



OmbudsmanSA

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# FINAL REPORT

THE CITY OF ADELAIDE

28 June 2011

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## FINAL REPORT

Date complaint received	24 December 2010
Agency	The City of Adelaide
Complainant <sup>1</sup>	
Allegations	<ol style="list-style-type: none"><li>1. The council issued a defective expiation notice</li><li>2. The council wrongly failed to withdraw an expiation notice</li></ol>

### JURISDICTION

1. Section 13(3) of the *Ombudsman Act 1972* states that the Ombudsman must not investigate any administrative act where the complainant had a remedy by way of legal proceedings, unless it is not reasonable to expect the complainant to exercise that remedy.
2. In this case, the complainant has acknowledged her liability for the substantive offence for which the expiation notice was issued. She therefore elected not to challenge the notice through court proceedings, as is her entitlement. Nonetheless, she remains aggrieved by the council's perceived failure to comply with the law.

In the circumstances I considered that it was reasonable to investigate the complaint.

3. On 1 June 2011, I advised the Lord Mayor that I had decided to undertake a full investigation of the complaint, in accordance with under section 18(1a) of the *Ombudsman Act 1972*.

### INVESTIGATION

4. My investigation has comprised:
  - assessing the information provided by the complainant
  - obtaining a response from the council
  - considering the *Expiation of Offences Act 1996* (**the Act**), the Expiation of Offences Regulations 1996 (**the regulations**) and the council's 'Standard Operating Procedures for Parking and Information Officer' (sic) (**the procedures**)
  - considering the case of *Reissen v The State of South Australia* [2001] SASC 71, and a report of the Victorian Ombudsman entitled 'Investigation into parking infringement notices issued by Melbourne City Council (April 2006)' (**the Victorian report**)
  - preparing a provisional report, including seeking legal advice on a draft, and inviting the parties' comments
  - considering the parties' comments on my provisional report
  - preparing this final report.

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<sup>1</sup> I do not consider that there is any demonstrable public interest in publishing the name of the complainant, and she has requested that I do not do so.

## RESPONSES TO MY PROVISIONAL REPORT

5. On 24 June 2011, the Lord Mayor responded to my provisional report agreeing that the matters raised in the complaint constituted defects in the council's expiation notices, and acknowledging that those defects must be rectified as soon as possible. He stated that all expiation notices issued by the council forthwith will be in a form that rectifies the defects identified in my provisional report.

6. The Lord Mayor also noted that:

... the Council does not accept that the defects identified in (the complainant's) expiation notice support or justify (my) conclusion that all expiation notices issued by the Council are invalid. This conclusion, as (I) have identified, will be a matter for determination by the courts in the event of a formal challenge to an expiation notice.

...

Nothing in the defects identified in (the complainant's) expiation notice was calculated by the council to mislead or had that effect...

The council maintains that its expiation notices are not rendered invalid by virtue of those defects. The council asks that your final report be varied to reflect this position.

7. I acknowledge that it will be a matter for a court to determine if any particular expiation notice is invalid. Nonetheless, under section 25 of the *Ombudsman Act 1972* I am obliged to make a finding on whether a council has made an administrative error, and for that purpose I consider that it is necessary for me to express a view on this issue.

8. I received no response from the complainant to my provisional report.

## FINAL VIEWS

### Background

9. On 11 November 2010 the complainant received an expiation notice no 59666709 (**the expiation notice**) issued by a council officer. The substantive terms of the notice alleged a breach as follows:

CONTRAVENE PERMISSIVE PARKING SIGN Park continuously for longer than period allowed in Ticket parking area - Rule 205

PENALTY \$22  
DUE DATE 09/12/2010

10. The complainant does not dispute the alleged offence, but she considers that the expiation notice was defective in that it did not comply with the terms of the Act and the regulations. In her complaint to me, she summarized the alleged defects as follows:<sup>2</sup>

1. Section 6(1)(b) of the Act states the notice **must** be in the prescribed form. Regulation 5(1) of the Expiation of Offences Regulations 1996 (the Regulations) states that "Schedule 1 prescribes forms for the purposes of the Act." Schedule 1 of the Regulations states that: "the form must

<sup>2</sup> The alleged defects were ordered differently in the complainant's complaint to the council dated 6 December 2010. On 9 December 2010, having received legal advice, she confirmed her view that the first and second alleged defects (as listed in her complaint to me) were substantiated. She advised the council that the third and fourth alleged defects 'may well be defects with the notice, however, it is not 100% clear and would be open to the interpretation of the court'. She withdrew her complaint about the sixth alleged defect. There was no reference in this email to the fifth alleged defect.

include a statement of the outcome if no choice is made by the alleged offender, for example – "If no choice is made for an offence, 1 reminder notice will be sent (a reminder fee will apply). After that, you may (without a court hearing) be convicted of the offence and the unpaid fee will be your fine. Court costs will be added." The notice does not contain any such statement. The notice is therefore defective.

2. Section 6(1)(b) of the Act states the notice **must** be in the prescribed form. Regulation 5(1) of the Regulations states that "Schedule 1 prescribes forms for the purposes of the Act." Schedule 1 of the Regulations states that the following choice be included on the notice: "Dispute the allegation that you committed the offence(s) (or any of them) and elect to be prosecuted for that offence (or offences)." The notice only talks about disputing the notice informally and does not inform me that I may elect to be prosecuted for the offence although there is provision on the notice to do so. The notice is therefore defective.

3. Section 6(1)(b) of the Act states the notice **must** be in the prescribed form. Regulation 5(1) of the Regulations states that: "Schedule 1 prescribes forms for the purposes of the Act." Schedule 1 of the Regulations requires that an expiation notice **must** include a heading identifying it as an expiation notice under the Expiation of Offences Act 1996. The notice does not have such a heading. The Act is mentioned on the notice, however, it is not a heading as it is listed amongst other Acts of Parliament near the bottom of the notice. The notice is therefore defective.

4. Section 6(1)(b) of the Act states the notice **must** be in the prescribed form. Regulation 5(1) of the Regulations states that: "Schedule 1 prescribes forms for the purposes of the Act." Schedule 1 of the Regulations states that "the form **must contain an allegation that a person committed an offence** or offences and specify – (i) (A) if the notice is to be addressed to the person as the owner or driver of a vehicle without naming or otherwise identifying the person – the vehicle registration number; or (B) in any other case – the name and address of the person." The notice is not addressed to a person, just a vehicle registration number. It should have at least been addressed to the 'vehicle owner/driver' along with the vehicle's registration details. The notice is therefore defective.

5. At the end of section 6 of the Expiation of Offences Act 1996 (the Act) it states:

**"Note–**

Certain other Acts (eg the *Local Government Act 1934* section 789D and the *Road Traffic Act 1961* section 174A) require that an expiation notice given to the registered owner of a motor vehicle must be accompanied by a notice relating to the question of whether the owner was the driver at the time of the alleged offence."

Section 174A(4) of the *Road Traffic Act 1961* states:

"An expiation notice or expiation reminder notice given under the *Expiation of Offences Act 1996* to the owner of a vehicle for an alleged offence against this section involving the vehicle **must** be accompanied by a notice inviting the owner, if he or she was not the driver at the time of the alleged prescribed offence, to provide the council or officer specified in the notice, within the period specified in the notice, with a statutory declaration –

(a) setting out the name and address of the driver; or

(b) if he or she had transferred ownership of the vehicle to another prior to the time of the alleged offence and has complied with the *Motor Vehicles Act 1959* in respect of the transfer – setting out details of the transfer (including the name and address of the transferee)."

While the notice was not addressed to anyone as is required by the Act (a defect on its own), I assume that it was left on the windscreen for the owner of the vehicle (me). The notice is not accompanied by the notice that is required under section 174A of the Road Traffic Act 1961. The notice makes mention of the option as set out under section 174A(4)(a), however, there is no mention of the option as set out under section 174A(4)(b). Again the notice is clearly defective.

6. In addition to the abovementioned defects, the ACC has extended the 'pay by date' of the notice. There is no provision in the Act that allows a law enforcement agency to arbitrarily apply a new 'pay by date'. I submit that the ACC by its own actions has rendered the notice defective.

11. I sought the council's response to the complaint. On 18 February 2010 it provided me with relevant information, including the procedures and a copy of the formal instrument of delegation to the officer who issued the expiation notice. The council also provided me with legal advice which it obtained in relation to the alleged defects identified by the complainant.

### Whether the expiation notice contained defects

12. Under section 5(1) of the Act, an expiation notice may only be issued if an expiation fee is fixed by an Act, regulation or by-law. In this case, the notice alleges a breach of Rule 205, which I take to be Rule 205 of the Australian Road Traffic Rules.
13. Rule 205 is given legal effect in this State through section 80 of the *Road Traffic Act 1961*, which permits the Governor to make rules to regulate traffic movement, flows and conditions, vehicle parking, the use of roads, and any aspect of driver, passenger or pedestrian conduct. Rule 205 provides as follows:

#### 205—Parking for longer than indicated

(1) A driver must not park continuously on a length of road, or in an area, to which a permissive parking sign applies for longer than the period indicated by information on or with the sign or, if rule 206 applies to the driver, the period allowed under that rule.

Offence provision.

14. In my view, Rule 205 is enforceable through the issue of an expiation notice. It is described in its terms as an 'offence provision', and is therefore to be read in conjunction with rule 10, which provides that offence provisions may be penalised by application of another law in South Australia.<sup>3</sup> Pursuant to rule 10, an expiation fee of \$22 was fixed under Schedule 9 of *Road Traffic (Miscellaneous) Regulations 1999* (SA).<sup>4</sup> This legislative chain therefore enlivens the operation of the Act.
15. Section 6(1)(b) of the Act provides that an expiation notice 'must be in the prescribed form', and Regulation 5(1) of the regulations states that Schedule 1 of the regulations (**Schedule 1**) prescribes forms for the purposes of the Act. Item 1 of Schedule 1 in its entirety provides as follows:

#### 1—Expiation notice

(1) The prescribed form for an expiation notice is a form that complies with the following requirements:

- (a) the form must include a heading identifying it as an expiation notice under the *Expiation of Offences Act 1996*;
- (b) the form must specify—
- (i) the expiation notice number; and
  - (ii) the date of issue of the expiation notice; and
  - (iii) the name of the issuing officer or a code enabling the issuing authority to identify the issuing officer;

<sup>3</sup> Australian Road Rules, Rule 10:

(1) The words 'Offence provision.' in a rule of the [Australian Road Rules](#) (or, if the rule has 2 or more subrules, in a subrule) indicates that a contravention of the rule (or subrule) is an offence.

(2) The penalty for an offence is the penalty applying to the offence under another law of this jurisdiction.

<sup>4</sup> *Road Traffic (Miscellaneous) Regulations 1999*, Schedule 9: Expiation Fees, Part 3 - Offences against the Road Traffic Rules.

- (c) the form must contain an allegation that a person committed an offence or offences and specify—
- (i) —
    - (A) if the notice is to be addressed to the person as the owner or driver of a vehicle without naming or otherwise identifying the person—the vehicle registration number;
    - (B) in any other case—the name and address of the person; and
  - (ii) the general nature of the alleged offence or offences; and
  - (iii) the time or times and date or dates of the alleged offence or offences (but if the time or date is the same as that of the notice, the time and date need not be separately identified); and
  - (iv) the place or places at which the alleged offence or offences were committed;
- (d) the form must inform the person that the offence or offences may be expiated and specify—
- (i) the amount of the expiation fee for each offence; and
  - (ii) if a levy is payable, the amount of the levy for each offence; and
  - (iii) the total amount payable; and
  - (iv) to whom the amount must be paid; and
  - (v) the date by which the amount must be paid;
- (e) the form must include a statement of the choices available to the alleged offender, for example—

**YOUR CHOICES:**

You may on or before the due date for payment—

- Dispute the allegation that you committed the offence(s) (or any of them) and elect to be prosecuted for that offence (or offences).  
If you elect to be prosecuted, you may get a summons. The summons will set out when and where to attend court.
  - Pay the total amount due for all offence(s) not disputed (including levies).
  - Apply to the court to pay the amount of the fee(s) in instalments or for an extension of time in which to pay it.  
You may make an application only if you owe \$50 or more in expiation fees (including fees under other notices). Obtain an application form from the Registrar of the Magistrates Court or Youth Court. The Registrar must be satisfied that payment of the fee(s) would cause you or your dependants hardship.
  - If you think the offence(s) (or any of them) was trifling—apply to the *[issuing authority]* for a review of the expiation notice (for special meaning of trifling see section 4(2) *Expiation of Offences Act 1996*).
- If applicable:*
- If the offence(s) (or any of them) is a parking or traffic offence and you were not driving at the time of the alleged offence—send the *[issuing authority]* a statutory declaration stating the name and address of the driver or, if you had by the time of the offence transferred ownership of the vehicle, the owner.

- (f) the form must include a statement of the outcome if no choice is made by the alleged offender, for example—

**If no choice is made for an offence, 1 reminder notice will be sent (a reminder fee will apply). After that, you may (without a court hearing) be convicted of the offence and the unpaid fee will be your fine. Court costs will be added.**

- (2) The notice may include payment details, a payment slip for use if the alleged offender wishes to expiate the offence, instructions for completion, contact details for the obtaining of further information, or other information considered relevant by the issuing authority (and the information may be interspersed with the statements required to be included in the notice).

**Note—**

Under section 6(1)(k) of the Act, the expiation notice is required to be accompanied by a notice in the prescribed form by which the alleged offender may elect to be prosecuted for the offence or any of the offences to which the notice relates—see clause 4.

Certain Acts require—

(a) that an expiation notice given to the registered owner of a motor vehicle must be accompanied by a notice relating to the question of whether the owner was the driver at the time of the alleged offence; and

(b) that an expiation notice given to a person named as the alleged driver in a statutory declaration must be accompanied by a notice setting out particulars of the statutory declaration that named the person as the alleged driver (excluding the address of the person who provided the statutory declaration).

16. Plainly, Schedule 1 does not specify the precise format in which an expiation notice must appear. It simply states the requirements with which a notice must comply. In this context, I note that section 25 of the *Acts Interpretation Act 1915* provides as follows:

#### **25—Variation of forms**

Whenever forms are prescribed or approved under any Act, forms to the same effect are sufficient provided that deviations from the prescribed or approved forms are not calculated to mislead.

#### *Prescribed form - outcome if no choice made - clause 1(1)(f)*

17. The first alleged defect is a failure to comply with Item 1(f) of Schedule 1, which requires that a notice must include a statement of the outcome if no choice is made by the alleged offender. In response, the council has drawn attention to the fact that its expiation notice sets out under the heading 'Overdue Payment Penalties' that a reminder notice will be issued and a reminder fee will apply.
18. In my view, this statement relates to additional costs which may be incurred in the event that an alleged offender chooses not to pay the expiation, and does not reflect the obligation to advise an alleged offender what will occur if he or she does nothing. There should be specific advice, for example, that a reminder notice will be sent; that in the absence of action the alleged offender may be convicted without a court hearing; and that the unpaid fee will be the amount of the fine. Consequently I do not consider that the expiation notice sufficiently complies with the obligation in Item 1(f) of Schedule 1.
19. I also do not consider that this deficiency is cured by the application of section 25 of the *Acts Interpretation Act 1915*. That provision requires that the effect of the form should be the same, and in my view ensures the validity of a form only in relation to elements such as layout. In my view the provision does not validate a lack of required substantive content.
20. Ultimately, whether an expiation notice is valid or not is a matter which a court can decide. However, I express the view that because of the seriousness of this defect, it is likely that it renders the expiation notice invalid for the purposes of the Act.

#### *Prescribed form - choices available to offender - clause 1(1)(e)*

21. The second alleged defect is a failure to comply with Item 1(e) of Schedule 1, which requires that a statement of the choices available to the alleged offender must be included. In response, the council has drawn attention to the fact that its expiation notice sets out under the heading 'Your Choices' that an alleged offender may take one of five listed actions, including 'dispute the allegation that you committed the offence'.

22. However, in my view the assertion in the notice that the alleged offender 'must on or before the due date' make one of the choices in the list is incorrect. Only the option of providing a statutory declaration identifying another person as the driver of the vehicle had to be exercised on or before the due date.<sup>5</sup> Generally speaking, the other options available to an alleged offender might be exercised at any time, except if an order under section 9 or section 13 has been made under the Act.<sup>6</sup>
23. Further, the statement in the notice does not specify that disputing the offence involves an election to be prosecuted. In my view Item 1(e) intends that an alleged offender should be aware that an election to dispute entails a prosecution, and this should be clear on the face of the notice.
24. For the same reasons as for the first alleged defect, I do not consider that this deficiency is cured by the application of section 25 of the *Acts Interpretation Act 1915*. Whilst noting that the validity of an expiation notice is a matter for a court to decide, I express the view that because of its seriousness, this defect is likely to render the expiation notice invalid for the purposes of the Act.

#### *Heading - clause 1(1)(a)*

25. The third alleged defect is a failure to comply with Item 1(a) of Schedule 1, which requires that a notice must include a heading identifying it as an expiation notice issued under the Act. The council's notice includes the heading 'Expiation Notice', but does not specifically identify it as having been issued under the Act. However, the name of the Act is listed elsewhere on the notice.
26. In my view the heading of the expiation notice does not amount to a significant deficiency, and the operation of section 25 of the *Acts Interpretation Act 1915* may well protect the notice in this respect. Further, I consider that the *Expiation of Offences Act 1996* does not demonstrate a legislative purpose to invalidate every act that fails to comply with a condition regulating the exercise of the powers which it contains.<sup>7</sup> The Act is beneficial in that it allows an alleged offender considerable concessions, for example in terms of substantially lesser penalty amounts than would follow in the event of the relevant alleged offence. This defect is slight and in my view does not detract from the substance of the notice.

#### *Addressed to owner/driver - section 6(1)(i) and clause 1(c)(i)(A)*

27. The fourth alleged defect is a failure to comply with Item 1(c) of Schedule 1, which requires that a notice must contain an allegation that a person committed an offence or offences, and must specify various listed particulars. Section 6(1)(i) of the Act, and clause 1(c)(i)(A) (which is quoted in full above), require the notice to be addressed to the owner or driver of the vehicle, but allow the addressee to remain unidentified where the relevant vehicle was found unattended.
28. The council's notice specifies a vehicle registration number, but does not indicate that it is addressed to the owner or driver of the vehicle. In effect it relies on the operation of the relevant legislation to ensure that responding to the notice becomes the legal responsibility of either the owner or driver.

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<sup>5</sup> Section 174A of the *Road Traffic Act 1961* allows the council to nominate the date by which the statutory declaration must be provided.

<sup>6</sup> See sections 8 (election to be prosecuted), 8A (review on grounds offence is trifling), 9 (applications on hardship grounds) *Expiation of Offences Act 1996*

<sup>7</sup> See *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91]

29. In my view, in this respect the council's notice is not unreasonable in the circumstances. I note that section 6(1)(j)(iii) of the Act permits an expiation notice to be served by affixing it to the relevant vehicle, and in my view it is reasonable to expect that a person responsible for the vehicle also becomes responsible for dealing with an expiation notice affixed to it. In my view, the council should be entitled to rely on this inference to establish the circumstances in which it is permissible for a notice to specify the vehicle registration number rather than the name and address of the alleged offender.

#### *Statutory declaration under the Road Traffic Act 1961*

30. The fifth alleged defect is that the expiation notice was not accompanied by the notice that is required under section 174A(4) of the *Road Traffic Act 1961* (**the section 174A obligation**). This provision is as follows:

(4) An expiation notice or expiation reminder notice given under the *Expiation of Offences Act 1996* to the owner of a vehicle for an alleged offence against this section involving the vehicle must be accompanied by a notice inviting the owner, if he or she was not the driver at the time of the alleged prescribed offence, to provide the council or officer specified in the notice, within the period specified in the notice, with a statutory declaration –

- (a) setting out the name and address of the driver; or
- (b) if he or she had transferred ownership of the vehicle to another prior to the time of the alleged offence and has complied with the *Motor Vehicles Act 1959* in respect of the transfer – setting out details of the transfer (including the name and address of the transferee).

31. The section 174A obligation attaches to 'prescribed offences'. Regulation 6(1)(b) of the *Road Traffic (Road Rules–Ancillary and Miscellaneous Provisions) Regulations 1999* specifies that the provisions of Part 12 of the Australian Road Rules (Restrictions on stopping and parking) - which includes Rule 205 - are prescribed for the purposes of section 174A.
32. As noted above in relation to the fourth alleged defect, it appears to me to be a necessary implication that the council's notice was in fact addressed to the owner or driver of the vehicle, although this is not clear on its face because only a vehicle registration number is specified. Therefore, it appears to me that the section 174A obligation applied in this case.
33. I am not persuaded that the council's notice met the section 174A obligation. On the notice, under the heading 'Your Choices', one of the five options identified is:

**if you were not driving at the time of the offence - submit a statutory declaration stating the name and address of the driver:** [To obtain a form, phone, write or attend as set out below]...

It appears to me that this statement partially complies with the section 174A obligation, but it does not specify the time within which a statutory declaration is to be provided, nor does it deal with the situation in which ownership of the vehicle may have been transferred.

34. However, in my view this defect is slight and does not detract from the substance of the notice. For similar reasons as for the third defect above, I do not consider that this defect alone would invalidate the expiation notice.

#### *Date for payment - section 6(1)(c)*

35. The sixth and final alleged defect is that the council purported to extend the 'pay by date', and that this exceeds the powers set out in the Act. Section 6(1)(c) of the Act states that an expiation notice 'must specify that the expiation fee is to be paid within 28 days from (and including) the date of the notice'. The council's notice was issued on 11 November 2010, and specifies a due date of 9 December 2010. This appears to me to be strictly incorrect, on the basis that the 28 day period expired on 8 December 2010. I observe that

it may nonetheless be reasonable to specify the following day as the due date, if that is to be interpreted as the date before which payment must be made. The notice is ambiguous as to this issue.

36. On 7 December 2010, during the course of the complainant's negotiations with the council, a customer service officer advised her that :

...the fine is held from any further action and you should receive a response within 10 working days.

The complainant correctly notes that at this stage in the process the fee was not a 'fine'. However, section 12 of the Act allows the council to accept late payment of an expiation fee at any time before an enforcement order is made. In my view this implies that the council may agree with an alleged offender as to the additional time to be allowed within which the expiation fee is to be paid. I note that this is not inconsistent with section 9 of the Act which allows a court Registrar to extend time in cases of hardship.

37. In summary, I conclude that all the complainant's allegations about the defects have substance, except the fourth, relating to the obligation to address the expiation notice to a vehicle owner or driver, and the sixth, relating to the extension of time to pay. Whilst the question of the validity of the notice is a matter for a court, I take the view that the first and second defects are significant, in that they concern the rights of an alleged offender under the Act that should be brought expressly and accurately to their attention. I also take the view that the third and fifth defects were minor, and would be unlikely in themselves to result in a court declaring the notice to be invalid.
38. My final view therefore is that in issuing the notice, the council acted contrary to law, within the meaning of section 25(1)(a) of the *Ombudsman Act 1972*.

#### *Whether the council wrongly failed to withdraw the expiation notice*

39. The complainant considers that when she pointed out the alleged defects to the council, it should have taken steps to withdraw the expiation notice. Further, in an email to the council dated 6 December 2010, she requested that the council:

1. rectify its expiation notices;
2. withdraw any defective notices that it has issued that are yet to be paid; and
3. withdraw any notices found to be defective, for a reasonable period (2 years), and refund any monies that have been paid in respect to those notices.

40. Section 16 of the Act enables the issuing authority, in limited circumstances and within a specified period from the expiration of the notice, to withdraw the notice. Section 16 is as follows:

#### **16–Withdrawal of expiation notices**

- (1) The issuing authority may withdraw an expiation notice with respect to all or any of the alleged offences to which the notice relates if–
- (a) the authority is of the opinion that the alleged offender did not commit the offence, or offences, or that the notice should not have been given with respect to the offence, or offences; or
  - (ab) the authority receives a statutory declaration or other document sent to the authority by the alleged offender in accordance with a notice required by law to accompany the expiation notice or expiation reminder notice; or
  - (ac) the notice is defective; or
  - (b) the authority decides that the alleged offender should be prosecuted for the offence, or offences.

- (2) An expiation notice may be withdrawn under subsection (1) despite payment of an expiation fee or an instalment, but in that event the amount paid must be refunded.
- (3) However, an expiation notice cannot be withdrawn for the purposes of prosecuting the alleged offender for an offence if—
- (a) an enforcement order has been made under this Act in respect of the offence; or
  - (b) —
    - (i) in the case of a notice issued before the commencement of Part 6 of the *Statutes Amendment (Fine Enforcement) Act 1998*—the period of 90 days from the date of the notice has expired;
    - (ii) in the case of a notice issued after that commencement—the period of 60 days from the date of the notice has expired.
- (5) If an expiation notice is withdrawn under subsection (1), a prosecution for an offence to which the notice related may be commenced, but the fact that the defendant paid an expiation fee or an instalment or applied for relief under this Act is not admissible in those proceedings as evidence against the defendant.
- (6) Subject to subsection (7), the issuing authority must withdraw an expiation notice if it becomes apparent that the alleged offender did not receive the notice until after the expiation period, or has never received it, as a result of error on the part of the authority or failure of the postal system.
- (7) An expiation notice cannot be withdrawn under subsection (6) if the alleged offender has paid the expiation fee or any instalment or other amount due under the notice.
- (9) The withdrawal of an expiation notice under this section is effected by giving written notice of the withdrawal, personally or by post, to the person to whom the expiation notice was given.
- (10) The notice of withdrawal must specify the reason for withdrawal.
- (11) If an expiation notice is withdrawn under this section and the notice of withdrawal does not specify that the notice is withdrawn for the purposes of prosecuting the alleged offender—
- (a) the issuing authority must, if a certificate has been sent to the Court under section 13 for enforcement of the notice, inform the Court of the withdrawal of the notice; and
  - (b) any enforcement order made under this Act in respect of the notice and all subsequent orders made under Division 3 of Part 9 of the *Criminal Law (Sentencing) Act 1988* will be taken to have been revoked; and
  - (c) the issuing authority cannot prosecute the alleged offender for an alleged offence to which the withdrawal related unless the alleged offender has been given a fresh expiation notice and allowed the opportunity to expiate the offence.
- (12) If an expiation notice for an offence against section 79B of the *Road Traffic Act 1961* is withdrawn and the notice of withdrawal specifies that the notice is withdrawn under subsection (1)(ab), the period within which—
- (a) a fresh expiation notice may be given to the alleged offender in respect of the offence;
- or
- (b) an expiation notice may be given in respect of the prescribed offence (within the meaning of that section) that gave rise to the offence, is extended to 1 year from the date of commission of the alleged offence.
- (13) If an expiation notice is withdrawn and the notice of withdrawal specifies that the notice is withdrawn under subsection (6), the period within which a fresh expiation notice may be given to the alleged offender in respect of the offence or offences to which the withdrawal related is extended to 1 year from the date of commission of the alleged offence or offences.

41. Whilst section 16(1)(ac) empowered the council to withdraw the notice if it was defective, the council took legal advice which indicated that in the author's view the notice was valid. It appears to me that it was reasonable for the council not to withdraw the notice.

42. On balance, I can see no administrative error in the council's decision not to withdraw the expiation notice. I note in particular that:
- the complainant did not deny committing the offence, but sought withdrawal of the notice on the grounds that there were technical defects in the notice
  - the council voluntarily deferred enforcement of the offence once the allegations of defects were made. In this context, I note in particular the comments by the High Court in the *David Securities* case<sup>8</sup>, quoted by Martin J in *Reissen v The State of South Australia*<sup>9</sup>
  - there is no statutory or common law obligation on the council to refund the payment
  - if the council were to withdraw the notice, it is now too late for it to issue a corrected notice.

## POSSIBLE RECOMMENDATION

43. In light of my finding above that the council has acted contrary to law, I have given consideration to whether I should make any further recommendation under section 25(2) of the *Ombudsman Act 1972* to rectify the council's administrative error.
44. In my provisional report, I foreshadowed a recommendation that the council should take the necessary action to rectify the defects in its expiation notices. In his response, the Lord Mayor agreed that the matters raised in the complaint constituted defects in the council's expiation notices, and acknowledged that those defects must be rectified as soon as possible. He stated that all expiation notices issued by the council forthwith will be in a form that rectifies the defects identified in my provisional report.
45. The complainant also has suggested that the council should withdraw all (defective) notices that are yet to be paid, and reimburse people who have paid (defective) notices over a reasonable period in the past. She has suggested a period of two years would be reasonable.
46. In the absence of a statutory requirement to withdraw a notice, a discretion rests with the issuing authority. This appears clear from section 16(1) of the Act, which states that an issuing authority may withdraw an expiation notice, and from the case of *Reissen v The State of South Australia*. In that case, the appellant received an expiation notice for exceeding the speed limit in a marked 25kph school zone outside the specified school zone hours.<sup>10</sup> The appellant willingly and voluntarily paid the expiation notice, but then contested it after hearing about a similar case in a complainant's favour. The court upheld the notice, and I set out below the relevant section of the judgment by Martin J:

24 Against that background, the defendant submitted that the code excludes a right to seek restitution of an expiation fee upon the basis of unjust enrichment or mistake. If the defendant is correct, the only remedy available to a person who has paid an expiation fee that was not payable is to appeal to the discretion of the issuing authority for the withdrawal of the expiation notice and refund of the fee pursuant to [s16](#) of the EOA (i.e. the *Expiation of Offences Act 1996* - my explanation).

25 There is considerable force in the defendant's position. The EOA is concerned with minor offences and provides a detailed scheme for expiation of those offences. Subject to [s 16](#), expiation finalises the rights and liabilities of the prosecuting authority and the alleged offender. The choice to expiate the offence rests with the alleged offender. The scheme is designed to facilitate the efficient disposal of matters involving minor offences. It is in the public interest that matters be finalised pursuant to the scheme of the legislation and not be subject to the uncertainty

<sup>8</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353

<sup>9</sup> [2001] SASC 71 (20 March 2001). See paragraph 30 of Martin J's judgement quoted in paragraph 31 below.

<sup>10</sup> A school zone operates only when children are proceeding to and from school, otherwise it is subject to the usual speed limit - see section 49(1) of the *Road Traffic Act 1961*

which would ensue if the common law principles of restitution and unjust enrichment can be invoked at any time after expiation.

26 In my opinion, the EOA is an exhaustive code governing the circumstances in which offences may be expiated and in which a person who has paid an expiation fee may seek to recover that fee. The common law remedies related to restitution and unjust enrichment have been excluded: *The Commonwealth of Australia v SCI Operations Pty Ltd* [1998] HCA 20; (1998) 192 CLR 285 and *Chippendale Printing Co. Pty Ltd v Commonwealth of Australia* (1996) 135 ALR 471.

27 If, contrary to my view, the common law principles of restitution are not excluded by the operation of the EOA, the defendant submitted that the plaintiff could not recover pursuant to those common law principles because her payment was voluntary and not made as a consequence of a relevant mistake. The defendant argued that having made a practical decision based upon the assessment of the risks and expenses involved, the plaintiff entered into a voluntary compromise which, for the purposes of the statutory scheme, created a statutory bargain. Counsel contended it was important as a matter of policy that such bargains be upheld. The plaintiff submitted, however, that on the assumption that the speed zone was not valid, she made a payment as a consequence of a mistake of law. In those circumstances, for the purposes of the principles of restitution, the payment was not voluntary. The State imposed upon her unlawfully and, as a consequence, the State has been unjustly enriched.

28 The plaintiff gave evidence and I accepted her as a witness of truth. She said that after she received the notice, having heard something on the radio about the RAA contesting the legality of school signs, she rang the RAA. She was told that the legality was being contested, but that the zones were legal at the time. She believed she was legally liable to pay the expiation fee. The plaintiff was aware, however, of her choices. She decided to pay rather than elect to be prosecuted because she thought she was not likely to win and it could have been expensive.

29 The plaintiff assessed her prospects of winning and made a calculated decision not to elect to be prosecuted. Although she was aware of a challenge to the legality of the school zones, she thought the zones were probably legal. Underpinning her decision, therefore, was the erroneous assessment as to the likelihood that the zone through which she travelled was legal. In that state of mind she felt obliged to pay the expiation notice because she thought a challenge would not be successful. However, the plaintiff was well aware that she could elect to be prosecuted rather than pay the expiation fee before the due date.

30 In *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353, in considering the law of restitution, the majority of five justices of the High Court made the following observations (p 373):

"An important feature of the relevant judgments in these three cases is the emphasis placed on voluntariness or election by the plaintiff. The payment is voluntary or there is an election if the plaintiff chooses to make the payment even though he or she believes a particular law or contractual provision requiring the payment is, or may be, invalid, or is not concerned to query whether payment is legally required; he or she is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment. We use the term "voluntary" therefore to refer to a payment made in satisfaction of an honest claim, rather than a payment not made under any form of compulsion or undue influence. If such qualifying, factual circumstances are considered relevant, the sweeping principle that money paid under a mistake of law is irrecoverable or even the Federal Court's modification of that principle to the effect that mistake of law does not on its own found an action for the recovery of money paid is broader and more preclusive than is necessary. As the authorities cited earlier in explanation of the term "mistake of law" make clear, the concept includes cases of sheer ignorance as well as cases of positive but incorrect belief. To define "mistake" as the supposition that a specific fact is true, as Parke B. did in *Kelly v Solari* [(1841) 9 M. & W., at p. 58 [152 E.R., at p. 26].], which was a mistake of fact case, leaves out of account many fact situations. A narrower principle, founded firmly on the policy that the law wishes to uphold bargains and enforce compromises freely entered into, would be more accurate and equitable."

31 In my opinion, even if the speed zone was invalid and the EOA does not exclude the common law remedy, the plaintiff's claim for restitution would fail. She was aware that she was not obliged to pay the expiation fee. She chose to do so after considering her options and making a calculated decision on pragmatic grounds. Her payment was voluntary in the relevant sense. The plaintiff freely entered into a statutory bargain or compromise.

32 The application for restitution of the expiation fee is dismissed.

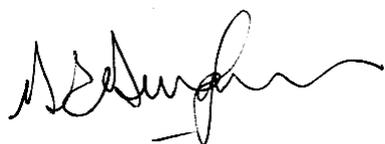
47. On the basis of this decision, I can see no legal obligation upon the council to exercise a discretion to withdraw expiation notices which in my view are defective, and to reimburse people who have paid expiation fees in response to such notices for a 'reasonable period' in the past. On this basis, I have decided to follow the reasoning in that case, and refrain from making any recommendation for reimbursement.
48. I note also that a similar issue regarding the refund of expiation fees was considered by my Victorian counterpart in 2006.<sup>11</sup> The Victorian report considered allegations of improper management of traffic and parking services for the Docklands area of Melbourne, including the issue of parking infringement notices, under an agreement between the Melbourne City Council and the VicUrban Development Authority.
49. The Victorian report found a number of deficiencies with the Melbourne City Council's infringement notice enforcement process, such as
- notices were issued by officers who were not authorised to do so
  - notices were issued for amounts in excess of the set penalty
  - no prosecuting officers were correctly appointed to prosecute notices registered for enforcement with the relevant court
  - notices were incorrectly registered with the relevant court for enforcement when that was not legally possible
  - the council continued to publish a statement that notices would be registered for enforcement when it was aware that could not legally be done
  - the council made decisions to withdraw notices but did not inform the person against whom the notice was issued. The council then kept money paid under the withdrawn notices.
50. In these circumstances my Victorian counterpart concluded that 146 fines paid as a result of notices being incorrectly registered with the relevant court should be refunded. Further he concluded that 287 payments made for notices which the council had withdrawn, but about which it had not advised the person, should be refunded.
51. In addition, in the Victorian report, my counterpart found that the council had been provided with legal advice some two years prior to the complaint being lodged with his office, that there were likely defects in the council's processes. The council had failed to act on this advice for some three years, and only did so after the commencement of my counterpart's investigation.
52. It appears to me that the circumstances in the current complaint are very different from those upon which my Victorian counterpart reported. In this case, I have no evidence of any deliberate wrongdoing on the part of the council, and the council was advised as recently as 20 January 2011 that there was no deficiency in its notices.
53. In light of this assessment, I am not persuaded that I should make any recommendation under section 25(2) of the *Ombudsman Act 1972*.

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## OPINION

54. In issuing the expiation notice which was the subject of this complaint, the council acted contrary to law, within the meaning of section 25(1)(a) of the *Ombudsman Act 1972*.
55. In refusing to withdraw the expiation notice, the council did not act in an way which was unlawful, unreasonable or wrong within the meaning of section 25(1) of the *Ombudsman Act 1972*.
56. I note that the Lord Mayor has agreed that the matters raised in the complaint constituted defects in the council's expiation notices, and acknowledged that those defects must be rectified as soon as possible. He has advised me that all expiation notices issued by the council forthwith will be in a form that rectifies the defects identified in my provisional report.
57. In these circumstances, I decline to make any recommendation under section 25(2) of the *Ombudsman Act 1972*.



Richard Bingham  
**SA OMBUDSMAN**

28 June 2011