) per hour (section 152). The person must work more than 20 hours and no more than 40 hours in a seven-day period, although the permit can be suspended if the person is ill or in other exceptional circumstances. A person may reduce the balance of any time that they are required to work at any time by making monetary payments in accordance with the Act.

When subject to a community work permit, a person must fulfil certain conditions, such as not committing an offence punishable on conviction by imprisonment, regularly reporting to a community corrections officer on a determined periodic basis, and not leaving Victoria (section 149).

If a person fails to comply with the conditions of the permit without reasonable excuse, then they will be brought before the Magistrates' Court under section 159. A person will also be brought before the court under section 159 if, after being arrested, they do not meet the above criteria for a community work permit. The court's powers to deal with people before it under section 160 of the Act are discussed at section 8.7 below.

8. Hearing a Case in Open Court

8.1 Overview

Homeless clients will often receive a more favourable and lenient sentencing disposition in open court than under the infringements system, as the Magistrates' Court is better equipped to consider and respond to the individual circumstances of a person than the 'automated' infringements system with its fixed penalties. This is particularly so if the client appears before a Magistrate on the Special Circumstances List (see section 8.3 below), as in such a case the Magistrate is more likely to have experience in dealing with homeless people who may be faced with a range of difficulties.

This section sets out details about the different types of open court hearings and tips for appearing in the Magistrates' Court.

8.2 Cases referred under section 66 (revocation on grounds other than special circumstances)

Section 66 of the Act provides that a matter may be revoked and referred to the court for hearing if there are sufficient grounds for revocation. Where a case is referred to the Magistrates' Court under section 66, other than where it is an application for revocation on the basis of special circumstances, you will receive a Notice of Hearing for your client. This notice will set out a "mention date":

- If your client is pleading guilty, the matter will be heard and determined on that mention date.
- If your client is pleading not guilty, the matter will generally be adjourned and set down for a contest hearing at a later date.

Each matter will generally be referred to the court nearest to where the offence is alleged to have occurred. If your client has multiple matters, this means that they may be referred to different courts. Ideally you would have all your client's matters dealt with at once in the same court. To do this you will need to identify all of the separate matters so that you can then contact the agencies involved to seek their consent to consolidate the matters into a single hearing. You can also ask the Magistrates' Court to list the cases at the same court, for a single hearing.

If the court decides not to revoke the enforcement order and determine the matter, then it will refer the matter back to the infringements registrar for enforcement in accordance with the Act (section 72). In practice, this does not happen very often.

8.3 Cases referred under section 66 (revocation on special circumstances grounds)

Where your client's case is referred to court under section 66 on the basis of 'special circumstances', their matter or matters will be listed together at the Melbourne Magistrates' Court for first mention on the Special Circumstances List. If your client pleads guilty at that mention, the Magistrate can then deal with the matter at that time.

The Special Circumstances List (a forum just for special circumstances applications that currently sits on the first and third Thursdays of each month) aims to identify and address the issues underlying the 'offending behaviours' of people with special circumstances. Most often, defendants in this list will have their matters dismissed, or adjourned on an undertaking of good behaviour for a specified period, after which the matters will be dismissed.

If the court decides not to revoke the enforcement order and determine the matter, then it will refer the matter back to the infringements registrar for enforcement in accordance with the Act (section 72). In practice, this does not happen very often.

8.4 Cases referred under sections 16 and 30 (objection to being dealt with under the Act)

If a person elects to have the offence heard and determined by the Magistrates' Court before the infringement notice has been lodged with the infringements registrar, or if the enforcement agency refers the matter to the court under section 17 or section 25(3), then the enforcement agency will supply certain information to the court. The court will

allocate a time and place of hearing and the enforcement agency must serve these details on the person at least 14 days before the date of the hearing. If the person is not served with the details but the court is satisfied that the person is avoiding service or cannot be found after reasonable search and inquiry, then the hearing can proceed in the absence of the person (section 41).

If a person does not have special circumstances, then the person will receive a white notice of hearing setting out a mention date. If the person pleads guilty, then the matter will be heard and determined on that date.

8.5 Appeal from Infringements Registrar's refusal to revoke (section 68)

As discussed above, where the Infringements Registrar refuses a revocation application, you can apply under section 68 of the Act to have the application for revocation to the Magistrates' Court. The application is, in effect, an appeal from the decision of the registrar to refuse the revocation application. Strict timelines apply to this process, which are discussed above at section 7.4. In general, the Magistrate will allow the appeal and revoke the enforcement order if satisfied that non-payment could result in imprisonment (i.e. if your client has no assets and an inadequate income to pay the fines) or if justice otherwise requires that the case be dealt with on its merits. This application may also proceed by way of consent.

If the enforcement order is revoked and your client pleads guilty to the alleged offence, the Magistrate will immediately proceed to hear and determine the matter.

8.6 Cases referred under section 25 (enforcement agency declines to withdraw infringement notice after internal review)

At the conclusion of an internal review, the agency may decline to withdraw the infringement notice and, if the application was made on the basis of the applicant's special circumstances, the agency *must* refer the matter to the court (section 25(3)). In general these matters are not referred to the Special Circumstances List. It is worth contacting the relevant agency and the Magistrates' Court to have the matter transferred to the Special Circumstances List if possible.

8.7 Appearing in the Magistrates' Court

Before the hearing you may be able to negotiate with the prosecutors from the relevant enforcement agencies to withdraw the matter so that there is no need for a hearing.

If this does not work, you and the client should arrive at the court at least 15 minutes before the hearing time. You need to announce your appearance in person with the associate in the court in which the matter is listed to be heard.

It is important that the client is present at the hearing. This is because some sentencing dispositions (such as a conditional bond) require that the client consent to the order. Also, sometimes Magistrates like to hear from the client directly.

It is also an advantage if a case worker or social worker is present at the hearing. This sends a strong message to the court that the client is being supported and that their

difficulties are being addressed. It may also be useful to show that the client has other support, such as from other professionals or family members.

When the associate calls your matter, you should proceed to the bar table and announce your appearance (for example, 'Your Honour, I appear for the defendant, Mr Brown, in this matter'). The Magistrate will then ask the enforcement agency prosecutor for an outline of the alleged offences. Following this outline, the Magistrate will ask whether your client pleads guilty or not guilty. If the client pleads guilty, then the Magistrate will ask for sentencing submissions. If the client pleads not guilty, then the matter will be adjourned to a contest date.

8.8 Sentencing

Sentencing in open court generally occurs under the *Sentencing Act 1991* (Vic). There is an exception in relation to a person who is brought before the court after having been arrested pursuant to the execution of an infringement warrant, in which case the court has restricted sentencing dispositions under section 160 of the Act.

Sentencing under section 160 of the Act (where infringement warrant executed)

When a person is arrested pursuant to an infringement warrant and they are not eligible for a community work permit, have not elected to do community work or have failed to comply with the community work permit, then they will be brought before the Magistrates' Court. In such a case, the court may:

- imprison the person for a period representing one day for each penalty unit (section 160(1)); or
- if the person has a mental or intellectual impairment, disorder, disease or illness or other special circumstances, discharge the whole outstanding amount (or 2/3 of the amount) or adjourn the proceedings for six months (section 160(2)); or
- if imprisonment would be excessive, disproportionate and unduly harsh, imprison the person for a period up to 2/3 less than that for which they would be imprisoned under section 160(1), discharge the whole amount (or 2/3 of the amount), adjourn the proceedings for six months, or make a community-based order (section 160(3)).

Section 3(3) of the Act expressly provides that the discretion of a Magistrate is not limited by the definition of 'special circumstances' in the Act. This means that a person may be able to avoid imprisonment under section 160 even if they do not fall within this definition.

Imprisonment may be served cumulatively with any period of imprisonment that the person is serving (section 161A).

Sentencing under the Sentencing Act 1991 (Vic) (in all other cases)

A person will be sentenced in accordance with the *Sentencing Act 1991* (Vic) when they have taken one of a number of routes to get out of the infringements system. The *Sentencing Act* applies **except** where the person appears before the court after having been arrested pursuant to the execution of an infringement warrant.

Section 5 of the *Sentencing Act* sets out sentencing guidelines. It provides that the only purposes for which a sentence may be imposed are just punishment, deterrence, rehabilitation and community protection. It further provides that, in sentencing an offender, the court must have regard to, among other things, the nature and gravity of the offence, the offender's culpability and degree of responsibility for the offence, whether the offender pleaded guilty to the offence and the presence of any aggravating or mitigating factor concerning the offender or any other relevant circumstances.

Courts are required by sections 5(3) – (8) of the *Sentencing Act* to impose the least severe penalty necessary to achieve the relevant sentencing purposes.

Courts may make conviction or non-conviction orders. Section 8 of the *Sentencing Act* provides that, in exercising its discretion whether or not to record a conviction, the court must consider, among other things, the character and past history of the offender and the impact of recording a conviction on the offender's economic or social well-being or on their employment prospects.

In making your sentencing submissions, your primary aim should be to identify the special or mitigating circumstances that caused or contributed to your client's commission of the offences. You should seek to persuade the court to take account of and address these circumstances in your sentencing submissions. Much of the information that you included in your revocation application (such as details of the client's assets and income, rehabilitative treatment being undertaken and a letter of support from a case worker etc) will form a part of your sentencing submissions.

The court's sentencing options under the *Sentencing Act* include (in decreasing order of severity):

- **imprisonment;**
- **intensive correction order (ICO)** — an ICO is imposed if the court believes that imprisonment of up to 12 months would be appropriate but would not address the underlying causes of the offence. ICOs impose stringent conditions, such as weekly visits from a corrections officer, community work and drug and alcohol counselling or treatment;
- **combined custody and treatment order (CCTO)** — a CCTO will be ordered for a defendant whose alcohol or drug addiction contributed to their offending and if the sentence of imprisonment is no more than 12 months. A CCTO requires the defendant to serve a sentence of custodial imprisonment and to serve the remainder of the sentence in the community undergoing treatment;
- **drug treatment order (DTO)** — DTOs may be made by the Victorian Drug Court. A DTO has two parts: a treatment and supervision part (which consists of conditions addressing the defendant's drug or alcohol dependency); and a custodial part (which is suspended pending satisfactory completion of the treatment and supervision part);
- **community-based order (CBO)** — CBOs are a less intensive form of ICOs and usually require the defendant to perform unpaid community work, attend supervision and counselling as required;
- **fine** — a fine is a monetary penalty. Court-imposed fines of more than 1.6 penalty units (\$176.19) may be converted to unpaid community work at the rate of 0.2

penalty units (\$11.01) per hour. These rates are applicable for the year 1 July 2007 – 30 June 2008 and vary each financial year according to the definition of 'penalty unit' under section 5(3) of the *Monetary Units Act 2004* (Vic);

- **adjournment with conviction** — a defendant may be convicted of an offence but have their case adjourned for up to 60 months and be released on an undertaking of good behaviour and compliance with any other special conditions. The case will be dismissed following the expiration of the adjournment;
- **adjournment without conviction** — a defendant, after pleading guilty, may have their case adjourned for up to 60 months on an undertaking of good behaviour and compliance with any other special conditions. The case will be dismissed following the expiration of the adjournment.
- **unconditional dismissal** — if a court is satisfied that a person is guilty of an offence, then the court may, without recording a conviction, dismiss the charge;

For the vast majority of homeless clients, an unconditional dismissal (under section 76 of the *Sentencing Act 1991* (Vic)) or an adjournment without conviction on conditions (under section 75 of the *Sentencing Act 1991* (Vic)) will be the most appropriate sentencing disposition. The latter may be used to enable the court to tailor orders requiring, for example, that the defendant comply with a case management plan prepared by their case worker, thereby addressing the underlying causes of their offending behaviours.

9. Dealing with Open Court Fines

It is not possible to apply for revocation of fines imposed by a court as a sentencing disposition under the *Sentencing Act 1991* (Vic). The options for dealing with fines imposed in open court are as follows:

1. If the fines were imposed *ex parte*, then you can apply for a rehearing of the matters pursuant to section 93 of the *Magistrates' Court Act 1989* (Vic). The application may be granted if the client had a valid reason for not attending court when the fines were imposed.
2. Apply for conversion of the outstanding amount to unpaid community work. An application for conversion should be made in person to a registrar at the Criminal Inquiry Counter at the Melbourne Magistrates' Court. The registrar will generally grant the application if the client is unemployed or if there is some exceptional reason why the client cannot pay the fine by instalment. If the application for conversion is granted, then the client will be required to report to, and undertake community work as directed by, the Office of Corrections. Conversion is at the rate of \$20 per hour of community work, with the minimum amount of community work allowable being eight hours.
3. Apply for payment by instalment or an extension of time to pay. An application for payment by instalment or an extension of time to pay should be made in person to a registrar at the Criminal Inquiry Counter at Melbourne Magistrates' Court.
4. Pay in full.

5. Appeal the decision to the County Court.

10. Disclaimer

This Manual is intended to be used as a resource that introduces different areas of law and provides guidance on how an issue might be addressed. The Manual is not intended to be advice on any particular matter. Readers should not act on the basis of any material in the Manual without obtaining advice relevant to your own particular situations. The authors and publishers expressly disclaim any liability to any person in respect of any action taken or not taken in reliance on the contents of this Manual.

The law in this edition of the Manual is correct as at 30 June 2008

11. Further Information

For further information about infringement fines, including sample revocation applications and sentencing submissions, go to <http://www.pilch.org.au>.

You can also obtain further information about infringement fines from Fitzroy Legal Service (www.fitzroy-legal.org.au/), Victoria Legal Aid (www.legalaid.vic.gov.au/), the Department of Justice (www.justice.vic.gov.au/) and the Magistrates' Court (www.magistratescourt.vic.gov.au/), particularly on their websites.