

0.0 OMBUDSMAN INVESTIGATION INTO COUNCILS' USE OF THIRD PARTY CONTRACTORS TO CONDUCT PARKING INFRINGEMENT INTERNAL REVIEWS

Author: Robert Parker, Co-ordinator Parking & Safety

Trim No: 20/134660

Attachments: Nil

PURPOSE AND SUMMARY

The purpose of this report is to inform Council of a report tabled in Parliament today, Tuesday 25 February 2020, and the recommendations that it makes with regard to the councils subject to the investigation, which included Glen Eira City Council.

The report also seeks Council's approval of an in good faith Refund Scheme, consistent with the Ombudsman's recommendations.

RECOMMENDATION

That Council

1. notes the report; and
2. approves the proposed Refund Scheme as outlined in the report, as Council's response to the Ombudsman's Recommendation 1.

BACKGROUND

On 20 May 2019 the Ombudsman wrote to the Minister for Local Government and the Mayors and CEOs of Port Phillip, Stonnington and Glen Eira Councils notifying them of her intention to investigate the matter of councils' use of third party contractors in the administration of parking infringement reviews. While the practice of outsourcing infringement reviews was not unique to those 3 municipalities, the investigation's scope was restricted to those three councils on the basis of complaints received directly by the Ombudsman.

The investigation was conducted as an 'own motion' investigation under section 16A of the Ombudsman Act and considered infringement reviews conducted since 1 July 2006, the date of introduction of the Infringements Act 2006.

The Infringements Act 2006 sets out a process for internal reviews in Part 2 Division 3 of the Act. It gives people with infringement notices a right to ask the enforcement agency that issued the infringement to review its decision to serve the infringement notice (s23). If a person asks for an internal review, the Act states that the enforcement agency must review the decision to serve an infringement notice on the person (s24). The Act's definition of enforcement agency (section 3) is complex and, as confirmed by the Ombudsman in her report, open to interpretation. It is outlined below for completeness:

- a) *A person or body authorised by or under an Act to take proceedings for the infringement offence in respect of which the infringement notice or official warning was issued or served; or*
- b) *A person by whom, or body by which a person or body referred to in paragraph (a) is employed or engaged to provide services if the taking of the proceedings referred to in that paragraph would occur in the course of that employment or in the course of providing those services; or*

- c) *A prescribed person or body or person or body which is a member of a prescribed class of person or body.*

The Act makes no specific reference to the use of private contractors.

Today the Ombudsman tabled her final report in Parliament. The report has also been published on the Ombudsman's website. The report makes five recommendations – two for all three Councils, two for Fines Victoria and one for the Department of Justice and Community Safety. The recommendations for the three Councils are as follows :

Recommendation 1

Establish an arrangement by April 2020 under which:

- a) motorists can contact the council if their parking infringement internal review application was rejected between the commencement of the Infringements Act and changes to council internal review practices in late 2016 and 2017*
- b) refund the infringement where the council does not have evidence that an appropriately delegated council officer read the application and exercised their own discretion*
- c) advertise the arrangement prominently on the council's website and social media accounts and via a media release.*

Recommendation 2

Identify decision makers in internal review decision notices by name and title or, if preferred, by an anonymised identifying reference.

The recommendations for Fines Victoria are as follows :

Recommendation 3

Update the internal review guidelines for enforcement agencies by June 2020 to advise Councils and relevant enforcement agencies :

- a) not to use contractors to determine parking infringement internal reviews*
- b) to identify internal review decision makers in notices by name or, if preferred, by an anonymised but identifying reference*

Recommendation 4

By the end of 2020, request the following information under section 53B of the Infringements Act from enforcement agencies that use contractors for parking infringement reviews:

- a) information about their internal review practices*
- b) copies of relevant contracts with the contractor*
- c) a sample of the internal review records*

and make recommendations under section 53C, as required, to ensure the councils and relevant enforcement agencies do not use contractors to decide parking infringement internal reviews.

The recommendation for the Department of Justice and Community Safety is as follows :

Recommendation 5

Seek amendments to the Infringements Act to clarify who can conduct internal reviews of parking infringements, for the avoidance of doubt.

ISSUES AND DISCUSSION

The Ombudsman's review did not concern itself with the merits of any infringement review, but rather, the legal administrative authority of a third party to act on Council's behalf in dealing with such reviews following amendments to the Infringements Act in 2006.

A risk in the legislative interpretation relating to the definition of an enforcement agency under the Infringements Act was first identified in 2016. Since that time councils, including Glen Eira, have proactively sought resolution in a manner that was in the best interests of the communities that they serve. The matter has been vexed by multiple and conflicting legal opinions, unclear communications from the Department of Justice and Community Safety, and a 2009 Victorian Auditor General report that in Council's view, by omission, validated the practice of outsourcing internal reviews. When the Ombudsman announced her investigation it was welcomed as a means to bring greater clarity and focus to the matter.

It should be noted that despite the Ombudsman's review and recommendations contained in her report, the legal interpretation has not yet been tested in court and therefore remains unresolved.

In November 2016 Council made the decision to bring infringement appeal processing in-house, for the avoidance of doubt and while clarity of legislative interpretation was achieved. It has remained an in-house function since that time.

Council has always held the view that we have acted lawfully in this matter. We also take our responsibility to act transparently and with integrity seriously. While we are disappointed that the Ombudsman's report concluded with an opinion that we used our third-party contractor in a manner that may be contrary to law, and that we were not sufficiently transparent with identification of the appeals review officer, we have welcomed the insights and accept the recommendations.

Our intended approach to implementing each recommendation is outlined below.

Recommendation 1

Council will implement a Refund Scheme in good faith, consistent with the Ombudsman's recommendation. This will provide community members who feel that they may have a case for redress the opportunity to have their appeal re-considered, without the burden of needing to go through the legal system.

Council will publicly invite those who unsuccessfully challenged parking infringements between 1 July 2006 – 17 November 2016 to apply to Council. Council will assess unsuccessfully reviewed parking infringements that were paid and refund those found to be eligible under the scheme.

Applications will be able to be made via Council's website. Applicants will need to provide the following historical information :

1. Full name at time of review
2. Vehicle Registration at time of review
3. Approximate year of review
4. Postal address at time of the review
5. Current postal address and/or email address
6. Current contact number

These details will enable Council to determine if an applicant has infringements that qualify under the refund program. Applicants will not be required to provide an infringement number as we accept that with the passage of time, this is likely to be impractical. Council will be able to locate infringement details through the vehicle registration, match the details provided to our infringement data base, and process applicable refunds.

Council has engaged Australia Post to pay monies to eligible applicants. Once approved, an applicant will receive either a letter, text message or email with a unique barcode for their eligible infringement/s.

The barcode can then be presented to any Australia Post outlet. Individuals will need to present their drivers licence to confirm their identity and will be able to collect the refund in cash. Barcodes will be single use only and allocated to individual infringements, mitigating duplicate payments.

Applying online will be the fastest way to process eligible applications. Those who are unable to apply online will be able to visit Council's customer service centre and staff will assist by entering their details into the web form.

Applicants can expect to hear back from Council within three weeks with the outcome to their application.

Recommendation 2

Recommendation 2 will be satisfied by providing decision makers with a unique identifier (e.g. a unique authorisation number) which will be included in the notifying letter. The letters will be signed with a generic Glen Eira City Council Authorised Officer reference with the decision maker's unique identifier included in the sign off description. This recommendation has already been implemented.

FINANCIAL, RESOURCE, RISK AND ASSET MANAGEMENT IMPLICATIONS

Council has undertaken an assessment of the number of infringements that could be subject to further review under the proposed Refund Scheme. This assessment has identified that up to 21,900 requests for review may be received. If all of these reviews are received and subsequently successful, the financial implication to Council would be in the vicinity of \$2.37M.

Refunds made in the 2019/20 financial year will be funded through Council's cash reserve. A provision will be made in the 2020/2021 budget for any refunds processed after 1 July 2020.

Council rates will be unaffected and remain capped at 2% for the 2020/21 year in line with the State Government's Fair Go Rating System.

POLICY AND LEGISLATIVE IMPLICATIONS

The Ombudsman's review related to Council's approach to reviewing parking infringement appeals prior to 2016.

Council's decision to bring infringement appeals in-house from December 2016 means that our current practice is consistent with the Infringements Act definition of Enforcement Agency as interpreted by the Ombudsman.

The Ombudsman's report has acknowledged the lack of clarity in the drafting of the Infringements Act 2016 and has recommended that this be resolved by the Department of Justice and Community Safety. This recommendation is welcomed by Council.

COMMUNICATION AND ENGAGEMENT

Until today, the Ombudsman's investigation has been a confidential process subject to the Ombudsman Act 1973 (Vic). Given this, communication on this matter has by necessity been limited to those on a need to know basis and considered by Council in-camera.

The Ombudsman's report is now public and is available for download via the Ombudsman's own website.

Recommendation 1 requires Council to publicly advertise its Refund Scheme. Council will issue a media release, there will be information on our website, and multiple posts on social media alerting the community to the opportunity to request a further review of their infringement appeal. An article will also appear in the April and May editions of Glen Eira News.

LINK TO COUNCIL AND COMMUNITY PLAN

Theme Five: Informed and Engaged

A well governed Council that is committed to transparency and engages residents in decision-making.

OFFICER DECLARATION OF CONFLICT OF INTEREST

No officers involved in the preparation of this report have any direct or indirect interest in this matter.

CONCLUSION

The community has a reasonable expectation that Councils, as public bodies, adopt the highest standards of transparency, integrity and accountability.

Council has welcomed the perspectives of the Victorian Ombudsman on this complex matter. As has been highlighted throughout the Ombudsman's report, the issue of the validity of Council's actions in managing internal reviews of parking infringements from 2006-2016 has been vexed by multiple and conflicting legal opinions, unclear communications from the Department of Justice and Community Safety, and a 2009 Victorian Auditor General report that in our view, by omission, validated the practice of outsourcing internal reviews. The administrative perspectives and opinions outlined by the Ombudsman have therefore been helpful to Council in considering appropriate next steps in responding to public concern.

In the interests of maintaining public confidence in our institution and its civic governance, Council accepts the Ombudsman's recommendations and will now work towards their timely implementation as outlined in this report.