Ombudsman
New South Wales

APPENDICES

Revenue NSW – The lawfulness of its garnishee order process

Contents

APPENDIX A

Statement of Facts (Revenue NSW's GO system from 2016 to 2019)

This Statement of Facts was prepared for the purpose of obtaining the First Emmett Opinion.

Statement of Facts –

Revenue NSW's System for Issuing Garnishee Orders

PART A: PRELIMINARY

Defined terms

In this document:

"**Commissioner**" means the Commissioner of Fines Administration.

"**Fine defaulter**" means a person who is, or who is alleged to be, liable to pay a fine under either a court enforcement notice or a penalty notice enforcement order (within the meaning of the Fines Act).

"**Fines debt**" means an amount that a fine defaulter is liable to pay, but has not paid, under either a court enforcement notice or a penalty notice enforcement order (within the meaning of the Fines Act).

"**Garnishee Order**" means a garnishee order made by the Commissioner under section 73 of the Fines Act.

"**Original Version**" refers to the GO system used by Revenue NSW in the administration of Garnishee Orders in early 2016.

"**Current Version**" refers to the GO system used by Revenue NSW in the administration of garnishee orders today.

"Vulnerable Person" includes (but is not limited to) any person listed in sub-section 99B(1)(b) of the Fines Act as a person in respect of whom a work and development order may be made in respect of a fine, being person who: has a mental illness, has an intellectual disability or cognitive impairment, is homeless, is experiencing acute economic hardship, or has a serious addiction to drugs, alcohol or volatile substances.

"**Vulnerable**" and "**vulnerability**" have corresponding meanings.

Acronyms and abbreviations

DPR	Debt Profile Report
FES	Fines Enforcement System
GO	Garnishee Order
SOR	System of Record
WDO	Work and Development Order

List of legislation

Civil Procedure Act 2005 (NSW) (**Civil Procedure Act**)

Fines Act 1996 (NSW) (**Fines Act**)

Fines Regulation 2015 (NSW) (**Fines Regulation**)

Government Sector Employment Act 2009 (**Government Sector Employment Act**)

Ombudsman Act 1974 (NSW) (**Ombudsman Act**)

State Debt Recovery Act 2018 (NSW) (**State Debt Recovery Act**)

Taxation Administration Act 1996 (NSW) (**Taxation Administration Act**)

Unless otherwise stated, a reference in this document to a legislative provision is a reference to that provision of the Fines Act.

PART B: THE LEGISLATIVE CONTEXT

Revenue NSW and the Commissioner of Fines Administration

1. Revenue NSW is the administrative agency of the NSW Government responsible for collecting revenues, administering grants and recovering fines and debts.
2. It is currently a division of the Department of Customer Service. The Department of Customer Service is a public service department established under the Government Sector Employment Act. The staff employed by the Department of Customer Service are public servants under that Act.
3. Revenue NSW was established on 31 July 2017, following a name change from the Office of State Revenue and State Debt Recovery Office.
4. The head of Revenue NSW holds the senior executive public service role of "Deputy Secretary" (of the Department of Customer Service). That person also holds the roles of "Commissioner of Fines Administration" under section 113 of the Fines Act and "Chief Commissioner of State Revenue" under section 60 of the Taxation Administration Act.
5. Functions relating to fines enforcement under the Fines Act are conferred on the Commissioner of Fines Administration.

The statutory power to make Garnishee Orders

6. Under section 73(1) of the Fines Act, the Commissioner "may make an order [i.e. a Garnishee Order] that all debts due and accruing to a fine defaulter from any person specified in the order are attached for the purposes of satisfying the fine payable by the fine defaulter."
7. The debts that can be enforced by way of a Garnishee Order are debts accruing in respect of:
    - a fine imposed by a court following the making of a court enforcement order, and
    - the amount payable under a penalty notice following a penalty notice enforcement order (s 57).

8. Under s 73(4), a Garnishee Order operates as a garnishee order made by the Local Court under Part 8 of the Civil Procedure Act. For this purpose, the Commissioner is taken to be the 'judgment creditor' and the fine defaulter is the 'judgment debtor'.

9. Section 117 of the Civil Procedure Act sets out how the order operates in relation to a bank:

> "*(1) Subject to the uniform rules, a garnishee order operates to attach, to the extent of the amount outstanding under the judgment, all debts that are due or accruing from the garnishee to the judgment debtor at the time of service of the order.*
>
> *(2) For the purposes of this Division, any amount standing to the credit of the judgment debtor in a financial institution is taken to be a debt owed to the judgment debtor by that institution.*"

10. A Garnishee Order is one of a range of civil enforcement actions that may be taken by the Commissioner to recover certain fines debt under Part 4, Division 4 of the Fines Act. Other possible actions include property seizure orders, examination summons and notices, and charges on land.

11. Under s 73(2), the Commissioner "may make a garnishee order only if satisfied that enforcement action is authorised against the fine defaulter under this Division [Part 4, Division 4]."

The statutory process leading to the making of a Garnishee Order

12. In respect of fines debt arising in respect of unpaid penalty notices, the standard process leading to consideration of any civil enforcement action under the Fines Act is as follows:

(1) Penalty Notice

A 'penalty notice' is issued (Part 3, Division 2).

(2) Penalty Reminder Notice

If the amount payable under the penalty notice remains unpaid within the time period required by the notice, a 'penalty reminder notice' is issued (Part 3,

Division 3).

(3) Penalty Notice Enforcement Notice

If the amount payable is still unpaid, the Commissioner may issue a 'penalty notice enforcement order' (Part 3, Division 4).

From this point, the person owing the fine is referred to as a 'fine defaulter'. Additional fees may apply for the cost of enforcement action taken at this and subsequent stages of the process.

(4) RMS enforcement action

If the amount payable continues to be unpaid, the Commissioner may direct Roads and Maritime Service (RMS) to take certain enforcement action, which may include suspending or cancelling the driver licence or vehicle registration of a fine defaulter.

RMS sanctions are not to be applied in certain circumstances, such as where the fine defaulter is under the age of 18 and the fine does not relate to a traffic offence (s 65(3)(b)).
RMS sanctions also need not be applied (before proceeding to civil sanctions) if the RMS sanctions are unavailable or if the Commissioner is satisfied that they would be unlikely to be successful or would have an excessively detrimental impact on the fine defaulter (ss 71(1) and 71(1A)).

(5) Civil enforcement action

If the amount payable remains unpaid and RMS enforcement action is either unavailable or unsuccessful, civil enforcement action may be taken (s 71(2)), including the making of a Garnishee Order (s 73).

Other relevant statutory provisions

13. (*Notice*) A Garnishee Order may be made without notice to the fine defaulter (s 73(3)).

14. (*Service*) A Garnishee Order can be served electronically by Revenue NSW using an information system (s 73(5)).[1]

15. (*Access to information*) The Commissioner is authorised to access information for the purposes of taking enforcement action including:

    a. from police and government agencies, including Roads and Maritime Services – criminal record, address, property, date of birth, driver license number, details of bank account number or employer of a fine defaulter held by (s 117)

    b. information held by employers (s 117AA)

    c. information held by credit-reporting bodies including the name of a person's financial institution and details of any account held (s 117AB).

16. (*Delegation*) The Commissioner may delegate any functions under the Fines Act (other than the power of delegation itself) to "any person employed in the Public Service" (s 116A(1)). Enforcement functions may be exercised by the Commissioner "or by any person employed in the Public Service who is authorised by the Commissioner to exercise that function" (s 116B).

17. Under s 116A(2), the following functions may be delegated to "any person" (i.e. not just to a person employed in the Public Service) :

    (a) The function of serving notice of a fine enforcement order (which includes a penalty notice enforcement order) (s 59).

    (b) The function of notifying a fine default of certain RMS enforcement action, such as driver licence suspension (s 66)

    (c) The function of serving (but not issuing) an order for examination.

18. (*Enforcement cost recovery*) The Fines Regulation sets out the costs for enforcement action under the Fines Act.

19. (*Reviews*) The Fines Act contains no right of review or statutory appeal right in respect of the making of a Garnishee Order. However:

    (a) "the Commissioner may, on application under section 46 or the Commissioner's own initiative, withdraw a penalty notice enforcement order" in certain circumstances including if the Commissioner is "satisfied that there is other just

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[1] Under the Fines Act, an order served after 5 p.m. is taken to have been served on the next day that is not a Saturday, Sunday or public holiday ss 73(6)(a)(b).

cause why the application should be granted, having regard to the circumstances of the case " (s 47(1)(i)).

(b) A person may apply to have the penalty notice enforcement notice annulled by the Commissioner (Part 3, Division 5).

20. (*Refunds*) Under s 77A of the Fines Act, the Commissioner may refund all or part of an amount paid under a Garnishee Order on the ground of hardship experienced by the fine defaulter or their dependant. The debt remains payable including any amount refunded to the fine defaulter (s 77A(2)).

PART C: REVENUE NSW'S GARNISHEE ORDER (GO) SYSTEM

21. The GO system described in this document is the one that has been used by Revenue NSW in the administration of Garnishee Orders since at least January 2016.
22. Changes have been made to the system from time to time since then. However, despite those changes, it is recognisably the same system.
23. In this document, 'Original Version' refers to the GO system as it was in early 2016 and 'Current Version' refers to the system as it is today. The most significant changes that have been made between the Original Version and the Current Version are noted on the next section below.

Revenue NSW's published policy documents

24. Revenue NSW has no published policies specifically relating to the making of Garnishee Orders.
25. Revenue NSW has internally published business rules relating to the making of garnishee orders.
26. Other policies of relevance include:
    (a) Hardship Policy, first published on the Revenue NSW website on 1 November 2019 and available here: https://www.revenue.nsw.gov.au/help-centre/resources-library/hardship-policy
    (b) Privacy Policy, most recent version published on the Revenue NSW website on 1 May 2020 and available here: https://www.revenue.nsw.gov.au/privacy

Revenue NSW's instruments of delegation

27. The Revenue NSW instruments of delegation are at **Attachment A**.

Core technology elements of the GO system

28. There are two core information technology applications used in the GO system:
    a. Fines Enforcement System (FES) – database and transaction processing
    b. Debt Profile Report (DPR) – analytics

29. The FES contains the system of record (SOR), which is essentially a database of records that includes:

    - names of 'customers'[2]
    - information about the debt (fine information)
    - contact information
    - record history (e.g. former addresses, former names)
    - financial records of the customer.

30. The FES interfaces directly with SORs of other government agencies, including RMS.

31. The FES also handles the processing of transactions (including, in particular, civil enforcement action). In relation to Garnishee Orders, the FES:

    - records the Garnishee Order 'transaction'
    - transmits the Garnishee Order to the relevant financial institution or other recipient (either electronically where that is possible or by generating an order that is sent by post where electronic transmission is not possible)
    - interprets the response from the recipient
    - processes applicable payments and other transactions.

32. The DPR (Debt Profile Report) is a business rule engine that takes the data in the FES (inputs), applies analytics that reflect business and prioritisation rules (analytics), and generates customer profiling and activity selection (outputs). The main function of the DPR is to 'select' the next enforcement action to be taken in respect of a file in the FES (e.g., SMS reminder message, data match request, Garnishee Order, and so on).

33. Once selected by the DPR, a message is sent by the DPR to the FES instructing the FES to either process the selected action (if it is an automated action) or to notify staff of the need to undertake the selected action (if it is a manual action).

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[2] 'Customer' is the general term used by Revenue NSW to refer to all persons who interact with Revenue NSW including fine defaulters. Under the Fines Act, a person does not become a 'fine defaulter' (as defined) in respect of an unpaid penalty notice until they have been served with a penalty notice enforcement order (s 57(3)). In this document, the term 'customer' is used interchangeably with 'fine defaulter'.

The standard process for enforcing an unpaid fine in the Original Version

34. Together, the FES and the DPR manage the end-to-end lifecycle of an enforced fine.

35. The following steps describe the standard process flow of a fine as it proceeds toward a Garnishee Order. It is not exhaustive and does not describe all possible alternative processes and outcomes.

36. It is noted that from Step 2 below, except where staff involvement has been specifically indicated, each step is undertaken as a result of Revenue NSW's programmed business rules and core technology systems which interface with external systems as indicated.

37. At any time during the below process, a customer may elect to:

    - pay the fine debt in full,
    - enter into a payment plan, or
    - contact Revenue NSW for further options such as a work and development order, dispute or write off.

    The taking of any of those actions will cut short the process.

Step 1 – Fine loaded The fine is 'loaded' from the issuing agency into the SOR (in the FES). That is, details of the relevant penalty notice, court fine, electoral fine or sheriff office jury branch fine are transmitted electronically to the FES.
Step 2 – Validation of details The FES 'validates' the referred details, ensuring the minimum amount of customer details are present (date of birth, name, address) and the offence details are present and in the right format. Staff intervention may be required if the FES identifies a critical error.

Step 3 – Enforcement order generated

An enforcement order is automatically generated. In the case of a fine debt arising from a penalty notice, this is a 'penalty notice enforcement order'.

Either a new customer file is created in the SOR or the enforcement order is linked to an existing customer.

Staff intervention is required if the FES identifies an error. This may occur if, for example, the system is unable to verify whether an incoming fine requires a new customer record to be created or should be matched to an existing customer record.

Step 4 – Data matching to confirm address details

If possible, a data match is conducted against RMS's system to confirm that Revenue NSW has the most up to date customer address and contact information.

Staff intervention is required when the RMS returns an error or anomaly.

Step 5 – 'Printing' the enforcement order

The enforcement order is 'printed'. This means that the order is despatched to the customer by post or, if the customer has previously consented to receiving such material electronically, by email. At this point the due date for payment (+28 days) is set. If the enforcement order is posted, the enforcement order is printed, enveloped and despatched with no staff involvement other than as required for ordinary mail handling. If the enforcement order is emailed, the email is generated and transmitted without staff involvement.

Before the due date the customer may receive a SMS message (if they have previously opted-in to receive such messaging) advising them that an enforcement order has been issued and they should expect it shortly.

Step 6 – RMS enforcement action

If on 'day +37' (that is, thirty seven days after the enforcement order was 'printed'), a request is automatically issued by the FES to the RMS to apply enforcement action under Part 4, Division 3 of the Fines Act if:

- the enforcement order remains 'open' in the FES (e.g., it has not been 'closed' by reason of the fine having been paid), and
- the enforcement order is not recorded as being subject to a payment plan or as otherwise being under management.

If the RMS takes enforcement action, a message is sent by RMS to the FES, and the customer is issued a 'sanction application letter' by Revenue NSW. Licence sanctions and vehicle sanctions take effect 14 days after the sanction application letter is 'printed' (that is, despatched by email, if the customer has previously consented to receive such materials by email, or by post).

During this time the customer (if opted-in to receive messages) may receive a SMS message advising them that an RMS sanction has been applied.

Step 7 – Assessment for Garnishee Order or other civil enforcement action

At the expiration of the 14 day period (if an RMS sanction was applied, the enforcement order remains 'open', and the enforcement order is not recorded as being subject to a payment plan or as otherwise being under management) the customer is assessed to determine whether any civil enforcement action, including any Garnishee Order (directed to a bank or an employer) should be made.

The assessment is undertaken by the DPR (Debt Profile Report).

The Debt Profile Report (DPR)

38. The DPR effectively determines which potentially eligible civil enforcement actions are to be applied to fine defaulters whose fines debt is recorded in the FES.

39. Actions may include Garnishee Orders (bank, employer and third party), property seizure orders, examination summons and notices, referral of the debt to a private

debt collector and/or various data matching routines with both the RMS and credit reporting bureaus.

40. Revenue NSW's analytics team maintains the DPR, which categorises all active fine defaulter records in the Fine Enforcement System (FES) and determines the next best course of action for each of them.

41. The development and creation of the DPR was the result of a long collaboration between the operational areas of Revenue NSW and its analytics team. Originally created in 2013, the DPR has continued to be enhanced over time and Revenue NSW advises that it "is continually improved and updated to ensure it is providing the maximum benefit to all business areas".

42. The DPR is a 'centralised business rules' engine. This means that customers are assessed for all potentially applicable actions in one process. The DPR replaced previous approaches that had involved 'multiple business rules' engines being applied in respect of different processes, which had created problems where the same customer could be selected for multiple actions at the same time.

43. The DPR, by contrast, ensures that only one 'next action' for any file is selected at any time, being the action that is considered most appropriate action for that customer at that time. This ensures that customers flow through a process one action at a time, before moving on to other actions.

44. Revenue NSW advises that, as well as avoiding the problem of multiple actions being selected for implementation simultaneously, the DPR also improves on previous approaches by ensuring that any actions, such as the selection of customers for Garnishee Orders, are taken in a consistent manner according to pre-approved business rules.

45. Those business rules are coded into algorithms in the DPR. The DPR does not utilise machine learning technology or other forms of 'artificial intelligence'.

46. The DPR's business rules are developed by subject matter experts in Revenue NSW's business areas, translated by its analysts into code-able instructions, and then incorporated by software coders into the DPR code.

47. All business rules and changes to business rules require approval by a senior executive (Executive Director). Once business rule amendments have been approved, changes to the DPR code are made with oversight by another executive (Director).

There is no formal delegation for these business rules. The roles in the rules process have been approved by the Executive Director.

48. A more detailed description of how the DPR works is at **Attachment B**.

Further steps for enforcement by way of a Garnishee Order

49. Picking up from Step 7 above (that is, after RMS enforcement action has been attempted and if the debt remains outstanding after 14 days) the next steps in the process toward enforcement by Garnishee Order are as follows:

Step 8 – Queuing of customers for Garnishee Orders

The DPR applies its coded business rules to pool customers into categories based on the next proposed enforcement action. The categorisation rules are generally aimed at assessing the potential success of each potential type of enforcement action, having regard to various customer attributes including the customer's age, the debt type and their address (see **Attachment B**).

The business rules have generally been drafted and coded with a view to selecting as the next action the one that is:

- available (i.e., permitted at the stage and time of the process under the legislation)
- likely to be successful in recovering the debt in a timely manner
- easy to administer and unlikely to incur significant cost for Revenue NSW.

Customers who are pooled into a category for a particular type of civil enforcement action (such as a Garnishee Order) are then placed in the relevant queue for that action.

Step 9 – Garnishee Orders made to the big four banks

The relevant enforcement action is then attempted using one of the following approaches, depending on the particular type of enforcement action:

- a 'straight through processing' – should be taken to mean where a particular action is done without the need for manual intervention, however does not necessarily include an entire 'end-to-end' process.

- an automated workflow – should be taken to mean where an entire 'end-to-end' function is undertaken wholly by an information system, such as 'selecting customers to issue a garnishee order then issuing a garnishee order then receiving a response back from a bank'.
- a manual workflow – should be taken to mean where one or more components of a particular process, action or transaction require human intervention.

In the case of Garnishee Orders, Revenue NSW has in place direct electronic interfaces with the four major banks - Commonwealth Bank of Australia (CBA), Australian and New Zealand Banking Group (ANZ), Westpac Banking Corporation (WBC), National Australia Bank (NAB)). This allows it to adopt a straight-through processing approach with those banks.

Accordingly, for customers in a GO queue for one of those banks, Revenue NSW serves the Garnishee Order on the bank electronically. The orders are transmitted as an electronic file on a nightly basis for bulk processing. The file contains a list of names of fine defaulters and the following information in relation to each:

- Date of birth
- Full Name
- Address
- GO Number
- GO Amount

However, the capacity of each bank to accept and process Garnishee Orders at any time is limited. This means that, typically, more fine defaulters are queued to be targeted for a Garnishee Order at any time than can be processed on any given day. Where a file is queued for a Garnishee Order but the order is not able to be issued on a given day, the file is held over in the queue to be re-assessed by the DPR the following working day. The next day's reassessment is undertaken afresh in accordance with Step 7.

Step 10 – Attempted compliance by the big four banks

Once a Garnishee Order is made, the financial institution is required to comply with the order.

An exception is where the relevant account is one into which certain Commonwealth support payments have been made. For example, under section 62 of the *Social Security (Administration) Act 1999* (Cth) (SSAA) a retrospective protected amount formula must be applied when a court order in the nature of a Garnishee Order comes into effect, and social security payments have

been made into an account. Under the SSAA, the garnishee order does not apply to the saved amount (if any) in an account. Similar provisions apply in relation to Commonwealth family assistance payments.

Revenue NSW takes the view that it is the responsibility of the banks to ensure that there is compliance with any relevant Commonwealth legislation. Revenue NSW takes no action to avoid issuing a Garnishee Order that would, if fully actioned, have the effect of contravening the Commonwealth legislation and it does not otherwise takes steps to verify that a contravention has not occurred. Again, these are considered to be matters for the financial institutions to address.

Each financial institution is responsible for matching the Garnishee Order against its own customer information.[3] The banks also decide how to process the orders and the extent to which any of that process is automated. It is understood that the process is almost entirely automated within all of the major four banks.

If an account held by the relevant fine defaulter is identified by the bank, and if sufficient funds (excluding any saved amount referred to above) are available in the account, then the amount of the outstanding debt is transferred to Revenue NSW. If there are insufficient funds in the account to satisfy the outstanding debt, then the entire amount held in the account is transferred (excluding any saved amount). In general, this means that, where an outstanding debt is equal to or higher than the balance of an account, a Garnishee Order results in a nil balance in that account.

If an account is located by the relevant bank, but there are no funds available at the time of the Garnishee Order, the bank returns an 'insufficient funds' notification to Revenue NSW.

If no active account can be located for the relevant customer, the bank returns a 'no account held' or 'account closed' notification to Revenue NSW.

Step 11 – Re-attempts if account identified, but less than full recovery

If, at Step 10, a bank has returned an 'insufficient funds' notification or only a partial remittance of funds from a fine defaulter's account, the DPR business rules apply a 14 day waiting period before a follow-up Garnishee Order can be issued to the same bank. Three re-attempts can be

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[3] Complaints have been received by Revenue NSW and the NSW Ombudsman from time to time when a bank has identified the wrong account to be garnisheed, such as from an account held by a person who shares the same full name as the fine defaulter. Revenue NSW advises banks to ensure that they verify all provided data against account details (eg., names, date of birth) before matching accounts to a Garnishee Order, but that the onus is ultimately on the bank to ensure that it identifies and transmits funds only from an account to which the order relates.

issued at the same bank, before the customer file is re-assessed for alternative enforcement action (as per Step 7), such as a Garnishee Order to another of the four major banks, or to another financial institution.

Under the DPR business rules, if an initial Garnishee Order results in an 'insufficient funds' notification or only partial recovery, the maximum number of further Garnishee Orders that can be issued in respect of the fine defaulter through 'straight-through processing' to the big four banks in the following 12-month period is limited to sixteen. However, additional Garnishee Orders can be issued manually by staff to those or other banks.

Step 12 – Re-assessment for enforcement action

If a fine debt is not fully recovered by step 11 above, the customer is re-assessed by the DPR for enforcement action in the same way as described at step 7 above.

However, if a bank returns a 'no account held' or 'account closed' notification, the DPR business rules provide that further Garnishee that can only be re-issued to that bank in respect of that particular customer a maximum of once every three months (in the case of CBA and ANZ) and once every six months (in the case of WBC, NAB and the non-major banks). This limit is in place to limit unnecessary administrative burden being placed on the banks.

If an account for a fine defaulter is not located at one of the four major banks, the DPR assesses whether alternative enforcement action should be taken (as per Step 7), including an attempted Garnishee Order directed to another of the four major banks, or to another financial institution.

Where Revenue NSW does not have an agreement with a bank or credit union to issue a Garnishee Order electronically, a paper Garnishee Order may be issued. Unlike the 'batch' processing undertaken with the big four banks, these orders are served manually on the relevant institution on a customer-by-customer bases. They are processed manually by the institution, and generally this includes remitting funds back for manual processing by Revenue NSW as well. Even in those cases, however, the DPR is still the mechanism for selecting whether a Garnishee Order should be issued.

Notification to fine defaulters

50. Revenue NSW does not provide specific notice to the fine defaulter before the making of a Garnishee Order apart from previous notices advising this is one of the options

that can be made if the fine defaulter does not pay or engage with Revenue NSW in some way. This means that a fine defaulter will typically first become aware that a Garnishee Order has been successful when they notice funds are missing from their bank account.

51. Revenue NSW does not provide any notice or reasons to the fine defaulter after the making of a Garnishee Order, including after the successful recovery of a debt under a Garnishee Order.

52. Penalty reminder notices and penalty notice enforcement orders issued to fine defaulters include specific information and a warning about the further enforcement actions that can be made if there is a failure to pay or take action.

Enforcement fees

53. Under the Fines Regulation, an enforcement fee of $65 may be applied by Revenue once every six months for Garnishee Order(s) issued during that period. Enforcement fees may also be applied for the issuing of an enforcement order ($65) and applying RMS sanctions ($40).

54. Under the original version of the GO system, unless a fine defaulter had sought an internal review of the original penalty notice, up to $170 in enforcement fees would be applied to a fine debt and included in a Garnishee Order without any staff member having reviewed the matter. (See paragraph [56] below, which notes changes made to the imposition of fees from late 2016.)

PART D: MODIFICATIONS TO THE GO SYSTEM

First modification – The introduction of a minimum protected amount

55. Following customer complaints and concerns raised by the NSW Ombudsman and others, in August 2016 Revenue NSW began applying a 'minimum protected amount' to bank-directed Garnishee Orders.

56. That amount is currently $523.10 (indexed in line with CPI). Revenue NSW instructs banks that this minimum balance must be left in any account that is otherwise subject to a Garnishee Order issued by Revenue NSW.

57. The minimum protected amount is consistent with the minimum protected amount for court-issued garnishee orders directed to employers and, since June 2018 court-issued garnishee orders directed to banks, under the *Civil Procedure Act*.[4]

58. Additionally, at around the same time, Revenue NSW implemented a new policy providing that the enforcement fee of $65 for Garnishee Orders is only to be applied once per customer, and only in cases where the total debt exceeds $400.

59. This did not involve any change to a published policy, however it was reflected in the relevant business rules maintained by Revenue NSW.

Second modification – The exclusion of Vulnerable Persons using a machine learning model

60. In September 2018 Revenue NSW agreed with the NSW Ombudsman that it should take steps to exclude the making of Garnishee Orders in respect of Vulnerable Persons.

61. Revenue NSW advises that it had found that collection success rates were lower if the fine defaulter was a Vulnerable Person. Further, when a Garnishee Order was issued on a Vulnerable Person there was a greater likelihood that it would result in a request for a refund, the processing of which imposed additional administrative costs for

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[4] S 118A of the *Civil Procedure Act 2005*, commenced by proclamation on 30 June 2018. Under s 118A(1), 'one or more garnishee orders must not, in total, reduce the amount of the aggregate debt that is due and accruing from the garnishee to the judgment debtor to less than $447.70.' Under s 118A(2), the amount referred to in s 118A(1) is an 'adjustable amount' for the purposes of Division 6 of Part 3 of the *Workers Compensation Act 1987*.

Revenue NSW. Consequently, Revenue NSW advises that the exclusion of Vulnerable Persons assists Revenue NSW to better target its resources.

62. Revenue NSW did this by implementing a new machine learning model within the DPR with the intention of identifying and excluding Vulnerable Persons from the application of Garnishee Order processes.

63. The model seeks to find relationships between different variables and to make a prediction about the likelihood of a person being Vulnerable.

64. Revenue NSW has around 4 million customer records, of which approximately 60,000 customers are known to be Vulnerable Persons. The model was developed using machine learning algorithms that compared all customer records with the 60,000 people already identified as Vulnerable in the system. Overall, the model was trained to identify if a person was Vulnerable using 250,000 customer files, and having regard to a list of potential variables. Those variables include:

    - age
    - amount of outstanding debt
    - success of previous garnishee orders issued
    - number of enforcement orders issued
    - previous payment plans
    - frequency of contact
    - type of offence
    - previous long-term hardship stay on enforcement
    - data from the Office of the Sheriff
    - known incarceration history
    - previous Centrepay[5] arrangements.

65. Revenue NSW also included externally-sourced data in the model, including the addresses of all Family and Community Services (FACS) owned properties and the Australian Bureau of Statistics socio-economic scores based on geographical location. This allowed the model to 'learn', for example, whether there was a correlation

[5] A free and voluntary service to pay bills and expenses as regular deductions from Centrelink payments.

between persons being vulnerable and the fact that their address matched the address of FACS-owned property. If there was such a correlation, then the model could use that correlation to predict that a fine defaulter whose address is the same as a FACs-owned property is more likely to be a Vulnerable Person.

66. The model's output is a 'prediction' as to the likelihood, expressed as a percentage, that the person is vulnerable.

67. If the machine learning model makes a prediction of 51 per cent and above, then the person is classified as a Vulnerable Person. Less than 5 per cent of all Revenue NSW customer files are predicted by the model to fall within this vulnerable category.

68. Revenue NSW advises that the machine learning model demonstrated a 96 per cent accuracy rate in identifying whether a person is a Vulnerable Person using this 51 per cent probability threshold.

69. Since the establishment of this machine learning model, the business rules of the DPR provide that a Garnishee Order will not be issued if the model predicts a 35 per cent or more likelihood of a fine defaulter being a Vulnerable Person.

70. In the month of November 2018, following the adoption of the Vulnerable Person module, Revenue NSW quarantined approximately 2,800 fine defaulters with up to $27 million in outstanding debt as ineligible to be considered for a Garnishee Order. This meant that a Garnishee Order would not be issued to those fine defaulters due to the likelihood they were Vulnerable and that a Garnishee Order would cause hardship.

71. Customers who return a prediction of Vulnerability are removed by the DPR from the 'GO' (Garnishee Order) process (as well as some other processes) and are instead diverted to a special tier within the DPR. Actions applicable to this tier may include:

    - phone calls, SMS messaging and mail out campaigns by the Hardship Team
    - referral to the Interactive Voice Response (IVR) system for manual contact so they can be routed to the Hardship Team.

    The Hardship Team can put the customer in contact with WDO sponsors and/or can discuss other options for debt resolution, such as low income payment plans or write-off of the debt, if appropriate.

72. The adoption of the Vulnerable Person Tool did not involve a change to any published policy and/or any other public communication.

Third modification – A 'human stop/go' process step

73. In March 2019, Revenue NSW introduced an additional manual step in the process of issuing Garnishee Orders.

74. Under this now Current Version, before the electronic file is transmitted to the garnisheed banks for action (that is, between Step 8 and Step 9 above), a designated staff member of Revenue NSW is required to 'authorise' the issuing of the proposed Garnishee Order.

75. This change was made in response to questions raised by the NSW Ombudsman as to the legality of Revenue NSW's GO system, and in particular whether that system was consistent with the statutory conferral of discretionary powers on the Commissioner under the Fines Act.

76. The manner in which this additional step is being applied in practice is as follows:

Step 8A – 'Human stop/go' (Staff member authorisation)

Once the DPR has selected the list of fine defaulters to be 'pooled' for the purpose of bulk processing of Garnishee Orders, a 'Garnishee Order Issue Check Summary Report' is produced. An example of such a report is set out in **Attachment C**.

A single consolidated report is prepared for all files selected for Garnishee Order. The example in **Attachment C** shows a report for a single day (23 March 2020) in which 7,386 fine defaulters had been selected by the DPR for the issuance of a Garnishee Order.

The report is accompanied by a spreadsheet of the raw data from all of the relevant files (not included in **Attachment C** for privacy reasons).

The report sets out by way of red/green 'traffic lights' whether the files meet eleven 'inclusion criteria' and do not meet sixteen 'exclusion criteria'. These criteria reflect Revenue NSW's business rules, and include some criteria prescribed by legislation.

The inclusion criteria include things like: the age of the fine defaulter being over 18 and less than 70.

The exclusion criteria include things like: the customer is deceased, bankrupt or in custody. Another exclusion criterion is: the machine learning model has reported a vulnerability score of more than 35 per cent.

Because these criteria are included in the DPR business rules, the Report should produce 'green traffic lights'.

The only circumstance in which a 'red traffic light' could appear would be if:

- There was some error in the coding of the business rules within the DPR (such that the DPR was not properly applying an exclusion criterion), or
- An inconsistency between the business rules and the criteria for the Report.

If a traffic light does show red, the staff member may review any file that has been flagged and exclude it from the Garnishee Order file.

In addition, if the Report generates a red traffic light, the file is sent to be reviewed by Revenue NSW's analytics team, as it may indicate a defect either with DPR coded business rules or with the Report itself. A senior officer must then confirm that the impacted customer is excluded from the daily file before approving.

If all traffic lights are green (or once any red traffic lighted files have been manually removed) the staff member approves the Garnishee Orders and the files are transmitted to the relevant banks.

In the example report the red light is a company file, although suitable for a Garnishee Order, is blocked from the auto file. If the Garnishee Order was to be issued, it would be manually generated by the Targeted Team. In practice, the case was removed from the file, and referred to the appropriate team to consider manually issuing a Garnishee Order.

PART E: IMPACT AND EFFECTIVENESS OF THE GO SYSTEM

Debt recovery under the GO system

77. The use of the GO system has resulted in a significant increase in the number of Garnishee Orders issued by Revenue NSW.

78. In the 2010-2011 financial year, Revenue NSW issued 6,905 garnishee orders. In the 2018-2019 financial year it issued more than 1.6 million.

79. However, as noted above, the GO system typically operates with an iterative process (see Steps 10 and following above). That is, if Revenue NSW wishes to issue a Garnishee Order in respect of a fine defaulter, it will generally first issue a Garnishee Order to one of the big four banks. The fine defaulter might not hold an account with that bank. If the first Garnishee Order is unsuccessful in recovering the debt, then further Garnishee Orders may be issued to different financial institutions. This may continue successively until an account held by the fine defaulter is identified.

80. For this reason, the number of Garnishee Orders issued in any period does not correspond with the number of fine defaulters whose active accounts are the subject of such orders. Of the ~1.6 million Garnishee Orders made by Revenue NSW in 2018-2019, those orders applied to around 237,548 distinct customers.

81. Nevertheless, it is clearly the case that Garnishee Orders have become more prevalent over the past decade through the use of the GO system. In 2012-2013, Revenue NSW recovered $10,126,428.15 by way of Garnishee Orders. In 2019-2020 it recovered $11,529,744.39. The average recovery per Garnishee Order is around $500.

82. Revenue NSW now issues significantly higher numbers of Garnishee Orders compared to other civil sanctions available under the Fines Act. This reflects the fact that the business rules in the DPR have been coded to prioritise Garnishee Orders, and Garnishee Orders directed to the big four banks in particular, for selection as a preferred enforcement action.

83. Reasons for this include that Garnishee Orders issued to the big four banks tend to be a successful means of recovering fine debt; Garnishee Orders to those banks are, through straight-through processing, very cheap to administer; and they allow for an iterative approach to be taken to identify an account held by the relevant fine defaulter if their account details are not already known.

84. Revenue NSW applied the following civil sanctions for the 2019-2020 financial year:

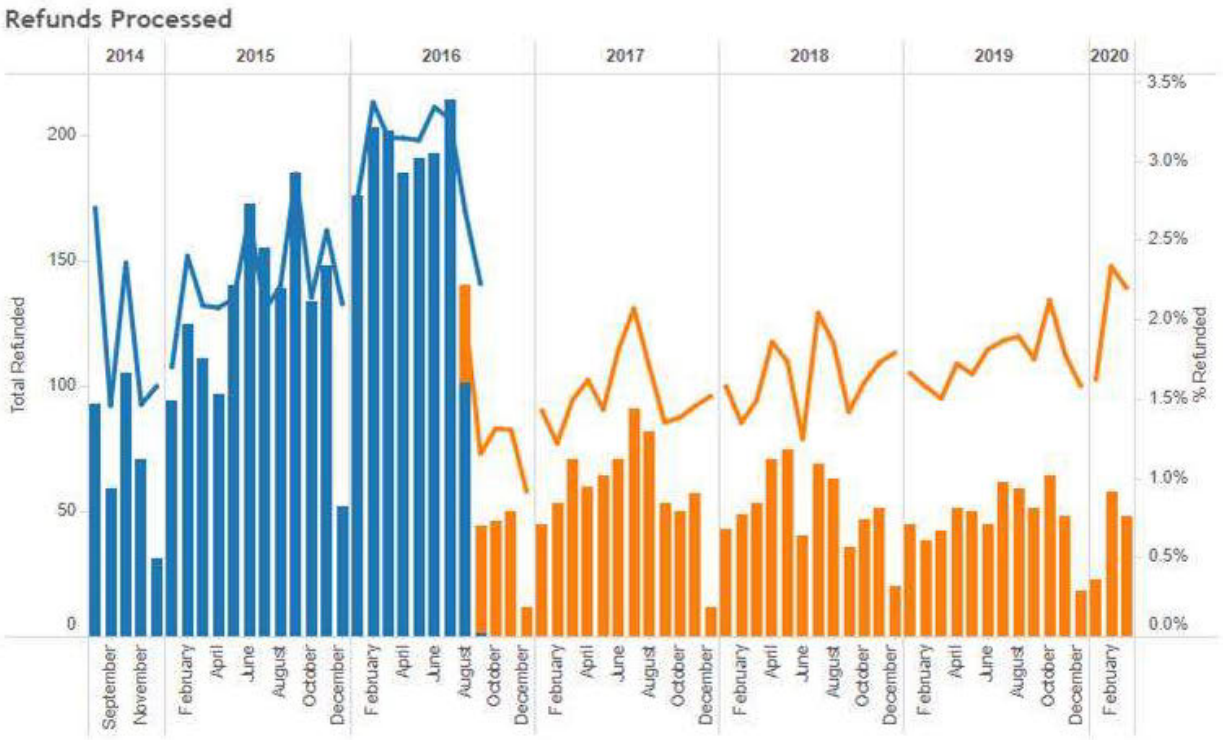
Sanction	Number Attempted
Direction to RMS to take enforcement action	401,775
Bank garnishee order	1,069,597
Employer garnishee order	8,991
External debt collection referral	19,868
Property seizure order	12,826
Examination Notices	130,999
Charges on land	~100
Community service orders	Nil
Imprisonment	Nil

85. The below table shows the number of requests for refunds of Garnishee Orders issued in each year since 2012:

Financial Year	# Refund Requests
2012-2013	313
2013-2014	794
2014-2015	1236
2015-2016	1963
2016-2017	870
2017-2018	677

2018-2019	557
2019-2020	431

86. The below visualisation depicts refund numbers have fallen significantly with the introduction of the protected amount in 2016.



Attachment A: Revenue NSW Delegation Instruments

This attachment includes three extracts from Revenue NSW's Instruments of Delegation as follows:

1. Revenue NSW Instrument of Delegation dated 29 October 2019
2. Revenue NSW Instrument of Delegation dated 20 March 2017
3. Revenue NSW Instrument of Delegation dated 17 June 2016

1. Revenue NSW Instrument of Delegation dated 29 October 2019

Fines delegations (extract from Revenue NSW Instrument of Delegation)

top

Section 2.1 sets out delegations by the Commissioner of Fines Administration of functions under the Fines Act 1996 as specified in Schedule A.

Schedule B sets out the delegations for writing off debt under section 101 of the *Fines Act 1996*, excluding certain offences specified in the schedule. The authority to write off fines for those specified offences rests with the Commissioner.

The delegation levels in Schedule B apply to an employee approving a write off. A decision not to write off is not limited to the roles or amounts in Schedule B. However, if an employee recommends that an application for write off be refused, that submission must be approved by another employee assigned to a role at a higher grade than the submitting employee.

Section 2.2 sets out an authorisation by the Commissioner of Fines Administration authorising persons to perform functions under the Road Transport Act 2013 in relation to penalty notices.

Section 2.3 sets out an authorisation by the Chief Commissioner of State Revenue appointing persons to perform functions under the *Road Transport Act 2013* in relation to penalty notice nomination offences.

For the purposes of these delegations, all DCS employees are assigned to roles within the following six categories.

Table 1:

A	Secretary
B	Any government officer in a Senior Executive Band 3 role (Deputy Secretary)
C	Any government officer in a Senior Executive Band 2 role (Executive Director)
D	Any government officer in a Senior Executive Band 1 role (Director)

1. Revenue NSW Instrument of Delegation dated 29 October 2019

Fines delegations (extract from Revenue NSW Instrument of Delegation)

top

Section 2.1 sets out delegations by the Commissioner of Fines Administration of functions under the Fines Act 1996 as specified in Schedule A.

Schedule B sets out the delegations for writing off debt under section 101 of the *Fines Act 1996*, excluding certain offences specified in the schedule. The authority to write off fines for those specified offences rests with the Commissioner.

The delegation levels in Schedule B apply to an employee approving a write off. A decision not to write off is not limited to the roles or amounts in Schedule B. However, if an employee recommends that an application for write off be refused, that submission must be approved by another employee assigned to a role at a higher grade than the submitting employee.

Section 2.2 sets out an authorisation by the Commissioner of Fines Administration authorising persons to perform functions under the Road Transport Act 2013 in relation to penalty notices.

Section 2.3 sets out an authorisation by the Chief Commissioner of State Revenue appointing persons to perform functions under the *Road Transport Act 2013* in relation to penalty notice nomination offences.

For the purposes of these delegations, all DCS employees are assigned to roles within the following six categories.

Table 1:

A	Secretary
B	Any government officer in a Senior Executive Band 3 role (Deputy Secretary)
C	Any government officer in a Senior Executive Band 2 role (Executive Director)
D	Any government officer in a Senior Executive Band 1 role (Director)

E	Any government officer in a non-executive role equal to or above clerk grade 7 in pay scale
F	Any government officer in a non-executive role below clerk grade 7 in pay scale

Fines Act 1996 instrument of delegation and authorisation

Pursuant to the power conferred on the Commissioner of Fines Administration by section 116A (1) of the Fines Act 1996 ("the Act"), the functions of the Commissioner conferred by or imposed under the Act (other than an enforcement function) and under the Fines Regulation 2015 are delegated to persons employed in:

- Revenue NSW, Customer Service Fines & Debt (Collections, Debt Resolution and Fines & Fees) and Technical & Advisory Services; and
- Service NSW, Service Delivery (Service Centres Metro, Service Centres Regional, Contact Centre)

assigned to the roles set out in Table 1, being the roles specified, and roles at or above the grade levels specified, in Schedule A.

Write off

The authority to write off fines (other than for specified offences) under section 101 of the Act is delegated to persons in Customer Service Fines & Debt assigned to the roles at or above the grade levels specified in Schedule B, and limited to the amounts specified in that schedule. A specified offence is any offence under the Work Health and Safety Act 2011 which resulted in a fatality.

Where multiple fines for a fine defaulter are written off, the delegate must be an employee with delegation to write off the total combined amount of the multiple fines. Where a schedule of fines is written off, the delegate must be an employee with delegation to write off the highest combined amount for an individual fine defaulter within the schedule.

Authorised officers - persons who may exercise enforcement functions

The exercise of any enforcement function listed in Schedule A, being a function of making or issuing an order under the Act, is, subject to the delegations detailed immediately below in relation to Service NSW, limited to persons within Revenue NSW assigned to roles in Customer Service Fines & Debt and Technical & Advisory Services. Such persons are authorised officers under section 116B (2) of the Act.

Authorised officers - Service NSW

Pursuant to the power conferred on the Commissioner of Fines Administration by section 116B of the Act, I hereby authorise persons assigned to roles in Service NSW, Service Delivery (Service Centres Metro, Service Centres Regional, Contact Centre), to exercise enforcement functions under the Act. These persons are authorised officers under section 116B(2) of the Act. The delegation of any enforcement function is limited to persons at or above the relevant grade levels listed in Schedule A.

Appropriate officers - persons who may issue and deal with penalty notices

Pursuant to the power in section 22 (2)(b) of the Fines Act 1996, all persons assigned to roles in Customer Service Fines & Debt (Collections, Debt Resolution and Fines & Fees) and Technical & Advisory Services (Correspondence & Briefings) are authorised as appropriate officers for the purposes of Part 3 of that Act.

This instrument replaces any prior instrument relating to these functions under the *Fines Act 1996*.

Kelly Wood
Commissioner of Fines Administration
29 October 2019

Schedule A

Section of Act	Description of delegation/function	F	E	D	C
3(1)	Approve form (definition of *approved form*)	Grade 5	Yes	Yes	Yes
3(1)	Approve kind of pension or benefit (definition of *person in receipt of a Government benefit*)	Grade 5	Yes	Yes	Yes
14(1) & (1C)	Make a court fine enforcement order; Refer matter back to the registrar	Yes	Yes	Yes	Yes
17(1)	Withdraw a court fine enforcement order where the amount payable - is not more than $2,500	Yes	Yes	Yes	Yes
	- is more than $2,500 but not more than $5,000	Grade 3	Yes	Yes	Yes
	- is more than $5,000 but not more than $25,000	No	Grade 9	Yes	Yes
	- is more than $25,000 but not more than $75,000	No	Grade 11	Yes	Yes
	- is more than $75,000 but not more than $150,000	No	No	No	Yes
38(2)	Approve notice for use when nominating	Grade 5	Yes	Yes	Yes
41	Make a penalty notice enforcement order	Yes	Yes	Yes	Yes
46(1) & (1A)	Withdraw a penalty notice enforcement order where the amount payable - is not more than $2,500	Yes	Yes	Yes	Yes
	- is more than $2,500 but not more than $5,000	Grade 3	Yes	Yes	Yes
	- is more than $5,000 but not more than $25,000	No	Grade 9	Yes	Yes
	- is more than $25,000 but not more than $75,000	No	Grade 11	Yes	Yes
	- is more than $75,000 but not more than $150,000	No	No	No	Yes
48(5)	Grant leave to make more than one application	Grade 5	Yes	Yes	Yes
49(1)	Be satisfied as to facts, annul a penalty notice enforcement order;	Grade 3	Yes	Yes	Yes
49(3), (3B) & (5)	Refer matter to the Local Court following annulment; give notice of determination of an application for annulment	Yes	Yes	Yes	Yes
49(7)	Refund application fee for successful annulment	Grade 5	Yes	Yes	Yes
49A(1) & (1A)	Seek a review of the decision to issue a penalty notice	Yes	Yes	Yes	Yes
52(1)	Stay enforcement action following application for annulment	Yes	Yes	Yes	Yes
59	Serve notice of a fine enforcement order	Yes	Yes	Yes	Yes
61(3)	Be satisfied as to most recent address	Yes	Yes	Yes	Yes

Section of Act	Description of delegation/function	F	E	D	C
65(2), (4), (4A) & (4B)	Direct Roads and Maritime Services (RMS) to take, recommence or cease enforcement action	Yes	Yes	Yes	Yes
66(2), (3) & (3A)	Direct RMS to cancel driver licence, remove suspension, or further suspend licence	Yes	Yes	Yes	Yes
66(4)	Notify fine defaulter of enforcement action	Yes	Yes	Yes	Yes
66A(3)	Direct RMS to cease enforcement action	Yes	Yes	Yes	Yes
67(2) & (3)	Direct RMS to cancel registration of a vehicle; notify fine defaulter of enforcement action	Yes	Yes	Yes	Yes
68(2) & (4)	Direct RMS not to apply, or to cease applying, sanctions	Yes	Yes	Yes	Yes
71(1A)	Be satisfied civil enforcement is preferable	Grade 3	Yes	Yes	Yes
72(1), (7)(b) & (8)	Make a property seizure order; direct Sheriff to execute in different order; cancel a property seizure order	Grade 3	Yes	Yes	Yes
73(1)	Make a garnishee order	Yes	Yes	Yes	Yes
74(1)	Apply to Registrar-General for registration of fine enforcement order in relation to land owned by fine defaulter	Yes	Yes	Yes	Yes
74(6)	Consent to sale or other disposition of property	Grade 3	Yes	Yes	Yes
75(1), (7) & (8)	Issue an order for examination; adjourn examination and notify person	Grade 3	Yes	Yes	Yes
75(9)	Request fine defaulter by notice to supply information	Yes	Yes	Yes	Yes
75A(3)	Report matter relating to an order for examination to the Supreme Court or District Court	Grade 5	Yes	Yes	Yes
76A(1)	Approve costs and expenses incurred by the Sheriff	No	Yes	Yes	Yes
77(3)	Cancel a property seizure order, garnishee order or charge on land	Grade 3	Yes	Yes	Yes
77A(1)	Refund amounts paid under garnishee orders where the amount to be refunded: - is not more than $500	Grade 5	Yes	Yes	Yes
	- is more than $500 but not more than $1500	No	Yes	Yes	Yes
	- is more than $1,500 but not more than $5000	No	Grade 9	Yes	Yes
	- is more than $5,000	No	No	Yes	Yes
79(1)	Make a community service order otherwise than at the request of the fine defaulter	No	No	Yes	Yes
	- at the request of the fine defaulter	No	No	Yes	Yes
80(1)	Cause copy of community service order and notice of the order to be served	No	No	Yes	Yes
80A(1)	Give directions for service of community service order and notice of the order	No	No	Yes	Yes
86(1), (3), (4) & (6)	Revoke a community service order; reverse decision to revoke a community service order	No	No	Yes	Yes
99B(1)	Make a work and development order	Yes	Yes	Yes	Yes

Section of Act	Description of delegation/function	F	E	D	C
99BA(4) & (5)	Require supporting evidence; waive requirement for evidence	Grade 5	Yes	Yes	Yes
99C(1)	Vary or revoke a work and development order	Yes	Yes	Yes	Yes
100(2), (3A), (4), (4A), (4C), (4D) & (4E)	Make a time to pay order; be satisfied as to arrangements and agree to direct debit; amend or revoke a time to pay order; give written notice	Yes	Yes	Yes	Yes
101(1A) & (1B)	Write off unpaid fine (other than for any offence under the *Work Health and Safety Act 2011* which resulted in a fatality)	See Schedule B			
101(4)	Reinstate enforcement order within 5 years of write off	Yes	Yes	Yes	Yes
101B(4)	Suspend enforcement action against fine defaulter who has applied to the Hardship Review Board	Yes	Yes	Yes	Yes
102(2)	Approve disposition of money	Yes	Yes	Yes	Yes
102A(1)	Waive payment of enforcement costs for minors	Yes	Yes	Yes	Yes
107(1), (3) & (4)	Register copy of conviction; record payment; remit amount of fine recovered	Yes	Yes	Yes	Yes
108(1) & (3)	Send request for enforcement of NSW fine; notify relevant officer of payment	Yes	Yes	Yes	Yes
108A(2)	Be satisfied body or person is authorised	Grade 5	Yes	Yes	Yes
108C(1)	Make an interstate fine enforcement order	Yes	Yes	Yes	Yes
108E(3)	Approve method of making request for interstate fine enforcement order	No	Grade 9	Yes	Yes
108G(2)	Approve method of making request to amend or withdraw interstate fine enforcement order	No	Grade 9	Yes	Yes
108H(1) & (2)(a)&(b)	Amend or withdraw interstate fine enforcement order	Yes	Yes	Yes	Yes
108H(2)(c)	Amend or withdraw interstate fine enforcement order on the ground that the order was 'otherwise made in error'	Grade 5	Yes	Yes	Yes
108H(5)	Provide written confirmation of withdrawal or amendment	Yes	Yes	Yes	Yes
108K(2)	Enter into arrangements for payment of amounts to interstate fine enforcement authority	No	Grade 9	Yes	Yes
108M(1) & (2)	Be satisfied that enforcement unsuccessful, request enforcement or NSW fine enforcement order; request amendment or withdrawal of enforcement	Grade 3	Yes	Yes	Yes
108M(4)	Enter into arrangements for payment of amounts to the Commissioner	No	Grade 9	Yes	Yes
108O	Notify of payment	Yes	Yes	Yes	Yes
112G(1)	Make attachment order	Grade 3	Yes	Yes	Yes
112G(5)	Serve notice of attachment order	Yes	Yes	Yes	Yes
112I(2)	Cancel attachment order	Grade 3	Yes	Yes	Yes
112J(1) & (6)	Suspend enforcement action; vary court fine enforcement order	Grade 3	Yes	Yes	Yes

Section of Act	Description of delegation/function	F	E	D	C
112L	Enter into arrangements with Commissioner of Victims Rights	No	No	Yes	Yes
114(2)	Enter into arrangements with respect to penalty notices	No	Yes	Yes	Yes
	Carry out functions under arrangements other than repaying or refunding amounts paid	Yes	Yes	Yes	Yes
114(2)	Repay or refund amounts paid under penalty notices in accordance with arrangements where the amount to be refunded: - is not more than $5,000	Grade 5	Yes	Yes	Yes
	- is more than $5,000	No	Grade 9	Yes	Yes
115(3)	Authorise use of the name “State Debt Recovery”	No	No	Yes	Yes
116(2)	Engage consultants or contractors	No	Grade 9	Yes	Yes
117(1) & (1A)	Request information about a fine defaulter	Yes	Yes	Yes	Yes
117AA	Obtain information about a fine defaulter from an employer or past employer	Yes	Yes	Yes	Yes
117AB(1)	Request information about a fine defaulter	Yes	Yes	Yes	Yes
117A	Disclose personal information	Yes	Yes	Yes	Yes
118	Register fine enforcement order, and record details of payment of the fine and the taking of enforcement action	Yes	Yes	Yes	Yes
122B(1) & (2)	Pay amount in accordance with arrangements; deduct or retain fee or payment	Yes	Yes	Yes	Yes
122C(1), (2) & (4)	Reallocate overpayment; notify person; revoke reallocation	Yes	Yes	Yes	Yes
Clause 6(1)	Waive, postpone or refund enforcement costs or application fees (except as provided below)	Grade 3	Yes	Yes	Yes

Schedule B

Section of Act	Description of delegation/function	F	E	D	C
101(1A) & (1B)	Write off amount up to $1,000,000	No	No	No	Yes
	Write off amount up to $150,000	No	Yes	Yes	Yes
	Write off amount up to $50,000	No	Grade 11	Yes	Yes
	Write off amount up to $25,000	No	Grade 9	Yes	Yes

Section of Act	Description of delegation/function	F	E	D	C
	Write off amount up to $5,000	No	Yes	Yes	Yes

Road Transport Act 2013 "Authorised officers" (Persons who may issue penalty notices)

Pursuant to the powers conferred on the Commissioner of Fines Administration in the definition of Class 1 officer in Schedule 4 to the Road Transport (General) Regulation 2013, I hereby authorise all persons assigned to roles in Revenue NSW Customer Service Fines & Debt (Collections, Debt Resolution and Fines & Fees) to be authorised officers in relation to the functions conferred on authorised officers by section 195 of the Road Transport Act 2013.

Kelly Wood
Commissioner of Fines Administration
29 October 2019

2. Revenue NSW Instrument of Delegation dated 20 March 2017

NSW Office of State Revenue

Contents

Office of State Revenue

1. General instructions

This document sets out the functions of the Chief Commissioner of State Revenue and the Commissioner of Fines Administration that can be exercised by persons assigned to roles in the Office of State Revenue ("OSR").

If a statutory function is not listed, it has not been delegated and can only be exercised by the Deputy Secretary DFSI as Chief Commissioner and Commissioner.

Human resources, administrative and finance delegations for all OSR employees are set out in the DFSI Delegations Manual.

This document currently only sets out, in Section 2, the Fines delegations. Delegations under OSR's other legislation will be added in further sections as developed.

For the purposes of these delegations, all DFSI employees are assigned to roles within the following five categories.

Table 1:

A	Secretary
B	All SEB 3 roles
C	All senior executive roles and transitional former senior executive roles excluding those in categories A and B
D	All non-executive roles equal to and above clerk grade 7 or equivalent in pay scale
E	All non-executive roles below clerk grade 7 in pay scale

Within OSR, the Deputy Secretary OSR has all the functions of the Chief Commissioner of State Revenue and the Commissioner of Fines Administration. Otherwise, categories A and B are not applicable to the delegations under legislation administered by OSR.

Within categories D and E of the delegation schedules, a reference to a grade level is a reference to the minimum grade level at which the function can be exercised.

Office of State Revenue

2. Fines delegations

Section 2.1 sets out delegations by the Commissioner of Fines Administration of functions under the *Fines Act 1996* as specified in Schedule A.

Schedule B sets out the delegations for writing off debt under section 101 of the *Fines Act 1996*, excluding certain offences specified in the schedule. The authority to write off fines for those specified offences rests with the Commissioner.

The delegation levels in Schedule B apply to an employee approving a write off. A decision not to write off is not limited to the roles or amounts in Schedule B. However, if an employee recommends that an application for write off be refused, that submission must be approved by another employee assigned to a role at a higher grade than the submitting employee.

Section 2.2 sets out an authorisation by the Commissioner of Fines Administration authorising persons to perform functions under the *Road Transport Act 2013* in relation to penalty notices.

Section 2.3 sets out an authorisation by the Chief Commissioner of State Revenue appointing persons to perform functions under the *Road Transport Act 2013* in relation to penalty notice nomination offences.

Office of State Revenue

2.1 Fines Act 1996
Instrument of delegation and authorisation

Pursuant to the power conferred on the Commissioner of Fines Administration by section 116A (1) of the *Fines Act 1996* ("the Act"), the functions of the Commissioner conferred by or imposed under the Act (other than an enforcement function) and under the *Fines Regulation 2015* are delegated to persons employed in Products, Service & Compliance (Fines & Fees), Collections (Fines Debt & Collections Centre) and Technical & Advisory Services within the Office of State Revenue assigned to the roles set out in Table 1, being the roles specified, and roles at or above the grade levels specified, in Schedule A.

Write off

The authority to write off fines (other than for specified offences) under section 101 of the Act is delegated to persons in Collections assigned to the roles at or above the grade levels specified in Schedule B, and limited to the amounts specified in that schedule. A specified offence is any offence under the *Work Health and Safety Act 2011* which resulted in a fatality.

Where multiple fines for a fine defaulter are written off, the delegate must be an employee with delegation to write off the total combined amount of the multiple fines. Where a schedule of fines is written off, the delegate must be an employee with delegation to write off the highest combined amount for an individual fine defaulter within the schedule.

Authorised officers – persons who may exercise enforcement functions

The delegation of any enforcement function listed in Schedule A, being a function of making or issuing an order under the Act, is limited to persons assigned to roles in Collections and Technical & Advisory Services, and such persons are authorised officers under section 116B (2) of the Act.

Appropriate officers – persons who may issue and deal with penalty notices

Pursuant to the power in section 22 (2)(b) of the *Fines Act 1996*, all persons assigned to roles in Products, Service & Compliance (Fines & Fees) and Collections (Collections Centre) are authorised as appropriate officers for the purposes of Part 3 of that Act.

This instrument takes effect on 21 March 2017 and replaces any prior instrument relating to these functions under the *Fines Act 1996*.

[redacted]

Stephen R Brady
Commissioner of Fines Administration
Date: 20/3/17

Office of State Revenue

Schedule A

Section of Act	Description of delegation/function	E	D	C
3(1)	Approve form (definition of *approved form*)	Grade 5	Yes	Yes
3(1)	Approve kind of pension or benefit (definition of *person in receipt of a Government benefit*)	Grade 5	Yes	Yes
14(1) & (1C)	Make a court fine enforcement order; Refer matter back to the registrar	Yes	Yes	Yes
17(1)	Withdraw a court fine enforcement order where the amount payable - is not more than $2,500	Yes	Yes	Yes
	- is more than $2,500 but not more than $5,000	Grade 3	Yes	Yes
	- is more than $5,000 but not more than $25,000	No	Grade 9	Yes
	- is more than $25,000 but not more than $75,000	No	Grade 11	Yes
	- is more than $75,000 but not more than $150,000	No	No	Executive Director
38(2)	Approve notice for use when nominating	Grade 5	Yes	Yes
41	Make a penalty notice enforcement order	Yes	Yes	Yes
46(1) & (1A)	Withdraw a penalty notice enforcement order where the amount payable - is not more than $2,500	Yes	Yes	Yes
	- is more than $2,500 but not more than $5,000	Grade 3	Yes	Yes
	- is more than $5,000 but not more than $25,000	No	Grade 9	Yes
	- is more than $25,000 but not more than $75,000	No	Grade 11	Yes
	- is more than $75,000 but not more than $150,000	No	No	Executive Director
48(5)	Grant leave to make more than one application	Grade 5	Yes	Yes
49(1)	Be satisfied as to facts, annul a penalty notice enforcement order;	Grade 3	Yes	Yes
49(3), (3B) & (5)	Refer matter to the Local Court following annulment; give notice of determination of an application for annulment	Yes	Yes	Yes
49(7)	Refund application fee for successful annulment	Grade 5	Yes	Yes

NSW Office of State Revenue

Section of Act	Description of delegation/function	E	D	C
49A(1) & (1A)	Seek a review of the decision to issue a penalty notice	Yes	Yes	Yes
52(1)	Stay enforcement action following application for annulment	Yes	Yes	Yes
59	Serve notice of a fine enforcement order	Yes	Yes	Yes
61(3)	Be satisfied as to most recent address	Yes	Yes	Yes
65(2), (4), (4A) & (4B)	Direct Roads and Maritime Services (RMS) to take, recommence or cease enforcement action	Yes	Yes	Yes
66(2), (3) & (3A)	Direct RMS to cancel driver licence, remove suspension, or further suspend licence	Yes	Yes	Yes
66(4)	Notify fine defaulter of enforcement action	Yes	Yes	Yes
66A(3)	Direct RMS to cease enforcement action	Yes	Yes	Yes
67(2) & (3)	Direct RMS to cancel registration of a vehicle; notify fine defaulter of enforcement action	Yes	Yes	Yes
68(2) & (4)	Direct RMS not to apply, or to cease applying, sanctions	Yes	Yes	Yes
71(1A)	Be satisfied civil enforcement is preferable	Grade 3	Yes	Yes
72(1), (7)(b) & (8)	Make a property seizure order; direct Sheriff to execute in different order; cancel a property seizure order	Grade 3	Yes	Yes
73(1)	Make a garnishee order	Yes	Yes	Yes
74(1)	Apply to Registrar-General for registration of fine enforcement order in relation to land owned by fine defaulter	Yes	Yes	Yes
74(6)	Consent to sale or other disposition of property	Grade 3	Yes	Yes
75(1), (7) & (8)	Issue an order for examination; adjourn examination and notify person	Grade 3	Yes	Yes
75(9)	Request fine defaulter by notice to supply information	Yes	Yes	Yes
75A(3)	Report matter relating to an order for examination to the Supreme Court or District Court	Grade 5	Yes	Yes
76A(1)	Approve costs and expenses incurred by the Sheriff	No	Yes	Yes
77(3)	Cancel a property seizure order, garnishee order or charge on land	Grade 3	Yes	Yes

NSW Office of State Revenue

Section of Act	Description of delegation/function	E	D	C
77A(1)	Refund amounts paid under garnishee orders where the amount to be refunded: - is not more than $500	Grade 5	Yes	Yes
	- is more than $500 but not more than $1500	No	Yes	Yes
	- is more than $1,500 but not more than $5000	No	Grade 9	Yes
	- is more than $5,000	No	No	Yes
79(1)	Make a community service order otherwise than at the request of the fine defaulter	No	No	Yes
	- at the request of the fine defaulter	No	No	Yes
80(1)	Cause copy of community service order and notice of the order to be served	No	No	Yes
80A(1)	Give directions for service of community service order and notice of the order	No	No	Yes
86(1), (3), (4) & (6)	Revoke a community service order; reverse decision to revoke a community service order	No	No	Yes
99B(1)	Make a work and development order	Grade 3	Yes	Yes
99BA(4) & (5)	Require supporting evidence; waive requirement for evidence	Grade 5	Yes	Yes
99C(1)	Vary or revoke a work and development order	Grade 3	Yes	Yes
100(2), (3A), (4), (4A), (4C), (4D) & (4E)	Make a time to pay order; be satisfied as to arrangements and agree to direct debit; amend or revoke a time to pay order; give written notice	Yes	Yes	Yes
101(1A) & (1B)	Write off unpaid fine (other than for any offence under the *Work Health and Safety Act 2011* which resulted in a fatality)	No	See Schedule B	See Schedule B
101(4)	Reinstate enforcement order within 5 years of write off	Yes	Yes	Yes
101B(4)	Suspend enforcement action against fine defaulter who has applied to the Hardship Review Board	Yes	Yes	Yes
102(2)	Approve disposition of money	Yes	Yes	Yes
102A(1)	Waive payment of enforcement costs for minors	Yes	Yes	Yes
107(1), (3) & (4)	Register copy of conviction; record payment; remit amount of fine recovered	Yes	Yes	Yes

Office of State Revenue

Section of Act	Description of delegation/function	E	D	C
108(1) & (3)	Send request for enforcement of NSW fine; notify relevant officer of payment	Yes	Yes	Yes
108A(2)	Be satisfied body or person is authorised	Grade 5	Yes	Yes
108C(1)	Make an interstate fine enforcement order	Yes	Yes	Yes
108E(3)	Approve method of making request for interstate fine enforcement order	No	Grade 9	Yes
108G(2)	Approve method of making request to amend or withdraw interstate fine enforcement order	No	Grade 9	Yes
108H(1) & (2)(a)&(b)	Amend or withdraw interstate fine enforcement order	Yes	Yes	Yes
108H(2)(c)	Amend or withdraw interstate fine enforcement order on the ground that the order was 'otherwise made in error'	Grade 5	Yes	Yes
108H(5)	Provide written confirmation of withdrawal or amendment	Yes	Yes	Yes
108K(2)	Enter into arrangements for payment of amounts to interstate fine enforcement authority	No	Grade 9	Yes
108M(1) & (2)	Be satisfied that enforcement unsuccessful, request enforcement or NSW fine enforcement order; request amendment or withdrawal of enforcement	Grade 3	Yes	Yes
108M(4)	Enter into arrangements for payment of amounts to the Commissioner	No	Grade 9	Yes
108O	Notify of payment	Yes	Yes	Yes
112G(1)	Make attachment order	Grade 3	Yes	Yes
112G(5)	Serve notice of attachment order	Yes	Yes	Yes
112I(2)	Cancel attachment order	Grade 3	Yes	Yes
112J(1) & (6)	Suspend enforcement action; vary court fine enforcement order	Grade 3	Yes	Yes
112L	Enter into arrangements with Commissioner of Victims Rights	No	No	Yes
114(2)	Enter into arrangements with respect to penalty notices	No	Yes	Yes
	Carry out functions under arrangements other than repaying or refunding amounts paid	Yes	Yes	Yes

Office of State Revenue

Section of Act	Description of delegation/function	E	D	C
114(2)	Repay or refund amounts paid under penalty notices in accordance with arrangements where the amount to be refunded: - is not more than $5,000	Grade 5	Yes	Yes
	- is more than $5,000	No	Grade 9	Yes
115(3)	Authorise use of the name "State Debt Recovery"	No	No	Yes
116(2)	Engage consultants or contractors	No	Grade 9	Yes
117(1) & (1A)	Request information about a fine defaulter	Yes	Yes	Yes
117AA	Obtain information about a fine defaulter from an employer or past employer	Yes	Yes	Yes
117AB(1)	Request information about a fine defaulter	Yes	Yes	Yes
118	Register fine enforcement order, and record details of payment of the fine and the taking of enforcement action	Yes	Yes	Yes
122B(1) & (2)	Pay amount in accordance with arrangements; deduct or retain fee or payment	Yes	Yes	Yes
122C(1), (2) & (4)	Reallocate overpayment; notify person; revoke reallocation	Yes	Yes	Yes
Clause 6(1)	Waive, postpone or refund enforcement costs or application fees (except as provided below)	Grade 3	Yes	Yes
Clause 6(1)	Waive enforcement costs where enforcement order made under section 42 (1AA) of the Fines Act	Yes	Yes	Yes

Schedule B

Section of Act	Description of delegation/function	E	D	C
101(1A) & (1B)	Write off amount up to $1,000,000	No	No	Executive Director
	Write off amount up to $150,000	No	No	Yes
	Write off amount up to $50,000	No	Grade 11	Yes
	Write off amount up to $25,000	No	Grade 9	Yes
	Write off amount up to $5,000	No	Yes	Yes

Office of State Revenue

2.2 Road Transport Act 2013

"Authorised officers"

(Persons who may issue penalty notices)

Pursuant to the powers conferred on the Commissioner of Fines Administration in the definition of ***Class 1 officer*** in Schedule 4 to the *Road Transport (General) Regulation 2013*, I hereby authorise all persons assigned to roles in Fines & Fees in Products, Service & Compliance within the Office of State Revenue to be authorised officers in relation to the functions conferred on authorised officers by section 195 of the *Road Transport Act 2013*.

[redacted] 20/3/17

Stephen R Brady
Commissioner of Fines Administration

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Office of State Revenue

2.3 Road Transport Act 2013
Appointment of authorised officers
(Persons who may issue certificates)

By instrument date 21 April 2006 and pursuant to the power in section 50 of the *Transport Administration Act 1988*, the Roads and Traffic Authority of NSW (now known as Roads and Maritime Services ("RMS")) delegated a specific function under the *Road Transport (General) Act 2005* to the Chief Commissioner of State Revenue. That delegation continues to apply to the corresponding function under the *Road Transport Act 2013* ("the Act") by virtue of clauses 4 and 34 of Schedule 4 to the Act.

As a delegate of RMS and pursuant to the powers conferred on RMS by section 166 of the Act, I hereby appoint the persons assigned to the roles listed below as authorised officers for the purposes of section 257 of the Act (Certificate evidence) in relation to offences under section 188 of the Act (Offences relating to nominations).

Manager Compliance (Fines & Fees), Products, Service & Compliance
Senior Advisor Fines Debt, Collections.

[redacted] 24/3/17

Stephen R Brady
Chief Commissioner of State Revenue

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3. Revenue NSW Instrument of Delegation dated 17 June 2016

FINES ACT 1996

INSTRUMENT OF DELEGATION AND AUTHORISATION

Pursuant to the power conferred on the Commissioner of Fines Administration by section 116A (1) of the *Fines Act 1996* ("the Act"), the functions of the Commissioner conferred by or imposed under the Act (other than an enforcement function) and under the *Fines Regulation 2015* are delegated to persons employed in Products, Service & Compliance (Fines & Fees), Collections (Fines Debt & Collections Centre) and Technical & Advisory Services within the Office of State Revenue assigned to the roles specified, and roles at or above the grade levels specified, in Schedule A.

The authority to write off fines under section 101 of the Act is delegated to persons in Collections assigned to the roles specified in Schedule B, and limited to the amounts specified in that schedule. In the case of the bulk write off of multiple fines, the limitation amount applies to the total cumulative value of those fines.

Authorised officers – persons who may exercise enforcement functions

The delegation of any *enforcement function* listed in Schedule A, being a function of making or issuing an order under the Act, is limited to persons assigned to roles in Collections and Technical & Advisory Services, and such persons are *authorised officers* under section 116B (2) of the Act.

Appropriate officers – persons who may issue and deal with penalty notices

Pursuant to the power in section 22 (2)(b) of the *Fines Act 1996*, all persons assigned to roles in Products, Service & Compliance (Fines) are authorised as *appropriate officers* for the purposes of Part 3 of that Act.

This instrument commences on 1 June 2016 and replaces any prior instruments relating to these functions under the *Fines Act 1996*.

Stephen R Brady
Commissioner of Fines Administration
17 June 2016

Schedule A

Section	Function	Role or minimum grade level
3(1)	Approve form (definition of *approved form*)	5/6
3(1)	Approve kind of pension or benefit (definition of *person in receipt of a Government benefit*)	5/6
14(1) & (1C)	Make a court fine enforcement order; Refer matter back to the registrar	1/2
17(1)	Withdraw a court fine enforcement order where the amount payable is not more than $2,500	1/2
	- is more than $2,500 but not more than $5,000	3/4
	- is more than $5,000 but not more than $25,000	9/10
	- is more than $25,000 but not more than $75,000	11/12
	- is more than $75,000 but not more than $150,000	Executive Director Collections
38(2)	Approve notice for use when nominating	5/6
41	Make a penalty notice enforcement order	1/2
46(1) & (1A)	Withdraw a penalty notice enforcement order where the amount payable is not more than $2,500	1/2
	- is more than $2,500 but not more than $5,000	3/4
	- is more than $5,000 but not more than $25,000	9/10
	- is more than $25,000 but not more than $75,000	11/12
	- is more than $75,000 but not more than $150,000	Executive Director Collections
48(5)	Grant leave to make more than one application	5/6
49(1)	Be satisfied as to facts, annul a penalty notice enforcement order;	3/4
49(3), (3B) & (5)	Refer matter to the Local Court following annulment; give notice of determination of an application for annulment	1/2
49(7)	Refund application fee for successful annulment	5/6
49A(1) & (1A)	Seek a review of the decision to issue a penalty notice	1/2
52(1)	Stay enforcement action following application for annulment	1/2
59	Serve notice of a fine enforcement order	1/2
61(3)	Be satisfied as to most recent address	1/2
65(2), (4), (4A) & (4B)	Direct Roads and Maritime Services (RMS) to take, recommence or cease enforcement action	1/2
66(2), (3) & (3A)	Direct RMS to cancel driver licence, remove suspension, or further suspend licence	1/2
66(4)	Notify fine defaulter of enforcement action	1/2
66A(3)	Direct RMS to cease enforcement action	1/2
67(2) & (3)	Direct RMS to cancel registration of a vehicle; notify fine defaulter of enforcement action	1/2
68(2) & (4)	Direct RMS not to apply, or to cease applying, sanctions	1/2
72(1), (7)(b) & (8)	Make a property seizure order; direct Sheriff to execute in different order; cancel a property seizure order	3/4

73(1)	Make a garnishee order	1/2
74(1)	Apply to Registrar-General for registration of fine enforcement order in relation to land owned by fine defaulter	1/2
74(6)	Consent to sale or other disposition of property	3/4
75(1) (7) & (8)	Issue an order for examination; adjourn examination and notify person	3/4
75(9)	Request fine defaulter by notice to supply information	1/2

Section	Function	Role or minimum grade level
75A(3)	Report matter relating to an order for examination to the Supreme Court or District Court	5/6
76A(1)	Approve costs and expenses incurred by the Sheriff	7/8
77(3)	Cancel a property seizure order, garnishee order or charge on land	3/4
77A(1)	Refund amounts paid under garnishee orders where the amount to be refunded: - is not more than $100	3/4
	- is more than $100 but not more than $500	5/6
	- is more than $500 but not more than $1,500	9/10
	- is more than $1,500 but not more than $15,000	11/12
	- is more than $15,000	Executive Director Collections, Director Fines Debt
79(1)	Make a community service order otherwise than at the request of the fine defaulter	9/10
	- at the request of the fine defaulter	3/4
80(1)	Cause copy of community service order and notice of the order to be served	1/2
80A(1)	Give directions for service of community service order and notice of the order	1/2
86(1), (3) (4) & (6)	Revoke a community service order; reverse decision to revoke a community service order	5/6
99B(1)	Make a work and development order	5/6
99BA(4) & (5)	Require supporting evidence; waive requirement for evidence	3/4
99C(1)	Vary or revoke a work and development order	3/4
100(2), (3A), (4), (4A), (4C), (4D) & (4E)	Make a time to pay order; be satisfied as to arrangements and agree to direct debit; amend or revoke a time to pay order; give written notice	1/2
101(1A) & (1B)	Write off unpaid fine	See Schedule B
101(4)	Reinstate enforcement order within 5 years of write off	3/4
101B(4)	Suspend enforcement action against fine defaulter who has applied to the Hardship Review Board	1/2
102(2)	Approve disposition of money	1/2
102A(1)	Waive payment of enforcement costs for minors	1/2

107(1), (3) & (4)	Register copy of conviction; record payment; remit amount of fine recovered	1/2
108(1) & (3)	Send request for enforcement of NSW fine; notify relevant officer of payment	1/2
108A(2)	Be satisfied body or person is authorised	5/6
108C(1)	Make an interstate fine enforcement order	1/2
108E(3)	Approve method of making request for interstate fine enforcement order	11/12
108G(2)	Approve method of making request to amend or withdraw interstate fine enforcement order	9/10
108H(1) & (2)(a)&(b)	Amend or withdraw interstate fine enforcement order	1/2
108H(2)(c)	Amend or withdraw interstate fine enforcement order on the ground that the order was 'otherwise made in error'	5/6
Section	**Function**	**Role or minimum grade level**
108H(5)	Provide written confirmation of withdrawal or amendment	1/2
108K(2)	Enter into arrangements for payment of amounts to interstate fine enforcement authority	9/10
108M(1) & (2)	Be satisfied that enforcement unsuccessful, request enforcement or NSW fine enforcement order; request amendment or withdrawal of enforcement	3/4
108M(4)	Enter into arrangements for payment of amounts to the Commissioner	9/10
108O	Notify of payment	1/2
114(2)	Enter into arrangements with respect to penalty notices	7/8
	Carry out functions under arrangements other than repaying or refunding amounts paid	1/2
	Repay or refund amounts paid under penalty notices in accordance with arrangements where the amount to be refunded: - is not more than $5,000	5/6
	- is more than $5,000	9/10
115(3)	Authorise use of the name "State Debt Recovery"	Executive Director Collections
116(2)	Engage consultants or contractors	9/10
117(1) & (1A)	Request information about a fine defaulter	1/2
117AA	Obtain information about a fine defaulter from an employer or past employer	1/2
117AB (1)	Request information about a fine defaulter	1/2
118	Register fine enforcement order, and record details of payment of the fine and the taking of enforcement action	1/2
122B(1) & (2)	Pay amount in accordance with arrangements; deduct or retain fee or payment	1/2
122C(1) (2) & (4)	Reallocate overpayment; notify person; revoke reallocation	1/2

134(2) & (4)	Agree on restitution orders to be enforced; agree number of orders to be enforced	Executive Director Collections
Fines Regulation 2015		
clause 6(1)	Waive, postpone or refund enforcement costs or application fees (except as provided below)	3/4
clause 6(1)	Waive enforcement costs where enforcement order made under section 42 (1AA) of the Fines Act	1/2

Schedule B – Write off

Role	Limit to amount that may be written off
Executive Director Collections (SEB 2)	$1,000,000
Director Fines Debt (SEB 1)	$150,000
Director Collections Centre, Manager Service, Fines (11/12)	$50,000
Senior Advisor Fines Debt, Senior Collection Centre Coordinator, Senior Operations Coordinator (9/10)	$25,000
Advisor Fines Debt, Coordinator Fines Debt, Collection Centre Coordinator (7/8)	$2,500

Attachment B: Revenue NSW Debt Profile Report

This attachment describes, in lay terms, the way in which Revenue NSW's DPR (Debt Profile Report) works in terms of making the 'selection' of a Garnishee Order as the appropriate enforcement action for a particular fine defaulter file.

1. The DPR captures over 120 individual data points about a fine defaulter from the FES. This includes but is not limited to: the outstanding balance, fine defaulter age, debt age, debt type, enforcement action already conducted (and its results), fine defaulter contact information and data matching results.
2. Using this data, the DPR sorts the fine defaulters into 'tiers' within the DPR. Each tier is associated with a different next action to be taken in respect of the find defaulter.
3. The tiers themselves are generally grouped into one of the following six categories:
   (a) Time to Pay

   The fine defaulter is actively repaying the outstanding debt via an instalment plan.

   (b) Collections Paused

   The fine defaulter has been identified as ineligible for enforcement action at the present time, for example, because the fine defaulter has been identified as a juvenile, has their financial affairs managed by the NSW Trustee and Guardian, is deceased or is in custody.

   (c) Remedial Action

   The fine defaulter has been identified in a tier that requires manual follow-up by a Revenue NSW staff member, for example due to data quality issues or because the file is the subject of a review. An example of this would be where a Transport for NSW data match is returned as inconclusive, requiring a person to investigate the file to determine the correct identification characteristics.

   (d) Queued For Collections Process

   The fine defaulter has been identified as eligible for a particular enforcement action, however that enforcement action has a limited number of actions that can be issued on a daily basis and the fine defaulter has been queued for an issue of that sanction type.

   (e) In Collections Process

The outstanding debt on the fine defaulter record is currently subject to an enforcement process for example, there is an active bank garnishee order, recently issued enforcement order, or a recently applied RMS sanction.

(f) Write Off Consideration

Enforcement action is otherwise not feasible, for example because only a small balance of debt remains, the client resides interstate (therefore enforcement options are limited) or the fine defaulter record has been subject to repeated enforcement action and it has been unsuccessful in recovery of the full debt.

4. The placement of a fine defaulter in a tier is undertaken on the basis of the following:
   - ***Eligibility for the relevant sanction***
     Algorithms, based on simple business rules, identify which fine defaulters meet relevant inclusion criteria (and de-select fine defaulters who meet other exclusion criteria) for particular sanction, and who are therefore considered 'eligible' for that sanction.
   - ***Potential success factor***
     Based on historical evidence of 'like' fine defaulters, the DPR makes an assessment of the likelihood of particular action being successful against the fine defaulter. In particular, the DPR has been configured to apply an algorithm that utilises historical data stored within FES to determine a 'potential success factor' for each fine defaulter and each sanction for which they are eligible. This algorithm was developed following a review of previous enforcement actions undertaken over a period of 12 months which allows the fine defaulter to be matched to a pool of 'like' fine defaulters who had enforcement action undertaken. (Analysis undertaken by Revenue NSW identifies several factors that contribute to determining the potential success of a sanction; these include the age of the fine defaulter, the type of debt, recidivism of the fine defaulter, amount outstanding, previous instalment plans, previous enforcement actions, address information and contact patterns). This is a rules based algorithm, however it is dynamic in that the algorithm is able to adjust as differences in the data is detected.
   - ***Priority in the queue***
     The number of fine defaulters already queued for an enforcement action is taken into account. For example, a fine defaulter's file may be eligible for a Garnishee Order but if there is already a long queue of proposed Garnishee Orders, and this

particular fine defaulter's file would have a low priority in that queue, then it may be streamed into another enforcement action.

5. In general terms, the following is the basic order of priority of tiers showing which enforcement methods are selected in the DPR. (However, this is subject to variation for some fine defaulters based on their own individual circumstances having regard to the matters described in paragraph 4. above):
    a. The issue of the enforcement order and attempt at an RMS sanction completed in the FES
    b. Targeted bank Garnishee Order (that is, a bank Garnishee Order that is issued to a specific bank because of a previously successful Garnishee Order at that bank in respect of the relevant fine defaulter, or because a fine defaulter's bank details are known)
    c. Employer garnishee order (if employer details known)
    d. Bank Garnishee Order
    e. Debt Partnerships Program
    f. Examination Notice
    g. Property Seizure Order.
6. Although the above suggests a linear process, the DPR applies its business rules against all fine defaulters on a daily basis. Therefore, it is possible that a fine defaulter could return a 'lower' tier allocation on day one but return a 'higher' tier on day two because of data changes within FES. For example, if a fine defaulter's file does not contain a date of birth then that fine defaulter will be ineligible for a Garnishee Order to be issued (as the DPR cannot verify that the fine defaulter is not within an excluded category, i.e., those under the age of 18). Therefore it will 'pass over' all of the Garnishee Order tiers for that fine defaulter. However, if a date of birth is subsequently found and entered into the FES, that fine defaulter may be allocated to a Garnishee Order tier based on this data change.
7. The DPR executes over 130 individual business rules to determine how a fine defaulter should be treated in the enforcement lifecycle.
8. Fine defaulters are allocated to a Garnishee Order tier based on the following general rules:
    a. The fine defaulter has not been identified in a higher priority tier
    b. The fine defaulter has at least one overdue enforcement order
    c. The fine defaulter's total overdue balance is $20 or greater
    d. The fine defaulter has at least one enforcement issued in the previous 7 years

e. The fine defaulter had all outstanding enforcement orders issued at least 38 days ago
f. The fine defaulter has not contacted Revenue NSW in the previous 14 days
g. The fine defaulter has not made a partial payment to Revenue NSW in the previous 14 days
h. The fine defaulter has not had a RMS sanction applied in the previous 14 days
i. The fine defaulter is aged between 18 and 70 (inclusive)
j. The fine defaulter has not had a letter advising the customer of a likely referral to an external debt collector (debt partner) issued in the previous 40 days
k. If the fine defaulter has been previously referred to an external debt collection agency, that referral must have been returned under an acceptable reason code i.e. not deceased
l. The fine defaulter has not already had previous Garnishee Orders issued to all major banks that have previously been unsuccessful within a specific timeframe (CBA and ANZ in the last three months and NAB and WBC in the last six months).

9. Once the fine defaulter record passes the general GO business rules, the record is then prioritised and placed in a queue with other fine defaulters in the same tier, for issue based on the fine defaulters' individual circumstances. The priority is generally as follows (from highest to lowest):
    a. A previous Garnishee Order was issued for this fine defaulter that identified an active account, but returned only partial funds or insufficient funds
    b. The fine defaulter recently defaulted on a Payment Plan arrangement
    c. The fine defaulter's bank details are known, which allows Revenue NSW to issue a targeted Garnishee Order to that specific bank. (Bank details are obtained either voluntarily by the fine defaulter or under some circumstances the financial institution can be identified if the fine defaulter has made a previous payment to Revenue NSW)
    d. The fine defaulter had recent debt re-activated from write off
    e. All remaining fine defaulters are prioritised by the age of the debt, with the most recent given the highest priority.

Attachment C: Garnishee Order Issue Check Summary Report Example

This attachment is an example 'Garnishee Order Issue Check Summary Report' showing a report for 23 March 2020 in which 7,386 fine defaulters had been selected by the DPR for the issuance of a Garnishee Order.

Daily GO Issue Check

1. Check Date for Gos to be loaded - 23/03/2020

2. Total customers identified for GO issue (Major) - 6750
3. Total customers identified for GO issue (Non Major) - 636

DPR GO Exclusions Check:

Rule Check	Identified Customers	Success / Fail Traffic Light
1. Identified Overpayments	0	
2. Write Off Reativation Pending	0	
3. Customer Deceased	0	
4. Work Develpoment Order on file	0	
5. NSW T&G Customer	0	
6. Bankrupt Customer	0	
7. Customer In Custody	0	
8. Active Civil Sanction (GO / EGO / PSO)	0	
9. Active Payment Plan	0	
10. Customer has EOs All Flagged RTS	0	
11. Vulnerability Score Over 35%	0	
12. Disaster Indicator Active	0	
13. NSWEC or SOJB Debt Only	0	
14. Customer Type Organisation	1	
15. All EOs Stayed	0	
16. Active REX Referral	0	
Total Customers	**1**	

DPR GO Inclusions Check:

Rule Check	DPR Value	Approved Parameters	Success / Fail Traffic Light
1. RMS Sanction Date Exclusion (Min Age)	16 days	14 Days	
2. Eligible Enforcement Orders (Min Overdue Count)	1	1	
3. Minimum Overdue Balance (Min Balance)	20.00	20	
4. Contact Date Exclusion (Min Age)	10 days	7 days	
5. Payment Date Exclusion (Min Age)	17 days	14 days	
6. Minumum Client Age	18	18	
7. Maximum Client Age	70	70	
8. Acceptable Period For GO Issue After REX Closure	1 mon 20 days	1 month	
9. Minimum Period For DP Client Before GO Issue (No Rex Referral)	21 days	20 days	
10. Period for Issue after EN	24 days	21 Days	
11. Acceptable REX Referral Resason For GO issue	AWR, CASE REFERRED IN ERROR, CENTREPAY APPROVED, CLIENT INCARCERATED, EDCA REQUEST, FAILED ELIGIBILITY CRITERIA, LOCATED - NO OUTCOME, OTHER, OVERSEAS, PAID IN FULL, REFUSED TO PAY, REX EXPIRED, SUSPECTED LOCATION - NO OUTCOME, UNABLE TO LOCATE, UNASSIGNED, WDO ISSUED, WRITE OFF	AWR, CASE REFERRED IN ERROR, CENTREPAY APPROVED, CLIENT INCARCERATED, EDCA REQUEST, FAILED ELIGIBILITY CRITERIA, LOCATED - NO OUTCOME, OTHER, OVERSEAS, PAID IN FULL, REFUSED TO PAY, REX EXPIRED, SUSPECTED LOCATION - NO OUTCOME, UNABLE TO LOCATE, UNASSIGNED, WDO ISSUED, WRITE OFF	

APPENDIX B

Supplementary Statement of Facts (Revenue NSW's GO system from 2020 to 2022)

This Supplementary Statement of Facts was prepared for the purpose of obtaining the Third Emmett Opinion.

Note that Attachment A to the Supplementary Statement of Facts (i.e., the Attachment titled '2020 Statement of Facts') has not been included in this Appendix, as it is included in full at Appendix A.

Supplementary Statement of Facts

Revenue NSW System for Issuing Garnishee Orders

Contents

List of attachments

A. 2020 Statement of Facts

B. May 2021 Revisions to Check Summary Report

C. May 2021 Changes to Garnishee Order Process – Revenue NSW Explanation

D. March 2022 Revisions to Check Summary Report

PART 1: PRELIMINARY

Updates to 2020 Statement of Facts

1. This document supplements the Statement of Facts prepared by NSW Ombudsman and Revenue NSW in September 2020 for the purpose of seeking Senior Counsel's opinion in respect of issues relating to Revenue NSW's use of automation in its garnishee order process (**2020 SOF** – **Attachment A**).
2. There have been no substantial updates to parts A, B and C of the **2020 SOF** and as such the following content included in those sections should be read as the same and applicable for the current purpose:

Part A: Preliminary – 2020 SOF • Defined terms (excepting 'current version' which refers to a garnishee order system no longer in use) • Acronyms and abbreviations • List of legislation
Part B: The Legislative Context – 2020 SOF • Revenue NSW and the Commissioner of Fines Administration (paragraphs 1-5 inclusive) • The statutory power to make Garnishee Orders (paragraphs 6-11) • The statutory process leading to the making of a Garnishee Order (paragraph 12) • Other relevant statutory provisions (paragraphs 13-20)
Part C: Revenue NSW's Garnishee Order (GO) System – 2020 SOF • Core technology elements of the GO system (paragraphs 28-33) • The standard process for enforcing an unpaid fine (paragraphs 34-37 and steps 1-7) • The Debt Profile Report (paragraphs 38-48) • Further steps for enforcement by way of a Garnishee Order (paragraph 49 and steps 8-12) • Notification to fine defaulters (paragraphs 50-52) • Enforcement fees (paragraphs 53-54)

Part D: Modifications to the GO System – 2020 SOF

3. While Parts A, B, and C are unchanged from the **2020 SOF**, Part D 'Modifications to the GO system' contains both original content from the **2020 SOF** as well as updates and modifications made since 2020. The updates and modifications made since 2020 comprise:

   First modification – The introduction of a minimum protected amount

   i. The current minimum protected amount is $550.80 (updated 1 October 2022).

Second modification – The exclusion of Vulnerable Persons using a machine learning model

ii. The current variables included in the Vulnerable Persons machine learning model are:

Model Attribute	**Brief Description**
(numeric) age_now	What is the current age of the customer
(numeric) age_at_last_eo	What was the age of the customer when the last enforcement order was loaded
(numeric) total_eos	How many enforcement orders in total does the customer have
(numeric) total_debt	What is the total amount of debt accumulated by the customer in dollars
(numeric) ttp_defaults	How many times has the customer defaulted (failed to complete) a payment plan
(numeric) last_ttp_weekly_repayment_amount	What was the amount (if one exists) the customer was/is paying on the most recent payment plan
(numeric) total_phone_contacts	How many times has the customer called Revenue NSW about debt
(numeric) total_advocacy_contacts	How many times (that can be detected) did an advocate call on behalf of the customer
(numeric) rail_eos	How many enforcement orders contain public transport type offences
(numeric) serious_court_eos	How many enforcement orders contain serious court offences i.e. assault, drug use, drink driving, firearms
(numeric) non_levy_pso	Following the issuance of a Property Seizure Order how many times did the NSW Sheriff attend the customers residence and report there are no goods of value/applicable to sell
(numeric) failed_go_attempts	How many times has Revenue NSW issued a bank garnishee order and it failed i.e. no account
(nominal) custody_history	Has the customer ever been incarcerated in a NSW prison
(nominal) state_housing_address	Is the current residential address of the customer a NSW State housing address
(numeric) seifa_decile	What is the assigned SEIFA decile as per https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2033.0.55.001~2016~Main%20Features~FAQs%20-%20SEIFA%202016~4
(nominal) employer_known	Is the customer known to be employed
(nominal) centrelink_benefits	Is the customer known to be receiving a Centrelink benefit
(numeric) eo_distrubution	How often does the customer incur new enforcement orders
(numeric) total_property_ownership	How many properties does the customer own (in part or in full)
(numeric) most_recent_lt_assessment_value	What was the value of the last land tax assessment (if one exists) for which the customer was at least part owner
(numeric) latest_avg_land_value	What is the total combined average land value of all holdings by the customer (for the purposes of land tax)
(numeric) pns_paid	How many penalties did the customer pay in full in the last 2 years that did not require enforcement action

(numeric) pns_other	How many penalties did the customer otherwise have closed in the last 2 years that did not require enforcement action
(numeric) last_ttp_payments_progress	How much of the last (last closed or active) payment plan did the customer complete i.e. payments made vs. payments required
(nominal) last_ttp_active	Is the last payment plan still active
(numeric) days_since_last_ttp_payment	How long has it been since the customer made a payment on a payment plan

iii. If the machine learning model makes a prediction of 85 per cent and above, then the person is classified as a Vulnerable Person and is removed from the automated garnishee order process.

Third modification – A 'human stop/go' process step

iv. Revenue NSW made changes to this process as outlined in Part 2 'Revenue NSW's Garnishee Order (GO) System 2020-22' below.

Part E: Impact and Effectiveness of the GO System – 2020 SOF

4. Attachment B 'Revenue NSW Debt Profile Report' contained in Part E **2020 SOF** described in lay terms, the way in which Revenue NSW Debt Profile Report works in terms of making the 'selection' of a garnishee order as the appropriate enforcement action for a particular fine defaulter file. The rules for allocation to a garnishee order referred to in paragraph 8 of Attachment B ('Revenue NSW Debt Profile Report' contained in Part E **2020 SOF**) were updated by Revenue NSW in May 2022 to reflect the changes made to the Check Summary Report in March 2022 (**Attachment D**) including stipulation of the full set of inclusionary and exclusionary rule checks contained in that Check Summary Report.

PART 2: REVENUE NSW'S GARNISHEE ORDER (GO) SYSTEM 2020-22

Operational context – suspension of issuing garnishee orders 2020-22

5. Revenue NSW suspended issuing of garnishee orders under the system described in this statement of facts in response to the COVID-19 pandemic for periods of time throughout 2020-22. For example, between April 2020 and May 2021 no garnishee orders were issued under the automated process. In June 2021, Revenue NSW recommenced issuing garnishee orders however, this was suspended again in August 2021 as a result of the spread of the Delta variant of COVID-19.
6. Revenue NSW recommenced issuing garnishee orders under the system described in this statement of facts in May 2022.

Modification made in May 2021

7. Revenue NSW made changes to the 'Garnishee Order Check Summary Report' [**2020 SOF** at 76] in May 2021. A copy of the May 2021 version of the 'Garnishee Oder Check Summary Report' is attached with changes highlighted by Revenue NSW (**Attachment B**).
8. An explanatory document prepared by Revenue NSW gives further information about the changes made to the 'Garnishee Order Check Summary Report' in May 2021 (**Attachment C**).
9. The May 2021 'Garnishee Order Check Summary Report' included 2 additional sentences on the document as follows:
    i. All customers included in this report fall within section 71(1)(a) or (b) of the Fines Act.
    ii. The officer authorising this report confirms the condition precedent to making a garnishee order under s73(1) of the Fines Act has been met.
10. The May 2021 'Garnishee Order Check Summary Report' included 5 additional traffic light rule checks as follows:
    i. PSO (property seizure order) preferred
    ii. CoL (charge on land) preferred
    iii. Payment plan application pending
    iv. WDO (work and development order) application pending
    v. Basis to consider write-off appropriate
11. This system was operational between June and August 2021.

Modification made in May 2022

12. Revenue NSW made changes to the 'Garnishee Order Check Summary Report' [**2020 SOF** at 76] in March 2022. A copy of the March 2022 version of the 'Garnishee Order Check Summary Report' is attached (**Attachment D**).
13. The March 2022 'Garnishee Order Check Summary Report' is divided into two parts: Part A and Part B.
14. Part A must be 'completed' by the 'delegated' Revenue NSW officer prior to transferring the file to relevant financial institutions for bulk processing of garnishee orders. Part A includes a check box next to the following statement:

i. By ticking this box I confirm the three statements to the right.

When the check box is clicked the cell on the spreadsheet turns from red to green.

15. The statements referred to in paragraph 14 above are:

i. I have read this report and understand that by way of indicators (green traffic lights) the report indicates that -

- it is open to me to issue garnishee orders in respect of these fine defaulters.
- issuing a garnishee order is the recommended enforcement action based on the application of eligibility criteria, including business rules which reflect the Chief Commissioner's policies on civil enforcement action, to the information held by Revenue NSW about these fine defaulters. These criteria are summarised in the inclusionary and exclusionary rule checks contained within Part B of this report.

ii. I understand that I am not bound to follow the indicators (green traffic lights) and issue garnishee orders in respect of these fine defaulters. I may consider other enforcement action (by means of a property seizure order or a charge on land) instead of or in addition to a garnishee order.

iii. I approve the issuing of a garnishee order in respect of each fine defaulter included in this report on the following basis:

- I am satisfied that enforcement action is authorised under Division 4 of Part 4 of the *Fines Act 1996* against each fine defaulter included in this report because each of the fine defaulters falls within section 71(1)(b) of the *Fines Act 1996:*
- The green light against the inclusionary criteria "TfNSW Sanction Date Exclusion (Min Time)" indicates that the relevant fines of all fine defaulters the subject of the report remain unpaid and at least 21 days has passed since the Commissioner directed TfNSW to take enforcement action.
- The green light against the exclusionary criteria "Customer has EOs All Flagged RTS" indicates that there is nothing in Revenue NSW's records to suggest that there were any issues with service of the fine enforcement order.

- Each fine defaulter in respect of whom this report recommends the issuing of a garnishee order has been assessed as eligible for such action against criteria reflecting legislative requirements and business rules, using the information contained in Revenue NSW's files about each fine defaulter. These criteria are summarised in the inclusionary and exclusionary rule checks contained within Part B of this report.
- There is no information within the report to suggest that a garnishee order cannot or should not be issued in respect of each of the fine defaulters contained within this report.

16. Part B captures each of the exclusions and inclusions applied by the business rule engine (Debt Profile Report **2020 SOF** at 38-48).

17. Against each ‘rule check’ there is an ‘explanation’ setting out:
    i. what each rule check means, and
    ii. what a green light in the ‘success/fail traffic light’ column on the spreadsheet means.

Daily GO Issue Check

1. Check Date for GOs to be loaded - 14/02/2020

2. Total customers identified for GO issue (Major) - 6750
3. Total customers identified for GO issue (Non Major) - 416

All customers included in this report fall within section 71(1)(a) or (b) of the Fines Act.

The officer authorising this report confirms the condition precedent to making a garnishee order under s73(1) of the Fines Act has been met.

DPR GO Exclusions Check:

Rule Check	Identified Customers	Success / Fail Traffic Light
1. Identified Overpayments		0
2. Write Off Reativation Pending		0
3. Customer Deceased		0
4. Work Develpoment Order on file		0
5. NSW T&G Customer		0
6. Bankrupt Customer		0
7. Customer In Custody		0
8. Active Civil Sanction (GO / EGO / PSO)		0
9. Active Payment Plan		0
10. Customer has EOs All Flagged RTS		0
11. Vulnerability Score Over 35%		0
12. Disaster Indicator Active		0
13. NSWEC or SOJB Debt Only		0
14. Customer Type Organisation		0
15. All EOs Stayed		0
16. Active REX Referral		0
17. PSO preferred		0
18. CoL preferred		0
19. Payment plan application pending		0
20. WDO application pending		0
21. Basis to consider write-off appropriate		0
Total Customers		**0**

DPR GO Inclusions Check:

Rule Check	DPR Value	Approved Parameters	Success / Fail Traffic Light
1. RMS Sanction Date Exclusion (Min Age)	15 days	14 Days	
2. Eligible Enforcement Orders (Min Overdue Count)	1	1	
3. Minimum Overdue Balance (Min Balance)	20.00	20	
4. Contact Date Exclusion (Min Age)	8 days	7 days	
5. Payment Date Exclusion (Min Age)	15 days	14 days	
6. Minumum Client Age	18	18	
7. Maximum Client Age	70	70	
8. Acceptable Period For GO Issue After REX Closure	1 mon 1 day	1 month	
9. Minimum Period For DP Client Before GO Issue (No Rex Referral)	21 days	20 days	
10. Period for Issue after EN	22 days	21 Days	
11. Acceptable REX Referral Resason For GO issue	AWR, CASE REFERRED IN ERROR, CENTREPAY APPROVED, CLIENT INCARCERATED, EDCA REQUEST, FAILED ELIGIBILITY CRITERIA, LOCATED - NO OUTCOME, OTHER, OVERSEAS, PAID IN FULL, REFUSED TO PAY, REX EXPIRED, SUSPECTED LOCATION - NO OUTCOME, UNABLE TO LOCATE, UNASSIGNED, WDO ISSUED, WRITE OFF	AWR, CASE REFERRED IN ERROR, CENTREPAY APPROVED, CLIENT INCARCERATED, EDCA REQUEST, FAILED ELIGIBILITY CRITERIA, LOCATED - NO OUTCOME, OTHER, OVERSEAS, PAID IN FULL, REFUSED TO PAY, REX EXPIRED, SUSPECTED LOCATION - NO OUTCOME, UNABLE TO LOCATE, UNASSIGNED, WDO ISSUED, WRITE OFF	

Report: Daily Garnishee Order (GO) Issue Check

This Report recommends to the delegated officer the issuing of GOs for the fine defaulters contained within the report. The report consists of:

Part A - to be completed by the delegated officer

Part B - exclusionary and inclusionary rule checks

Appendix - background information including files for those fine defaulters in respect of whom the report recommends the issuing of GOs

PART A: The below must be completed by the delegated officer before decision to issue GOs

☐ By ticking this box I confirm the three statements to the right

1. I have read this report and understand that by way of indicators (green traffic lights) the report indicates that -

- it is open to me to issue garnishee orders in respect of these fine defaulters.

- issuing a garnishee order is the recommended enforcement action based on the application of eligibility criteria, including business rules which reflect the Chief Commissioner's policies on civil enforcement action, to the information held by Revenue NSW about these fine defaulters. These criteria are summarised in the inclusionary and exclusionary rule checks contained within Part B of this report.

2. I understand that I am not bound to follow the indicators (green traffic lights) and issue garnishee orders in respect of these fine defaulters. I may consider other enforcement action (by means of a property seizure order or a charge on land) instead of or in addition to a garnishee order.

3. I approve the issuing of a garnishee order in respect of each fine defaulter included in this report on the following basis:

- I am satisfied that enforcement action is authorised under Division 4 of Part 4 of the Fines Act 1996 against each fine defaulter included in this report because each of the fine defaulters falls within section 71(1)(b) of the Fines Act 1996:

  - The green light against the inclusionary criteria "TfNSW Sanction Date Exclusion (Min Time)" indicates that the relevant fines of all fine defaulters the subject of the report remain unpaid and at least 21 days has passed since the Commissioner directed TfNSW to take enforcement action.

  - The green light against the exclusionary criteria "Customer has EOs All Flagged RTS" indicates that there is nothing in Revenue NSW's records to suggest that there were any issues with service of the fine enforcement order.

- Each fine defaulter in respect of whom this report recommends the issuing of a garnishee order has been assessed as eligible for such action against criteria reflecting legislative requirements and business rules, using the information contained in Revenue NSW's files about each fine defaulter. These criteria are summarised in the inclusionary and exclusionary rule checks contained within Part B of this report.

- There is no information within the report to suggest that a garnishee order cannot or should not be issued in respect of each of the fine defaulters contained within this report.

PART B: Debt Profile Report (DPR) GO Exclusions Check:

Rule Check	Explanation	Success / Fail Traffic Light
1. Identified Overpayments	Fine defaulters in respect of whom an outstanding overpayment is recorded against any fine are to be excluded from a garnishee order issue because the payment may be credited against the fine defaulter's outstanding balance. A green light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has an outstanding overpayment recorded against any fine.	
2. Write Off Reativation Pending	Fine defaulters in respect of whom write-off reactivation is pending are to be excluded from a garnishee order issue because the write-off may reduce their outstanding debt. A green light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has a pending write-off reactivation.	

3. Customer Deceased	Where Fines Enforcement System (FES) records identify a fine defaulter as deceased, they should be excluded from a garnishee order issue. A green light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report is deceased.	
4. Work Develpoment Order on file	Fine defaulters in respect of whom a work and development order (WDO) is in force are to be excluded from a garnishee order issue in accordance with section 99B(7) of the Fines Act 1996. A green light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has a WDO in force.	
5. NSW T&G Customer	Fine defaulters who have been identified as NSW Trustee and Guardian (NSW T&G) clients are to be excluded from a garnishee order issue under an existing MoU between Revenue NSW and NSW T&G. A green traffic light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report are NSW T&G clients.	
6. Bankrupt Customer	Fine defaulters identified as bankrupt are to be excluded from a garnishee order issue under current business rule 21.2 Effect of Bankruptcy which requires provable debts to be written off and prohibits civil sanctions for non-provable debts. A green traffic light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has been identified as bankrupt.	
7. Customer In Custody	Fine defaulters who are identified as being in custody (including remand) are to be excluded from a garnishee order issue under business rule 17.8 EOs will be stayed. A green traffic light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report is in custody (including remand).	
8. Active Civil Sanction	Fine defaulters in respect of whom there is already a civil sanction in force are to be excluded from a garnishee order issue; Revenue NSW will await resolution of the original civil sanction before undertaking further action. A green traffic light in the "Success/Fail Traffic Light" column means that there is no civil sanction already in force in respect of any of the fine defaulters the subject of this report.	
9. Active Payment Plan	Fine defaulters in respect of whom an application for time to pay has been granted and payment of the fine is made in accordance with the order of the Commissioner are to be excluded from a garnishee order issue in accordance with section 100(5) of the Fines Act 1996. A green traffic light in the "Success/Fail Traffic Light" column means that there is no active payment plan in respect of any of the fine defaulters the subject of this report.	
10. Customer has EOs All Flagged RTS	Fine defaulters in respect of whom a notice of a fine enforcement order has been returned to sender (RTS) are to be excluded from a garnishee order issue, as the notice would not have been served in accordance with Part 4, Division 2 of the Fines Act 1996 . A green traffic light in the "Success/Fail Traffic Light" column means that, in respect of each of the fine defaulters the subject of this report, there is no record of the fine enforcement order being “returned to sender”.	
11. Vulnerability Score Over 35%	Fine defaulters who are profiled with a 'vulnerability score' over 35% are to be excluded from a garnishee order issue. A green traffic light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has a “vulnerability score” over 35%.	
12. Disaster Indicator Active	Where a fine defaulter is identified as affected by a natural disaster, they are to be excluded from a garnishee order issue until Revenue NSW is satisfied that the person is no longer so affected. A green traffic light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report is identified as affected by a natural disaster.	
13. NSWEC or SOJB Debt Only	Fine defaulters whose fines relate only to failing to vote or failing to attend jury duty are to be excluded from a garnishee order issue. A green traffic light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has fines that relate only to “failing to vote” or “failing to attend jury duty”.	
14. Customer Type Organisation	Fine defaulters who are not natural persons (such as bodies corporate) are to be excluded from a garnishee order issue and dealt with on a case-by-case basis. A green traffic light in the "Success/Fail Traffic Light" column means all of the fine defaulters the subject of this report is a natural person.	

15. All EOs Stayed	Where a fine defaulter has all outstanding debts stayed, no garnishee order should issue in accordance with business rule 17.3 Effect of a Stay. A green traffic light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has had all outstanding debts stayed.	
16. Active REX	Fine defaulters in respect of whom an active referral to a debt partner (REX) is in place are to be excluded from a garnishee order issue; Revenue NSW will await resolution of the debt partner referral before undertaking further action. A green traffic light in the "Success/Fail Traffic Light" column means that there is no active referral to an external mercantile agent (debt partner) in place in respect of any of the fine defaulters the subject of this report.	
17. PSO preferred	Fine defaulters in respect of whom a property seizure order (PSO) resolved a debt in the previous six months are to be excluded from a garnishee order issue and a PSO issued instead. A green traffic light in the "Success/Fail Traffic Light" columnt means that, in the previous six months, none of the fine defaulters the subject of this report has resolved a debt with Revenue NSW after being issued with a PSO.	
18. CoL preferred	Fine defaulters in respect of whom a charge on land (CoL) resolved a debt in the previous six months are to be excluded from a garnishee order issue and a CoL registered instead. A green traffic light in the "Success/Fail Traffic Light" column means that, in the previous six months, none of the fine defaulters the subject of this report has resolved a debt with Revenue NSW after a charge was placed on land.	
19. Payment plan application pending	Fine defaulters in respect of whom an application for time to pay is pending are to be excluded from a garnishee order issue until the application is determined. A green traffic light in the "Success/Fail Traffic Light" column means that there is no pending application for time to pay in respect of any of the fine defaulters the subject of this report.	
20. WDO application pending	Fine defaulters in respect of whom a Work and Development Order (WDO) application is pending are to be excluded from a garnishee order issue until the application is determined. A green traffic light in the "Success/Fail Traffic Light" column means that there is no pending WDO application in respect of any of the fine defaulters the subject of this report.	
21. Basis to consider write-off	Fine defaulters in respect of whom an application for write off has been approved within the last 12 months are to be excluded from a garnishee order issue and the case reviewed to determine whether further enforcement action should be taken. A green traffic light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has had an application for write-off approved within the previous 12 months.	

PART B: DPR GO Inclusions Check:

Rule Check	Explanation	Success / Fail Traffic Light
1. TfNSW Sanction Date Exclusion (Min Age)	The fine remains unpaid at least 21days after the Commissioner directed Transport for NSW (TfNSW) to take enforcement action under Part 4, Division 3 of the Fines Act 1996 (section 71(1)(b)). A green light in the "Success/Fail Traffic Light" column means that the relevant fines of all fine defaulters the subject of this report remain unpaid at least 21 days after the Commissioner directed TfNSW to take enforcement action.	
2. Minimum Overdue Balance (Min Balance)	The fine defaulter owes at least $20 in debt. A green light in the "Success/Fail Traffic Light" column means that all fine defaulters the subject of this report owe at least $20 in debt.	
3. Contact Date Exclusion (Min Age)	The fine defaulter has not contacted Revenue NSW in relation to the outstanding fine in the previous 8 days (this is to allow a customer who has recently contacted Revenue NSW sufficient time to engage/resolve their debt). A green light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has contacted Revenue NSW in relation to the outstanding fine in the previous 8 days.	
4. Payment Date Exclusion (Min Age)	The fine defaulter has not made a payment within the previous 15 days (this is to allow a customer who has made a recent payment sufficient time to resolve their debt). A green light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has made a payment within the previous 15 days.	

5. Minumum Client Age	The fine defaulter is at least 18 years of age. A green light in the "Success/Fail Traffic Light" column means that all of the fine defaulters the subject of this report are at least 18 years of age.	
6. Maximum Client Age	The fine defaulter is no older than 70 years of age. A green light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report is older than 70 years of age.	
7. Acceptable Period For GO Issue After REX Closure	At least one month has elapsed since a referral to a debt partner (REX) has been closed (this is to ensure any debt partner referral has been fully resolved prior to a garnishee order being issued). A green light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has an external referral to a debt partner that was closed less than one month ago.	
8. Minimum Period For DP Client Before GO Issue (No REX Referral)	Where a fine defaulter is flagged as a client of a debt partner (DP) but a referral is not underway, Revenue NSW will wait 20 days to allow time to determine if a debt partner referral is planned or under consideration; if such a referral is planned or under consideration, at the time this report is prepared Revenue NSW will await the outcome of that process before taking any further action. A green light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report is a DP client in respect of whom a referral is planned or under consideration at the time this Report is prepared.	
9. Period for Issue after EN	At least 22 days have elapsed since an examination notice (EN) was issued (this is to ensure the due date for any provision of information under an examination notice has been met). A green light in the "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of this report has been issued with an examination notice within the last 22 days.	
10. Acceptable REX Referral Reason For GO issue	Further enforcement action (including the issue of a garnishee order) is acceptable having regard to the reasons for an external debt partner referral closure (if any). A green light in the "Success/Fail Traffic Light" column means that, for all fine defaulters the subject of this report and in respect of whom there is an external debt referral closure, further enforcement action (including the issue of a garnishee order) is acceptable having regard to the reasons for an external debt partner referral closure.	

CHANGES TO GARNISHEE ORDER PROCESS – CHECK SUMMARY REPORT

In May 2020, Revenue NSW made two further sets of changes to the garnishee order process in response to the remaining concerns expressed by Counsel at paragraphs 78-85 of the opinion.

Before detailing these, the following points are made by way of clarification to the statement of facts issued to Counsel:

Points of clarification

- The check summary report only proposes the issuing of garnishee orders in respect of persons who fall within section 71(1) of the *Fines Act 1996*. As Counsel notes, section 71(1) effectively mandates the taking of enforcement action for such persons – enforcement action *is to be taken*. The green lights in the report are intended to be an indication to the Commissioner's delegate that the fine defaulters in respect of whom garnishee orders are proposed fall within section 71(1).

- The rule checks embody the key filters used as part of the operation of the FES and DPR to determine the list of persons against whom garnishee action is proposed in the check summary report. For example, this filtering process removes persons –
  - who fall within (or potentially fall within) section 71(1A), or who, although falling within section 71(1), have applied for more time to pay a fine (section 100) or to have their fine written off (section 101).
  - in respect of whom enforcement action other than a garnishee order may be considered more suitable.

- As a matter of policy garnishee orders are the preferred enforcement action for persons in respect of whom enforcement action is authorised under Division 4. Revenue NSW will generally use garnishee orders unless such action has been unsuccessful in the past in respect of a particular fine defaulter, or it has information which suggests that another type of enforcement action is viable or preferred for the fine defaulter. The filtering process reflects this policy.

- The check summary report is therefore intended to satisfy the delegate of the following:
  - That the persons in respect of whom garnishee action is proposed are persons falling within section 71(1); as such, they are persons in respect of whom enforcement action is authorised.
  - That, as a result of the filtering process, there is no reason not to proceed with garnishee action as the preferred enforcement action in respect of the fine recipients concerned.

Changes to check summary report

Changes to the check summary report to address the concerns of Counsel are highlighted in yellow. Below is an explanation of these changes.

1. <u>Condition precedent to making of a garnishee order – section 73(2)</u>

Counsel was not persuaded that the Commissioner or delegate was forming the state of satisfaction required by section 73(2); that is, satisfaction that enforcement action was authorised under Division 4.

The check summary report has been amended to include:

- a statement confirming that the persons in respect of whom it is proposed to issue garnishee orders (and against whom green lights are assigned) are persons in respect of whom enforcement action is authorised under Division 4. Specifically, these persons fall within section 71(1).
- a statement to the effect that the officer authorising the issuing of the orders confirms that enforcement action is authorised in respect of the persons identified for garnishee action.

2. Exercise of the discretion – section 73(1)

Counsel advised that the scope of the discretion under section 73(1) was dependent upon the operation of other provisions. For fine defaulters captured by section 71(1), for example, the discretion is, subject to some limited exceptions, confined to determining the type of enforcement action that should be taken, not whether enforcement action should be taken at all.

Counsel was concerned that the delegate may not be engaging in a deliberative process in issuing the garnishee orders; that orders were being issued simply because the lights in the report were green without any process of reasoning being undertaken to justify that course of action. For fine defaulters falling within section 71(1), such a process means deciding whether a garnishee order is the enforcement action that should be imposed rather than, or in addition to, a property seizure order or charge on land.

As noted above, the check summary report is intended to convey (albeit in abbreviated form) certain things to the delegate, including the factors or inputs that have determined the list of fine recipients in respect of whom garnishee action is proposed. Those factors or inputs include a policy of using garnishee orders for persons falling within section 71(1)(a) or 71(1)(b) unless there is information suggesting that another form of enforcement action should be considered.

Having regard to Counsel's observations, it was decided to make explicit the following rule checks relating to the use of other enforcement actions:

1. *Property Seizure Order (PSO) preference traffic light*

   This indicator is green when the PSO history does not identify likelihood of successful PSO based on sheriff information in the previous 6 months (eg goods being available etc). If the traffic light is red, an officer will investigate whether a PSO is the preferred enforcement option.

2. *Charge on Land (CoL) preference traffic light*

   This indicator is green when the CoL history does not identify that a payment has been received after a CoL has been applied in the previous 6 months. If the traffic light is red, an officer will investigate whether a CoL is the preferred enforcement option.

   As Counsel noted (paragraph 33), sections 100 and 101 provide bases for the Commissioner not to take enforcement action despite the operation of section 71(1)[1]. Section 99B would also appear to fall within this category. The check summary report has therefore been amended to show whether any persons have been excluded from the list of persons against whom garnishee action is proposed on the basis of the operation of these provisions.

[1] Counsel also advised that section 78(b) (community service) may also provide a basis for not taking enforcement action. Revenue NSW does not issue community service orders.

3. Payment plan application pending traffic light

This indicator is green when there is no record of any form of request for a payment plan awaiting to be approved/rejected. If this indicator is red, an officer will investigate whether a payment plan is the more appropriate resolution of the debt.

4. Work and Development Order (WDO) application pending traffic light

This indicator is green when there is no record of a WDO at a processing or pending stage including instances where it is not yet matched to the customer record. If this indicator is red, an officer will investigate whether a WDO is the more appropriate resolution of the debt.

5. Basis to consider write-off is appropriate traffic light

This indicator is green when there is no record of a write-off for hardship under medical/financial/domestic grounds being approved in the previous 12 months. If this indicator is red, an officer will investigate whether a write-off is the more appropriate resolution of the debt.

Report: Daily Garnishee Order (GO) Issue Check

This Report recommends the issuing of GOs for the fine defaulters contained within the report. The report consists of three parts:

Part A - declaration to be completed by the delegated officer

Part B - exclusionary and inclusionary rule checks explained (referred to in Part A)

Part C - appendix containing background information for reference. This includes files for those fine defaulters in respect of whom the report recommends the issuing of GOs.

1. Check Date for Gos to be loaded - 12/12/2022

2. Total customers identified for GO issue (Major) - 1700
3. Total customers identified for GO issue (Non Major) - 434

PART A: the below must be completed before decision to issue GOs

☐ Delegated Officer must read and confirm statements to the right

I have read this report and understand that by way of indicators (green traffic lights) the report indicates that -

•it is open to me to issue garnishee orders in respect of these fine defaulters.

•issuing a garnishee order is the recommended enforcement action
based on the application of eligibility criteria, including business rules which reflect the Chief Commissioner's policies on civil enforcement action, to the information held by Revenue NSW about these fine defaulters. These criteria are summarised in the inclusionary and exclusionary rule checks contained within Part B of this report.
I understand that I am not bound to follow the indicators (green traffic lights) and issue garnishee orders in respect of these fine defaulters. I may consider other enforcement action (by means of a property seizure order or a charge on land) instead of or in addition to a garnishee order

☐ Delegated Officer must read and approve statements to the right

I approve the issuing of a garnishee order in respect of each fine defaulter included in this report on the following basis.

•I am satisfied that enforcement action is authorised under Division 4 of Part 4 of the Fines Act 1996 against each fine defaulter included in this report because each of the fine defaulters falls within section 71(1)(b) of the Fines Act 1996:
oThe green light against the inclusionary criteria "RMS Sanction Date Exclusion (Min Time)" indicates that the relevant fines of all fine defaulters the subject of the report remain unpaid and at least 21 days has passed since the Commissioner directed TfNSW to take enforcement action.
oThe green light against the exclusionary criteria "Customer has EOs All Flagged RTS" indicates that there is nothing in Revenue NSW's records to suggest that there were any issues with service of the fine enforcement order.

•Each fine defaulter in respect of whom this report recommends the issuing of a garnishee order has been assessed as eligible for such action against criteria reflecting legislative requirements and business rules, using the information contained in Revenue NSW's files about each fine defaulter. These criteria are summarised in the inclusionary and exclusionary rule checks contained within Part B of this report.

•There is no information within the report to suggest that a garnishee order cannot or should not be issued in respect of each of the fine defaulters contained in this report.

PART B: DPR GO Exclusions Check:

Rule Check	Explanation	Identified Customers	Success / Fail Traffic Light
	Fine defaulters in respect of whom an outstanding overpayment is recorded against any fine are to be excluded from a garnishee order issue because the payment may be credited against the fine defaulter's outstanding balance.		
1. Identified Overpayments	A green light in the Check Summary Report means that none of the fine defaulters the subject of that report has an outstanding overpayment recorded against any fine. Fine defaulters in respect of whom write-off reactivation is pending are to be excluded from a garnishee order issue because the write-off may reduce their outstanding debt.	0	
2. Write Off Reativation Pending	A green light in the Check Summary Report means that none of the fine defaulters the subject of that report has a pending write-off Where Fines Enforcement System (FES) records identify a fine defaulter as deceased, they should be excluded from a garnishee order issue.	0	
3. Customer Deceased	Fine defaulters in respect of whom a work and development order (WDO) is in force are to be excluded from a garnishee order issue in accordance with section 99B(7) of the Fines Act 1996.	0	
4. Work Develpoment Order on file	A green light in the Check Summary Report means that none of the fine defaulters the subject of that report has a WDO in force. Fine defaulters who have been identified as NSW Trustee and Guardian (NSW T&G) clients are to be excluded from a garnishee order issue under an existing MoU between Revenue NSW and NSW T&G.	0	
5. NSW T&G Customer	A green traffic light in the Check Summary Report means that none of the fine defaulters the subject of that report are NSW T&G clients. Fine defaulters identified as bankrupt are to be excluded from a garnishee order issue under current business rule 21.2 Effect of Bankruptcy which requires provable debts to be written off and prohibits civil sanctions for non-provable debts.	0	
6. Bankrupt Customer	A green traffic light in the Check Summary Report means that none of the fine defaulters the subject of that report has been identified as bankrupt. Fine defaulters who are identified as being in custody (including remand) are to be excluded from a garnishee order issue under business rule 17.8 EOs will be stayed.	0	
7. Customer In Custody	A green traffic light in the Check Summary Report means that none of the fine defaulters the subject of that report is in custody (including remand). Fine defaulters in respect of whom there is already a civil sanction in force are to be excluded from a garnishee order issue; Revenue NSW will await resolution of the original civil sanction before undertaking further action.	0	
8. Active Civil Sanction (GO / EGO / PSO)	A green traffic light in the Check Summary Report means that there is no civil sanction already in force in respect of any of the fine defaulters the subject of that report.	0	

	Fine defaulters in respect of whom an application for time to pay has been granted and payment of the fine is made in accordance with the order of the Commissioner are to be excluded from a garnishee order issue in accordance with section 100(5) of the Fines Act 1996.		
9. Active Payment Plan	A green traffic light in the Check Summary Report means that there is no active payment plan in respect of any of the fine defaulters the subject of that report. Fine defaulters in respect of whom a notice of a fine enforcement order has been returned to sender are to be excluded from a garnishee order issue, as the notice would not have been served in accordance with Part 4, Division 2 of the Fines Act 1996 .	0	
10. Customer has EOs All Flagged RTS	A green traffic light in the Check Summary Report means that, in respect of each fine defaulter the subject of that report, there is no record of the fine enforcement order being "returned to sender". Fine defaulters who are profiled with a 'vulnerability score' over 85% are to be excluded from a garnishee order issue.	0	
11. Vulnerability Score Over 85%	A green traffic light in the Check Summary Report means that none of the fine defaulters the subject of that report has a "vulnerability score" over 85%. Where a fine defaulter is identified as affected by a natural disaster, they are to be excluded from a garnishee order issue until Revenue NSW is satisfied that the person is no longer so affected.	0	
12. Disaster Indicator Active	A green traffic light in the Check Summary Report means that none of the fine defaulters the subject of that report is identified as affected by a natural disaster. Fine defaulters whose fines relate only to failing to vote or failing to attend jury duty are to be excluded from a garnishee order issue.	0	
13. NSWEC or SOJB Debt Only	A green traffic light in the Check Summary Report means that none of the fine defaulters the subject of that report has fines that relate only to "failing to vote" or "failing to attend jury duty". Fine defaulters who are not natural persons (such as bodies corporate) are to be excluded from a garnishee order issue and dealt with on a case-by-case basis.	0	
14. Customer Type Organisation	A green traffic light in the Check Summary Report means that all of the fine defaulters the subject of that report are natural persons. Where a fine defaulter has all outstanding debts stayed, no garnishee order should issue in accordance with business rule 17.3 Effect of a Stay.	0	
15. All EOs Stayed	A green traffic light in the Check Summary Report means that none of the fine defaulters the subject of that report has had all outstanding Fine defaulters in respect of whom an active referral to an external mercantile agent (debt partner) is in place are to be excluded from a garnishee order issue; Revenue NSW will await resolution of the debt partner referral before undertaking further action.	0	
16. Active REX Referral	A green traffic light in the Check Summary Report means that there is no active referral to an external mercantile agent (debt partner) in place in respect of any of the fine defaulters the subject of that report. Fine defaulters in respect of whom a property seizure order (PSO) resolved a debt in the previous six months are to be excluded from a garnishee order issue and a PSO issued instead.	0	
17. PSO preferred	A green traffic light in the Check Summary Report means that, in the previous six months, none of the fine defaulters the subject of that report has resolved a debt with RNSW after being issued with a PSO. Fine defaulters in respect of whom a charge on land (CoL) resolved a debt in the previous six months are to be excluded from a garnishee order issue and a CoL registered instead.	0	
18. CoL preferred	A green traffic light in the Check Summary Report means that, in the previous six months, none of the fine defaulters the subject of that report has resolved a debt with RNSW after a charge was placed on land. Fine defaulters in respect of whom an application for time to pay is pending are to be excluded from a garnishee order issue until the application is determined.	0	
19. Payment plan application pending	A green traffic light in the Check Summary Report means that there is no pending application for time to pay in respect of any of the fine defaulters the subject of that report. Fine defaulters in respect of whom a WDO application is pending are to be excluded from a garnishee order issue until the application is determined.	0	
20. WDO application pending	A green traffic light in the Check Summary Report means that there is no pending WDO application in respect of any of the fine defaulters the subject of that report. Fine defaulters in respect of whom an application for write off has been approved within the last 12 months are to be excluded from a garnishee order issue and the case reviewed to determine whether further enforcement action should be taken.	0	
21. Basis to consider write-off appropriate	A green traffic light in the Check Summary Report means that none of the fine defaulters the subject of that report has had an application for write-off approved within the previous 12 months.	0	
Total Customers		**0**	

PART C: DPR GO Inclusions Check:

Rule Check	DPR Value	Approved Parameters	Success / Fail Traffic Light	Explanation
				The fine remains unpaid at least 21days after the Commissioner directed TfNSW to take enforcement action under Part 4, Division 3 of the Fines Act 1996 (section 71(1)(b)).
1. RMS Sanction Date Exclusion (Min Age)	16 days	14 Days		A green light in the Check Summary Report means that the relevant fines of all fine defaulters the subject of that report remain unpaid at least 21 days after the Commissioner directed TfNSW to take enforcement action.
2. Eligible Enforcement Orders (Min Overdue Count)	1	1		This rule check indicates that, according to Revenue NSW records, there is at least one enforcement order eligible for civil enforcement action under Division 4. A green light in the Check Summary Report means that all fine defaulters have at least one fine at overdue EO stage.
3. Minimum Overdue Balance (Min Balance)	20.00	20		The fine defaulter owes at least $20 in debt A green light in the Check Summary Report means that all fine defaulters the subject of that report owe at least $20 in debt.
4. Contact Date Exclusion (Min Age)	10 days	7 days		The fine defaulter has not contacted Revenue NSW in relation to the outstanding fine in the previous 8 days (this is to allow customer who has recently contacted Revenue NSW sufficient time to engage/resolve their debt). A green light in the Check Summary Report means that none of the fine defaulters the subject of that report has contacted RNSW in relation to the outstanding fine in the previous 8 days. The fine defaulter has not made a payment within the previous 15 days (this is to allow a customer who has made a recent payment sufficient time to resolve their debt).
5. Payment Date Exclusion (Min Age)	17 days	14 days		A green light in the Check Summary Report means that none of the fine defaulters the subject of that report has made a payment within the previous 15 days.
6. Minumum Client Age	18	18		The fine defaulter is at least 18 years of age. A green light in the Check Summary Report means that all of the fine defaulters the subject of that report are at least 18 years of age.

7. Maximum Client Age	70	70	
8. Acceptable Period For GO Issue After REX Closure	1 year 5 mons 6 days	1 month	
9. Minimum Period For DP Client Before GO Issue (No Rex Referral)	21 days	20 days	
10. Period for Issue after EN	24 days	21 Days	
11. Acceptable REX Referral Resason For GO issue	AWR, CENTREPAY APPROVED, CLIENT INCARCERATED, EDCA REQUEST, LOCATED - NO OUTCOME, OTHER, OVERSEAS, PAID IN FULL, REFUSED TO PAY, REX EXPIRED, SUSPECTED LOCATION - NO OUTCOME, UNABLE TO LOCATE, UNASSIGNED, WDO ISSUED, WRITE OFF	AWR, CASE REFERRED IN ERROR, CENTREPAY APPROVED, CLIENT INCARCERATED, EDCA REQUEST, FAILED ELIGIBILITY CRITERIA, LOCATED - NO OUTCOME, OTHER, OVERSEAS, PAID IN FULL, REFUSED TO PAY, REX EXPIRED, SUSPECTED LOCATION - NO OUTCOME, UNABLE TO LOCATE, UNASSIGNED, WDO ISSUED, WRITE OFF	

The fine defaulter is no older than 70 years of age.

A green light in the Check Summary Report means that none of the fine defaulters the subject of that report is older than 70 years of age.

At least one month has elapsed since an external referral to a debt partner has been closed (this is to ensure any debt partner referral has been fully resolved prior to a garnishee order being issued).

A green light in the Check Summary Report means that none of the fine defaulters the subject of that report has an external referral to a debt partner that was closed less than one month ago.
Where a fine defaulter is flagged as a client of a debt partner but no external referral is underway, 20 days has elapsed to ensu a debt partner referral does not proceed before issuing a garnishee order.

A green light in the Check Summary Report means that none of the fine defaulters the subject of that report has been referred to a debt partner within the last 20 days.

At least 22 days have elapsed since an examination notice was issued (this is to ensure the due date for any provision of information under an examination notice has been met).

A green light in the Check Summary Report means that none of the fine defaulters the subject of that report has been issued with an examination notice within the last 22 days.

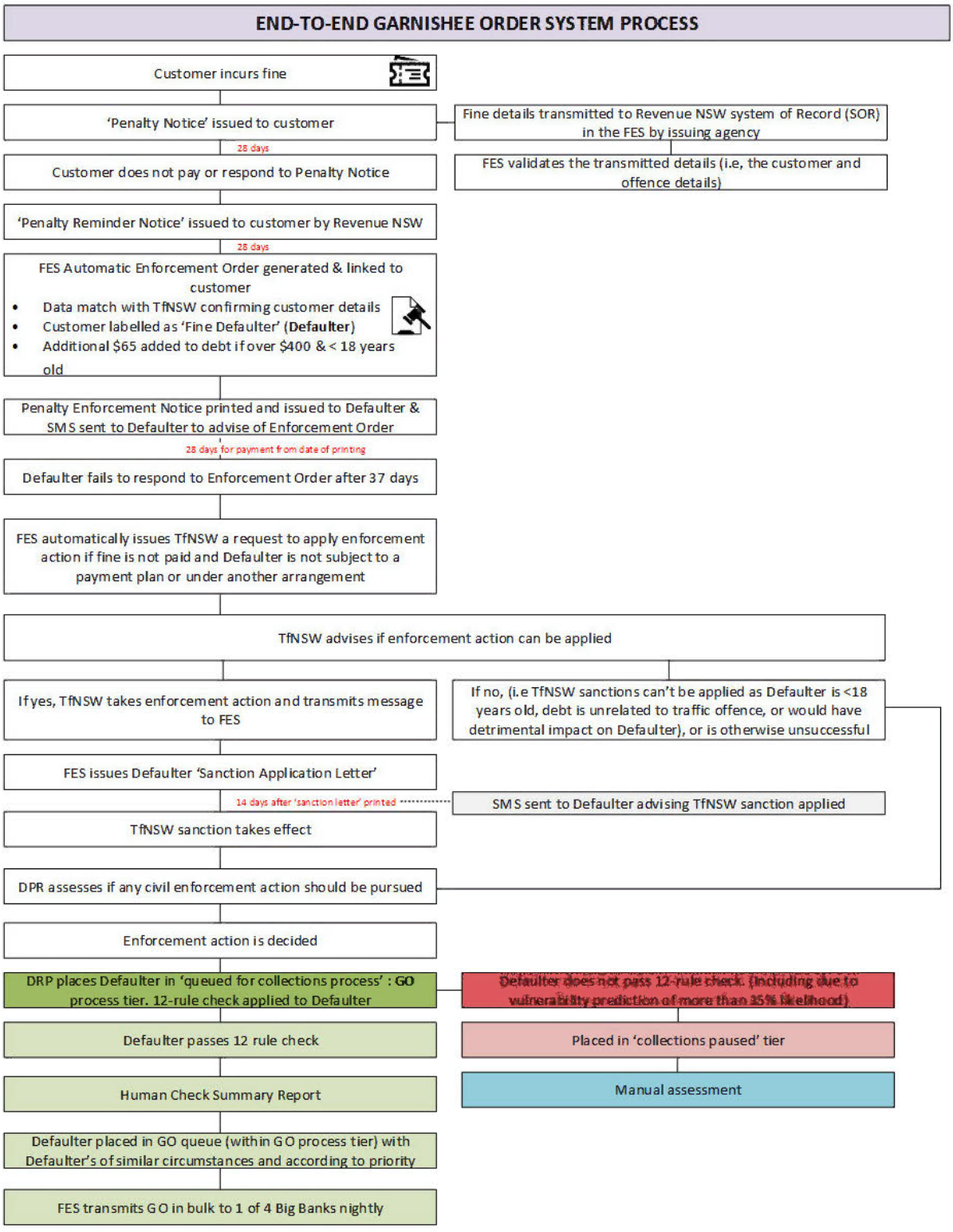
Further enforcement action (including the issue of a garnishee order) is acceptable having regard to the reasons for an external debt partner referral closure (if any).

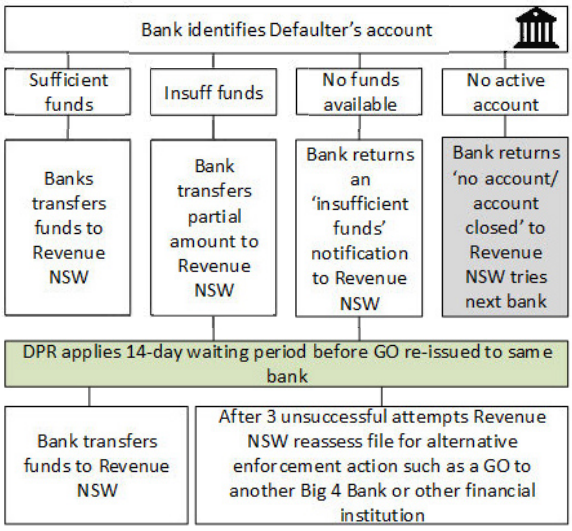
A green light in the Check Summary Report means that, for all fine defaulters the subject of that report and in respect of whom there is an external debt referral closure, further enforcement action (including the issue of a garnishee order) is acceptable having regard the reasons for an external debt partner referral closure.

APPENDIX C

Visual Aids

Figure 1 - End to end GO system process

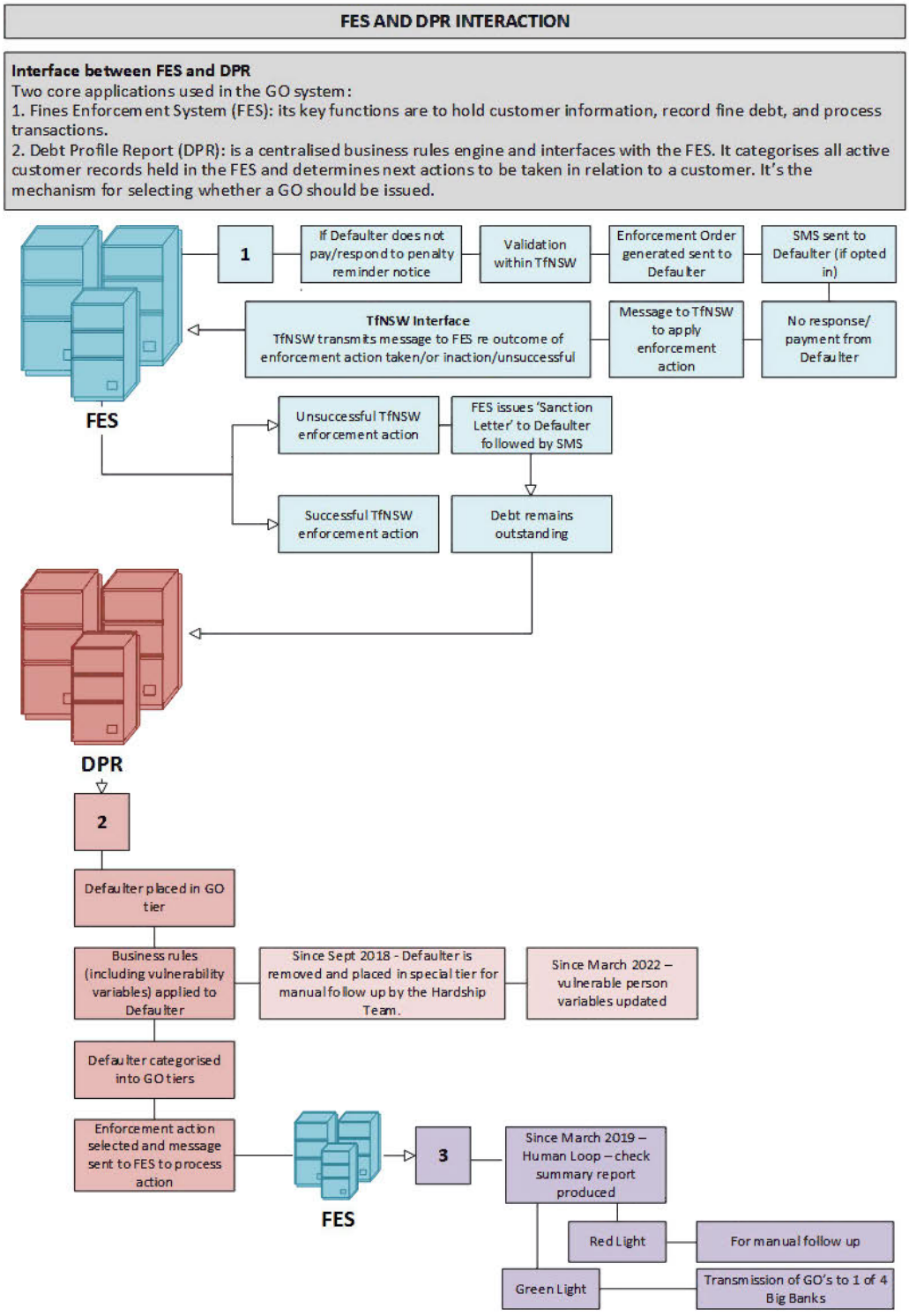




Acronyms:

- DPR = Debt Profile Report.
- FES = Fines Enforcement System.
- GO = Garnishee Order.
- RNSW = Revenue NSW.
- FD = Fine Defaulter.
- TfNSW = Transport for NSW.
- SDR=System of Record.

Figure 2 FES and DPR interaction



APPENDIX D

First Emmett Opinion

Legality of automated decision-making procedures

for the making of garnishee orders

Joint Opinion

1. Our instructing solicitors act for the NSW Ombudsman.

2. Our advice is sought to assist the NSW Ombudsman prepare a report on automated decision-making. Our opinion is specifically sought in relation to:

    a. The requirements for the lawful issue of a garnishee order under the *Fines Act 1996* (NSW).

    b. Whether the processes by which garnishee orders have been made by the Commissioner of Fines Administration (**Commissioner**) under the *Fines Act* since 2016 have been lawful.

    c. If the process by which the Commissioner presently makes garnishee orders is not lawful, whether that defect could be cured by modification of the process or legislative amendment.

3. In summary:

    a. The Commissioner's satisfaction that enforcement action is authorised under Pt 4 Div. 4 of the *Fines Act* (s 73(2)) is a subjective jurisdictional fact for the exercise of the Commissioner's power to make a garnishee order.

    b. Section 73(1) of the *Fines Act* confers a discretionary power on the Commissioner, although the extent of the discretion depends on the basis upon which enforcement action is authorised under Pt 4, Div. 4 (see s 71). That discretionary power must be exercised by the repository of the power or a person authorised or delegated the function in accordance with ss 116A and 116B of the *Fines Act*. The power must be exercised in accordance with the subject matter, scope and purpose of the *Fines Act*. Any policy adopted to guide the discretion needs to be consistent with that Act.

c. Commonwealth laws, through s 109 of the *Constitution* (Cth), may, depending on the relevant circumstances, operate to constrain the Commissioner's ability to issue garnishee orders.

d. To the extent that an individual, being the Commissioner, their delegate or an authorised person, was not involved in the making of garnishee orders between January 2016 and March 2019, the Commissioner's process was not lawful because the requisite discretion was not exercised by the repository of the power and orders were not issued following satisfaction of the subjective jurisdictional fact.

e. While the interposition of an individual in the process for making garnishee orders has resulted in orders being made by the repository of the power, it does not appear to have addressed concerns about the establishment of the subjective jurisdictional fact in s 73(2) or the manner in which the discretionary power is being exercised under s 73(1).

f. The defects in the Commissioner's process for the issue of garnishee orders could be addressed either by modification of the process or by legislative amendment.

Background

4. We are instructed with a document titled "Statement of Facts – Revenue NSW's System for Issuing Garnishee Orders" (**SOF**), which we understand was prepared by the NSW Ombudsman with input from Revenue NSW. For the purposes of this advice, we presume that that document accurately represents the processes of the Commissioner and our advice must be read with that limitation in mind.

5. Information technology has played a central role in the Commissioner's process for making garnishee orders since January 2016: SOF at [21]. There are two "core" information technology applications in the process: the fines enforcement system (**FES**) and the debt profile report (**DPR**): SOF at [28]. The FES comprises a database of records (referred to as a system of records (**SOR**)) and transaction processing: SOF at [29] and [31]. The FES records the garnishee order transaction, transmits the garnishee order, interprets the response and processes applicable payments and other transactions: SOF at [31].

6. The DPR is a centralised business rule engine that takes the data in the FES, applies business and prioritisation rules and generates customer profiling and activity selection: SOF at [32]. The DPR is relevantly responsible for assessing fine defaulters for all potentially applicable enforcement actions and selecting the next enforcement action: SOF at [32]. We understand that the DPR has ordered tiers of enforcement actions and executes over 130 individual business rules to determine how a fine defaulter should be treated: SOF, Attachment B at [5] and [7]. We are instructed (see SOF, Attachment B at [7]) that fine defaulters are allocated to a garnishee order "based on the following general rules":

- The fine defaulter has not been identified in a higher priority tier.
- The fine defaulter has at least one overdue enforcement order.
- The fine defaulter's total overdue balance is $20 or greater.
- The fine defaulter has at least one enforcement [order] issued in the previous 7 years.
- The fine defaulter had all outstanding enforcement orders issued at least 38 days ago.
- The fine defaulter has not contacted Revenue NSW in the previous 14 days.
- The fine defaulter has not made a partial payment to Revenue NSW in the previous 14 days.
- The fine defaulter has not had a RMS sanction applied in the previous 14 days.
- The fine defaulter is aged between 18 and 70 (inclusive).
- The fine defaulter has not had a letter advising them of a likely referral to an external debt collector issued in the previous 40 days.
- If the fine defaulter has been previously referred to an external debt collection agency, that referral must have been returned under an acceptable reason code i.e. not deceased.
- The fine defaulter has not already had previous garnishee orders issued to all major banks that have previously been unsuccessful within a specific timeframe.

7. Once the next enforcement action is selected, a message is sent by the DPR to the FES instructing the FES either to process the selected action (if an automated action) or to notify staff of the need to undertake the selected action (if a manual action): SOF at [33]. No manual intervention is required for garnishee orders to the Commonwealth Bank, ANZ, Westpac or NAB: see Step 9 below.

8. I am instructed (see SOF at [37], [49] and [76]) that the "standard process flow" from a fine to a garnishee order is as follows:

Step 1: The fine is loaded into the SOR in the FES.

Step 2: The FES validates the referred details.

Step 3: An enforcement order is automatically generated by the FES.

Step 4: A data match is conducted between the FES and the system of Roads and Maritime Services (**RMS**).

Step 5: An enforcement order is generated and transmitted by post or email, without any staff involvement other than, in the case of post, as is involved in ordinary mail handling.

Step 6: Thirty-seven days after the enforcement order is printed, if the enforcement order has not been closed (eg because it was paid or under management), a request is automatically issued by the FES to RMS to apply enforcement action under Pt 4, Div. 3.

Step 7: After 14-days, the DPR assesses whether any civil enforcement action should be taken. See [6] above.

Step 8: In accordance with the process identified at [6] above, fine defaulters are pooled by the DPR according to the next proposed enforcement action and fine defaulters are then placed in the relevant queue, in accordance with rules of priority, for that action.

Step 9: Garnishee orders are made by FES, without human intervention, to one of the Commonwealth Bank, ANZ, Westpac or the NAB. We understand that human intervention may be required for garnishee orders to other recipients. If a file is queued for a garnishee order but it is not able to be issued on a given day, the file is held over to be re-assessed by the DPR the following working day.

Step 10: The garnishee order is complied with. The amount of the outstanding debt, to the extent that there are funds in the fine defaulter's account, is transferred to Revenue NSW. The banks notify Revenue NSW if there are no funds available at the time or if the fine defaulter does not hold an account with the bank.

Step 11: If no funds were available, or if only part of the debt was recovered, the DPR applies a 14-day waiting period before a garnishee order may be re-issued to that bank.

Step 12: If the debt is not fully recovered after Step 11, the fine defaulter is re-assessed by the DPR as set out at Step 7. The DPR places limits on re-issuing garnishee orders to a bank if notified that the fine defaulter does not hold an account with that bank. If the fine defaulter does not hold an account with the Commonwealth Bank, ANZ, Westpac or the NAB, DPR assesses whether alternative enforcement action should be taken including making garnishee orders to other banks and financial institutions.

9. We are instructed that there have been three alterations to this general process since 2016 (**Original Version**). First, since August 2016, a "minimum protected amount", currently in the sum of $523.10, was applied to garnishee orders made to banks (**First Modification**): SOF at [55]-[56]. Banks are instructed that the "minimum protected amount" must be left in any account subject to a garnishee order.

10. Second, since September 2018, a machine learning model within the DPR has been used to identify and exclude "vulnerable persons" from the application of garnishee order processes (**Second Modification**): SOF at [60] and [62].

11. Third, in March 2019, an additional manual step was added between Steps 8 and 9 (**Current Version**). Before the electronic file is transmitted to the garnished banks for action, a designated staff member of Revenue NSW is required to authorise the issuing of the proposed garnishee order: SOF at [74]. After the pooling at Step 8, a Garnishee Order Issue Check Summary Report (**Check Summary Report**) is produced: SOF at [76]. We understand that the Check Summary Report is a single consolidated report for all the fine defaulters selected for a garnishee order and that that report is accompanied by a spreadsheet of the raw data from all relevant files: SOF at [76].

12. The Check Summary Report uses a traffic light system in respect of inclusionary and exclusionary criteria: SOF at [76]. We are instructed that the criteria reflect the DPR's business rules and includes some criteria prescribed by legislation: SOF at [76]. At least a number of the criteria reflect the considerations referred to at [6] above that are used by the DPR to select a garnishee order as the next enforcement action: SOF at [76]. We understand that if the traffic lights are green, a staff member of Revenue NSW approves the garnishee orders and the files are transmitted to the relevant banks: SOF at [76]. A red traffic light results in the removal and review of the relevant fine defaulters file: SOF at [76]. For example, the Check Summary Report with which we have been briefed concerned 7,386 fine defaulters and we understand that, if all the traffic lights were green, the reviewer would proceed to approve the making of the garnishee orders without giving any specific consideration to the file of the underlying fine defaulters.

Relevant legislation

Fines Act

13. The *Fines Act* is an Act relating to fines and their enforcement: see the Long Title. There are relevantly two species of fines under the *Fines Act*: fines imposed by courts (see Pt 2); and penalty notices (see Pt 3). They may respectively be enforced by way of a "court fine enforcement order" and a "penalty notice enforcement order".

14. A court fine enforcement order is an order "made by the Commissioner for the enforcement of a fine imposed by a court": s 12. The Commissioner "may make" such an order in the circumstances specified in s 14 of the *Fines Act*.

15. A penalty notice enforcement order is an order "made by the Commissioner for the enforcement of the amount payable under a penalty notice: s 40. The Commissioner "may… make" such an order on application by an appropriate officer for a penalty notice or on the Commissioner's own initiative: s 41. The circumstances in which a penalty notice enforcement order may be made are set out in s 42 of the *Fines Act*.

16. Part 4 of the *Fines Act*, headed "Fine enforcement action", applies to court fine enforcement orders and penalty notice enforcement orders. Such orders are referred to as "fine enforcement order[s]" (s 57(2)) and the person liable to pay the fine is referred to as the "fine defaulter": s 57(3). Subject to limited exception, as soon as practicable after a fine enforcement order is made, the Commissioner is required to serve notice of the order on the fine defaulter: s 59(1). Part 4 provides a graduated series of enforcement options including the suspension or cancellation of a fine defaulter's driver licence or vehicle registration (see Div. 3), civil enforcement (see Div. 4), community service (see Div. 5) and imprisonment (see Div. 6). See the summary of the cascading enforcement procedure in s 58 of the *Fines Act*.

17. Divisions 3 and 4 are of present relevance. Section 65 provides that enforcement action "is to be taken" against a fine defaulter under Div. 3 if they have not paid the fine as required by the fine enforcement order notice or as arranged with the Commissioner. RMS is to take that enforcement action when directed by the Commissioner to do so: s 65(2). Division 3 makes provision for the suspension or cancellation of a fine defaulter's driver licence (see s 66), the suspension of visitor driver privileges (see s 66A), and the cancellation of the registration of motor vehicles of which the fine defaulter is a registered operator (see s 67).

18. Division 4 of Pt 4 of the *Fines Act* deals with civil enforcement, which encompasses property seizure orders (see s 72), garnishee orders (see s 73) and the registration of charges on land (see s 74). Enforcement action may be taken by one, all or any combination of these means: s 71(2).

19. Section 71(1) provides that enforcement action "is to be taken" under Div. 4 if:

> … the fine defaulter has not paid the fine as required by the notice of the fine enforcement order served on the fine defaulter and—
> (a) enforcement action is not available under Division 3 to suspend or cancel the driver licence or vehicle registration of the fine defaulter, or
> (b) the fine remains unpaid 21 days after the Commissioner directed Roads and Maritime Services to take enforcement action under Division 3.

20. Section 71(1A), however, provides:

> Enforcement action may be taken under this Division before or without taking action under Division 3 if the fine defaulter is an individual and the Commissioner is satisfied that civil enforcement action is preferable because, having regard to any information known to the Commissioner about the personal circumstances of the fine defaulter—
> (a) enforcement action under Division 3 is unlikely to be successful in satisfying the fine, or
> (b) enforcement action under Division 3 would have an excessively detrimental impact on the fine defaulter.

The Commissioner may decide that civil enforcement action is "preferable" in the absence of, and without giving notice to or making inquiries of, the fine defaulter: s 71(1B).

21. Section 73 deals with civil enforcement by garnishee order. Section 73(1) relevantly provides:

> The Commissioner may make an order that all debts due and accruing to a fine defaulter from any person specified in the order are attached for the purposes of satisfying the fine payable by the fine defaulter (including an order expressed to be for the continuous attachment of the wage or salary of the fine defaulter). ...

22. Section 73(2) provides that the Commissioner "may make a garnishee order only if satisfied that enforcement action is authorised against the fine defaulter under" Div. 4.

23. The garnishee order may be "made in the absence of, and without notice to, the fine defaulter": s 73(3). The garnishee order "operates as a garnishee order made by the Local Court under Pt 8 of the *Civil Procedure Act 2005*" (NSW): s 73(4). For that purpose, the Commissioner is taken to be the judgment creditor: s 73(4)(a).

24. At the point in the fine enforcement process when the Commissioner makes a garnishee order, the Commissioner is empowered to give fine defaulters time to pay the fine and to write off the debt. The *Fines Act* provides that before a community correction or community service order is issued under Div. 5, a fine defaulter may apply to the Commissioner for time to pay a fine (s 100) or have the fine written off (s 101). The Commissioner may allow further time to pay the fine and its payment in installments

(s 100(2)-(3)) and may also write off, in whole or in part, the unpaid fine in the circumstances specified in s 101(1A).

Civil Procedure Act

25. In Pt 8, Div. 3 of the *Civil Procedure Act,* s 117(1) provides that "[s]ubject to the uniform rules, a garnishee order operates to attach, to the extent of the amount outstanding under the judgment, all debts that are due or accruing from the garnishee to the judgment debtor at the time of service of the order."[1] Section 117(2) provides that any amount standing to the credit of the judgment debtor in a financial institution is taken to be a debt owed to the judgment debtor by that institution. A payment under a garnishee order must be made in accordance with, and to the judgment creditor specified in, the order: s 123(1) of the *Civil Procedure Act*. Section 3 of the *Civil Procedure Act* defines a judgment debtor as the person *by whom* a judgment debt is payable and a judgment creditor as the person *to whom* a judgment debt is payable (ie the Commissioner). The "garnishee" is the person to whom a garnishee order is addressed: s 102 of the *Civil Procedure Act*.

First question: Requirements for the lawful issue of a garnishee order

Pre-condition to the exercise of the power

26. By reason of ss 73(2) and 71 of the *Fines Act*, the Commissioner may only make a garnishee order if the fine is unpaid and the Commissioner is "satisfied" of one of three matters:

    a. Enforcement action is not available under Div. 3 to suspend or cancel the driver licence or vehicle registration of the fine defaulter (s 71(1)(a)). This would occur where the fine defaulter does not hold a driver licence, is not a visitor driver and is not the registered operator of a vehicle: see the note to s 65; see also ss 66, 66A and 67.

    b. Enforcement action has been taken under Div. 3 and the fine remains unpaid 21 days after the Commissioner directed RMS to take the enforcement action: s 71(1)(b).

[1] The *Uniform Civil Procedure Rules 2005* (NSW) (***UCPR***) deal with garnishee orders in Pt 39, Div. 4.

c. If the fine defaulter is an individual, and without taking action under Div. 3, civil enforcement action is "preferable" to enforcement action under Div. 3 because such action:

i. is unlikely to be successful in satisfying the fine; or

ii. would have an excessively detrimental impact on the fine defaulter: s 71(1A).

27. In explaining the insertion of s 71(1A) and (1B) by the *Fines Amendment Bill 2017* (see Hansard, Legislative Assembly, 14 February 2017 at 46-47), the Minister for Finance, Services and Property said:

> These amendments will allow the Office of State Revenue to better target different fines enforcement actions in individual cases. At present, the first fines enforcement action taken by the Office of State Revenue is to direct Roads and Maritime Services [RMS] to impose licence, vehicle registration and business restrictions on the fine defaulter. …
>
> If available, these RMS sanctions must be attempted before the Office of State Revenue can attempt any other enforcement action, such as a garnishee order. This requirement limits the flexibility to take the most appropriate action, having regard to the particular circumstances of the offender. In some cases, the imposition of RMS sanctions such as driver licence suspension is unlikely to result in the recovery of fines and may, in fact, be counterproductive in terms of an individual's employment and access to services. This is particularly applicable to vulnerable members of the community or people living in rural or remote locations.
>
> The Office of State Revenue processes and systems have been designed to allow identification of the most effective enforcement action for particular clients or categories of clients. The bill therefore amends the Fines Act to provide the Office of State Revenue with the discretion not to direct RMS to impose licence, vehicle registration and business restrictions before civil sanctions are imposed, where the Office of State Revenue is satisfied that, having regard to the individual's circumstances, a better fine enforcement outcome would be achieved. This will allow the Office of State Revenue to recover fines earlier than is currently permitted with less negative impact on vulnerable members of the community.

28. The satisfaction of the Commissioner that enforcement action is authorised under Div. 4, because of one of the matters in [26] above, is a condition precedent to the making of a garnishee order under s 73(1) of the *Fines Act* and constitutes a jurisdictional fact for the exercise of that power: see *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130] per Gummow J; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 78 ALJR 992 at [37] per Gummow and Hayne JJ.

Nature of power

29. While permissive statutory powers may, "in particular circumstances, be coupled with a duty to exercise the power" (*Cain v New South Wales Land and Housing Corporation* (2014) 86 NSWLR 1 at [14] (citation omitted)), in our view, s 73 of the *Fines Act* confers a discretionary power on the Commissioner.

30. Section 73(1) provides that the Commissioner "may" make a garnishee order. Subject to contrary intention (s 5(2) of the *Interpretation Act 1987* (NSW)), the use of that word "indicates that the power may be exercised or not, at discretion": s 9(1) of the *Interpretation Act*. We do not think that any contrary intention can be discerned in the *Fines Act* in circumstances where the *Fines Act* appears to use mandatory language where that is intended: see the use of "is to be taken" in s 71(1).

31. Interpreting s 73(1) as conferring a discretion accords with the nature of power conferred on, and available to, the Commissioner. A garnishee order is a compulsory exaction of property held by third parties that is ordinarily ordered by a court; it would be surprising if the making of such an order is compelled, without the scope for discretionary non-exercise, by the *Fines Act*.[2] This consideration is even more powerful when it is recognised that the Commissioner's power to make orders requiring community service and imprisonment are conferred in similar terms: "[t]he Commissioner may make…" – see s 79(1) and (3) and s 87(1).

32. The *scope*, however, of the Commissioner's discretion under s 73(1) of the *Fines Act* is not without some complexity. Given the provision's mandatory language, in cases falling within s 71(1) of the *Fines Act*, the Commissioner's discretion would appear to be limited to selecting whether a garnishee order is *the* civil enforcement action that should be imposed rather than a property seizure order or a charge on land or, given s 71(2), is *one of the* civil enforcement actions that should be imposed. See also s 58(1)(c) of the *Fines Act* (describing Div. 4 as the part of the procedure where "civil action *is taken* to enforce the fine" (emphasis added)).

33. Sections 100 and 101 (see [24] above), and potentially s 78(b) of the *Fines Act*, would appear to provide the only bases for the Commissioner not to undertake any civil enforcement

[2] It is noted that the issue a garnishee order by a Court is discretionary: see r 39.38 of the *UCPR*.

action in cases falling within s 71(1). Section 78(b) provides that enforcement action may be taken under Div. 5 (community service) if "civil enforcement action has not been *or is unlikely to be successful in satisfying the fine*" (emphasis added). While s 78(b) could be read as indicating that the Commissioner is not compelled to take civil enforcement action (being entitled to proceed directly to Div. 5 where action is unlikely to be successful), consistently with the chapeau of s 71(1), it can be read as allowing the Commissioner to proceed under Div. 5 where civil enforcement action has been taken but its outcome is not yet known and is likely to be unsuccessful.

34. In contrast, in cases falling within s 71(1A), the Commissioner is not compelled to undertake civil enforcement action. In such cases, the Commissioner "may" take enforcement action under Div. 4: see s 71(1A) and 73(1). The Commissioner's power is clearly a true discretion.

Repository of the power

35. The *Fines Act* reposes the power to make a garnishee order in the Commissioner. Subject to consideration of issues like agency (see *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560) and delegation, to be validly exercised a discretionary power must be exercised by the repository of that power. Justice Gibbs, for example, observed in *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Qld)* (1979) 142 CLR 460 at 481:

> When a discretionary power is conferred by statute upon the Executive Government, or indeed upon any public authority, the power can only be validly exercised by the authority upon whom it was conferred. ...

See also *Re Reference Under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; ex parte Director-General of Social Services* (1979) 2 ALD 86 at 93.

36. For the reasons set out in the paragraphs that follow, the intention evident in the *Fines Act* is that the power to make a garnishee order is to be exercised by an individual who is a member of the Public Service, being either the Commissioner, their delegate appointed under s 116A the *Fines Act*, or a member of the Public Service authorised under s 116B.

37. Section 114 of the *Fines Act* provides that the Commissioner, who is to be employed in the Public Service (s 113(2)), has the functions conferred or imposed on the Commissioner by or under the *Fines Act*: s 114(1). A function includes a power, authority or duty (s 3(1)) and

would include the function of making a garnishee order under s 73. The reference in s 114(3)(b) to the Commissioner's function "of administering… the taking of enforcement action against fine defaulters" should not be understood as suggesting that the Commissioner need only *administer* a process for enforcement action in circumstances where that is inconsistent with the text employed by both s 73(1) and (2). It appears that s 114(3)(b) is a holdover from when the State Debt Recovery Office was responsible for issuing garnishee orders: see ss 73 and 114(2)(b) of the *Fines Act* prior to the *Fines Amendment Act 2013* (NSW).

38. If the Commissioner does not wish to exercise the power personally, the Commissioner may utilise s 116A or s 116B. Section 116A(1) provides that "[t]he Commissioner may delegate to any person employed in the Public Service any function of the Commissioner under [the *Fines Act*], other than this power of delegation".

39. Section 116B(1) also provides that "[a]n enforcement function may be exercised by the Commissioner or by any person employed in the Public Service who is authorised by the Commissioner to exercise that function". Section 116B(4) defines an "enforcement function" as a "function of the Commissioner of making or issuing an order or warrant under this Act" and would include the making of a garnishee order pursuant to s 73 of the *Fines Act*.

40. The need for the function to be exercised by a member of the Public Service is underlined by s 116A(2), which identifies only three functions, of a procedural nature, which the Commissioner may "delegate to *any person*" (emphasis added).

Considerations relevant to the discretion

41. Section 73(1) of the *Fines Act* does not specify what the Commissioner should, or should not, consider in determining whether or not to exercise the power to make a garnishee order.

42. The absence of express guidance about the considerations does not mean that the discretion is unbounded. As French CJ explained in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***) at [23] (citations omitted):

> Every statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred. Where the discretion is conferred on a

judicial or administrative officer without definition of the grounds upon which it is to be exercised then:

> "the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case."

That view, however, must be reached by a process of reasoning.

43. The scope of permissible considerations for the Commissioner under s 73(1) of the *Fines Act* is, in our view, relatively broad.

44. While there is considerable scope for debate about this, when exercising the s 73(1) discretion in respect of fine defaulters falling within s 71(1)(a) or (b), we consider that it would be open to the Commissioner (or delegate or authorised decision-maker) to decide that particular factual matters would not change their decision and therefore do not require specific consideration. It would follow that it would not be necessary for the Commissioner (or delegate or authorised decision-maker) to take the time to review the fine defaulter's file in relation to such matters.[3] This would extend to considerations raised in applications under ss 100 and 101 in the *Fines Act*, at least to the extent that they did not bear on the selection of a garnishee order as the appropriate civil enforcement action vis-à-vis a property seizure order or charge on land. The decision-maker would, of course, be *entitled* to take such matters into account in exercising their discretion and, if so, would be expected to review the file to consider such matters.

45. We note, however, that if the Commissioner proceeded in that fashion, there would be a risk that the Commissioner might occasion a denial of procedural fairness. Unless clearly displaced, procedural fairness is implied as a condition of the exercise of a statutory power: see *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [75] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ. While the obligation to afford procedural fairness has been modified by s 73(3), it has not been abrogated. Declining to consider all, or part, of a fine defaulters file would seem to us to carry the risk that the Commissioner might make a garnishee order in circumstances which would be

[3] A simple example might be the person's age or even a person's financial circumstances. These are matters that the decision-maker could properly take into account, but it would also be open to the decision-maker to say to themselves "I would exercise the discretion by making an order regardless of how old the person is or how parlous their financial circumstances. I therefore do not need to inquire into those mattesr in order to take them into account."

considered be procedural unfair. Whether this was so would necessarily turn on the facts of each case.[4]

46. In the case of fine defaulters falling within s 71(1A) of the *Fines Act*, in our view, it is not open for the Commissioner to limit the inputs into the decision-making process in the same fashion. The chapeau to s 71(1A) makes clear that fine defaulters fall within the purview of Div. 4 based on an assessment of the Commissioner "having regard to any information known to the Commissioner about the personal circumstances of the fine defaulter": see [20] and [26](c) above. While the same language is not employed in s 73, we do not consider that, in exercising the discretion, the Commissioner could properly ignore, or put from the Commissioner's mind, considerations which the Commissioner was required to consider at the anterior stage of exercising the function under s 71A (ie, considerations arising from those personal circumstances). The Commissioner may, however, decide to accord some or all of such matters little or no weight in the exercise of the s 73(1) discretion.

47. Irrelevant considerations would be matters falling outside the proper scope of the administration of the fines enforcement system and, in particular, civil enforcement action. This might include, for example, the personal characteristics of the fine defaulter that are unrelated to the fine and its enforcement under the *Fines Act* (eg the fine defaulter's sex).

Policy

48. While the benefit of adopting policies to guide administrative discretion has been recognised (see *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [54]), the nature and application of such policies is constrained by administrative law principles.

49. Any policy adopted must be consistent with the *Fines Act*: see *Minister for Home Affairs v G* (2019) 266 FCR 569 at [58]; *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 (***Drake (No 2)***) at 640. In *Minister for Home Affairs v G*, the Full Federal Court (Murphy, Moshinsky and O'Callaghan JJ) explained at [58]-[59]:

> It is established that an executive policy relating to the exercise of a statutory discretion must be consistent with the relevant statute in the sense that: it must allow the decision-maker to take into account relevant considerations; it must not require

[4] This might include, for example, a garnishee order being made in circumstances that are inconsistent with any representations made to the fine defaulter by Revenue NSW.

> the decision-maker to take into account irrelevant considerations; and it must not serve a purpose foreign to the purpose for which the discretionary power was created: see *Drake (No 2)* at 640 per Brennan J; *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [24] per Gleeson CJ; *Cummeragunga* at [159] per Jacobson J.
>
> An executive policy will also be inconsistent with the relevant statute if it seeks to preclude consideration of relevant arguments running counter to the policy that might reasonably be advanced in particular cases: *Drake (No 2)* at 640. Thus, an executive policy relating to the exercise of a statutory discretion must leave the decision-maker "free to consider the unique circumstances of each case, and no part of a lawful policy can determine in advance the decision which the [decision-maker] will make in the circumstances of a given case": *Drake (No 2)* at 641.

50. Care is required in applying these principles in different statutory contexts. *Drake (No 2),* at 640, was concerned with a Minister's power to "determine whether or not to deport an immigrant or alien whose criminal conviction exposes him to that jeopardy". Justice Brennan considered in *Drake (No 2)* that "[t]he discretions reposed in the Minister by these sections cannot be exercised according to broad and binding rules (as some discretions may be: see, eg, *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149)". It was in the specific statutory context of *Drake (No 2)* that Brennan J said that the Minister's policy had to leave him free to consider the individual circumstances of the case.

51. In respect of fine defaulters falling within s 71(1) of the *Fines Act*, having regard to the limited nature of the decision-maker's function, the modification of procedural fairness effected by s 73(3) and the absence of any mechanism for fine defaulters to make submissions with respect to the exercise of the power in s 73,[5] we consider that it would be open to the Commissioner to adopt a policy that the making of a garnishee order would ordinarily be appropriate in identified circumstances.

52. Given the nature of the Commissioner's discretion in respect of fine defaulters falling within s 71(1A), and consistently with [46] above, any policy adopted by the Commissioner in respect of fine defaulters falling within s 71(1A) would need to leave the Commissioner free to consider the unique circumstances of each such case.

53. In either case, it would remain necessary that there be an individual, being the Commissioner, their delegate or an authorised person, who reaches the relevant state of

[5] The Commissioner's power may be distinguished from cases where the decision-maker is required to "consider" certain material, such as a submission, which would involve "an active intellectual process directed" to that material: see *Tickner v Chapman* (1995) 57 FCR 451 at 462.

satisfaction and decides that this is how they will exercise their discretion in the case or cases before them.

Amenability to challenge

54. A garnishee order is liable to be challenged in two ways. First, given that the *Fines Act* provides that the order "operates as a garnishee order made by the Local Court under Pt 8 of the *Civil Procedure Act 2005*", and subject to the applicable jurisdictional limit, we are inclined to the view that the judgment debtor would be able to avail themselves of the mechanism in Pt 8 to challenge a garnishee order.[6] In this regard, s 124A of the *Civil Procedure Act* provides that:

> The court may, at any time on the application by a judgment debtor, vary or suspend the making of payments by the judgment debtor under a garnishee order, or order the total amount paid by the judgment debtor under the garnishee order to be repaid, if the court is satisfied that it is appropriate to do so.

55. Secondly, a garnishee order is liable to be challenged in the supervisory jurisdiction of the Supreme Court. The Supreme Court's supervisory jurisdiction is "the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court": *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [99]. An applicant would need to establish jurisdictional error to enliven the Court's jurisdiction. In *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (***Hossain***) Kiefel CJ, Gageler and Keane JJ explained, at [24], that "jurisdictional error":

> … refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it.

56. It is important to recognise, particularly in the context of a discussion of the requirements for the lawful issue of a garnishee order, that the *Fines Act* would be "interpreted as incorporating a threshold of materiality in the event of non-compliance": *Hossain* at [29] (ie a breach of a statutory precondition/condition must be material in order to be a jurisdictional error). In *Hossain*, Kiefel CJ, Gageler and Keane JJ, at [30], explained:

[6] The Commissioner, as the judgment creditor, would equally be able to avail himself or herself of the enforcement mechanism in s 124.

> Whilst a statute on its proper construction might set a higher or lower threshold of materiality, the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made.

57. Their Honours went on to observe, at [31], that "[o]rdinarily… breach of a condition cannot be material unless compliance with the condition could have resulted in the making of a different decision": see also, *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (***SZMTA***) at [2]-[3] and [45] per Bell, Gageler and Keane JJ.

58. Materiality "is a question of fact in respect of which the applicant for judicial review bears the onus of proof": *SZMTA* at [4] per Bell, Gageler and Keane JJ; see also at [46].

Constitutional limits

59. Commonwealth laws may, through s 109 of the *Constitution* (Cth), operate to constrain the Commissioner's ability to issue garnishee orders.

60. Section 109 of the *Constitution* provides that "[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

61. The operation of s 109 of the *Constitution* was recently explained by the High Court in *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 (***Outback Ballooning***) at [29] and [31]-[35] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ. There are two general types of inconsistency which will engage s 109: a direct inconsistency; and an indirect inconsistency.

    a. A direct inconsistency will arise where the "State law would 'alter, impair or detract from' the operation of the Commonwealth law": *Outback Ballooning* at [32].

    b. An indirect inconsistency arises where the Commonwealth law "is to be read as expressing an intention to say 'completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed'" and the State law deals with that conduct or matter: *Outback Ballooning* at [33].

Where there is an inconsistency, s 109 resolves the conflict by giving the Commonwealth law paramountcy and rendering the State law invalid or inoperative to the extent of the inconsistency: *Outback Ballooning* at [29].

62. Given the limited purpose for which our advice is sought, it is not necessary to attempt to exhaustively identify all Commonwealth laws which might give rise to a s 109 issue for the making of garnishee orders under the *Fines Act*. It is sufficient to demonstrate the operation of s 109 by reference to two examples: the *Social Security (Administration) Act 1999* (Cth); and the *Bankruptcy Act 1966* (Cth).

Social Security (Administration) Act

63. Division 5 of the *Social Security (Administration) Act* deals with the "[p]rotection of social security payments". Section 60 provides that, subject to exceptions which are not presently relevant, "[a] social security payment is absolutely inalienable."[7] Section 62 deals with the effect of a garnishee or attachment order, with subsection (1) providing:

> If:
>
> (a) a person has an account with a financial institution; and
> (b) either or both of the following subparagraphs apply:
> (i) instalments of a social security payment payable to the person (whether on the person's own behalf or not) are being paid to the credit of the account;
> (ii) an advance payment of a social security payment payable to the person (whether on the person's own behalf or not) has been paid to the credit of the account; and
> (c) a court order in the nature of a garnishee order comes into force in respect of the account;
>
> the court order does not apply to the saved amount (if any) in the account.

64. The "saved amount" is calculated by deducting the total amount withdrawn from an account during the 4 week period immediately before the court order came into force from the total amount of social security payments paid to the credit of the account during that period: see s 62(2).

65. There is no indirect inconsistency between the *Fines Act* and s 62 of the *Social Security (Administration) Act* in circumstances where s 62 contemplates the attachment of garnishee orders to any amounts in an account other than the "saved amount" (including amounts

[7] A "social security payment" is defined in s 23 of the *Social Security Act 1991* (Cth). It includes, for example, a society security pension, a social security benefit and allowances under the *Social Security Act*.

arising from social security payments paid prior to the four week period by reference to which the "saved amount" is calculated).

66. However, a state law that authorised the issue of garnishee orders for debts, by way of a court order, that attached to a "saved amount" in an account with a financial institution would alter, impair or detract from s 62 of the *Social Security (Administration) Act*. As garnishee orders issued by the Commissioner pursuant to s 73(1) operate as an order of the Local Court (s 73(4)), we accordingly consider that there is a direct inconsistency between the *Social Security (Administration) Act* and s 73 of the *Fines Act,* and s 117 of the *Civil Procedure Act*, to the extent that they purport to authorise the making of garnishee orders that attach to a "saved amount". Section 109 resolves that inconsistency in favour of the Commonwealth law, and ss 73 and 117 would be rendered inoperative to the extent of the inconsistency.

Bankruptcy Act

67. Part VI, Div. 4B, Subdiv. HA of the *Bankruptcy Act* establishes a supervised account regime. The trustee of a bankrupt's estate may determine that the supervised account regime applies to the bankrupt in certain circumstances: s 139ZIC. The bankrupt is required to ensure all monetary income actually received by the bankrupt after the opening of the account is deposited to the account: see s 139ZIF. Unless specific circumstances exist, the bankrupt is prohibited from making, or authorizing, withdrawals from the account: see s 139ZIG(1)-(7). Section 139ZIG(8) provides:

> *Garnishee powers not affected*
> (8) This section does not affect the exercise of powers conferred by:
> (a) section 139ZL of this Act; or
> (b) section 260-5 in Schedule 1 to the Taxation Administration Act 1953; or
> (c) a similar provision in:
> (i) any other law of the Commonwealth; or
> (ii) a law of a State or a Territory.

68. Although there is a level of similarity to the "saved amount" concept in the *Social Security (Administration) Act*, no s 109 inconsistency arises from s 139ZIG. Section 139ZIG places the relevant prohibition on the bankrupt, not third parties in the position of the Commissioner. Even if that were not the case, the Commissioner's power under s 73 of the *Fines Act* would not be affected by reason of s 139ZIG(8), whose evident purpose is to

avoid the provision limiting garnishee powers: see the Explanatory Memorandum of the *Bankruptcy and Family Law Legislation Amendment Act 2005* (Cth) at [141].

69. Other provisions of the *Bankruptcy Act* do, however, operate to constrain the Commissioner's ability to issue garnishee orders. Although it is beyond the scope of the present advice to identify all the inconsistencies potentially arising between the *Fines Act* and the *Bankruptcy Act*, it may be noted that the *Bankruptcy Act* prohibits a person entitled under a law of the State, like the Commissioner, from retaining or deducting money in particular circumstances: see ss 54H, 185F and 185K. In addition, it is to be noted that where a bankrupt is discharged from bankruptcy, s 153 of the *Bankruptcy Act* provides that the "discharge operates to release him or her from all debts (including secured debts) provable in the bankruptcy".[8] As explained above, s 109 of the *Constitution* would operate to render any inconsistent provisions in the *Fines Act* inoperative to the extent of the inconsistency with the relevant provisions of the *Bankruptcy Act*.

70. We are happy to provide further advice about these matters if instructed to do so.

Second question: Validity of the Commissioner's processes

71. In our view, the Commissioner's processes for the issuing of garnishee orders since 2016 departs from the requirements of the *Fines Act* in a number of respects.

Original Version of the process

72. The Original Version of the Commissioner's process was not lawful because human input was wholly excluded from the process for issuing garnishee orders. As identified above, once the DPR had selected a garnishee order as the next enforcement action, the garnishee order was automatically generated and issued by the FES, at least with respect to orders made to the Commonwealth Bank, ANZ, Westpac and NAB. Human interaction was only involved to the extent that manual action was required to issue the order.

73. To the extent that the Commissioner, their delegate or an authorised person was not involved in making the garnishee order under the Original Version of the process, the

[8] Section 82(3) of the *Bankruptcy Act* provides that "[p]enalties or fines imposed by a court in respect of an offence against a law, whether a law of the Commonwealth or not, are not provable in bankruptcy." Section 82(3) would accordingly operate to the limit the extent to which court fine enforcement orders are discharged by s 153 of the *Bankruptcy Act*.

absence of human involvement had two salient effects. First, at no point was the subjective jurisdictional fact met; the Commissioner, their delegate or an authorised person did not reach the state of satisfaction required by s 73(2), namely that civil enforcement action was authorised against the fine defaulter.

74. Secondly, and relatedly, given that the *Fines Act* invests the power to make an order in the Commissioner, their delegate or an authorised person, it could not be said that the garnishee order had been *made* by the repository of the power. Indeed, it would not appear possible to identify any human decision-maker for the decision to make a garnishee order under the Original Version of the process.

Process following the First and Second Modification

75. So far as we understand them, the amendments to the Commissioner's processes for making garnishee orders in August 2016 and September 2018 (see [9]-[10] above) did not change the fact that the Commissioner, their delegate or an authorised person was not involved in the determination to make a garnishee order. Those amendments accordingly do not alter our opinion as to the lawfulness of the Commissioner's process for making garnishee orders during that period.

Current Version of the process

76. Although the Current Version corrects at least one of the defects of the previous versions, we maintain concerns about the lawfulness of the Commissioner's process for making garnishee orders under the *Fines Act*.

77. The Current Version, through the interposition of a staff member between the information technology applications and the issue of the garnishee order, would appear to address the issue concerning the source of the power to make the order. On the assumption that the staff member involved in the Check Summary Report holds the relevant delegation under s 116A or authorisation under s 116B,[9] the amendment resulted in garnishee orders being

[9] We have been instructed with instruments of delegation and authorisation dated 17 June 2016, 20 March 2017 and 29 October 2019. They indicate that specified staff in Revenue NSW are empowered to make garnishee orders under s 73 of the *Fines Act*. The 2016 and 2017 delegation and authorisation is relevantly to persons assigned to roles in Collections and Technical & Advisory Services. The 2019 delegation and authorisation is to persons assigned to roles in Customer Service Fines & Debt and Technical & Advisory Services. The 2019 instrument also delegates and authorises the exercise of enforcement functions under the *Fines* Act to persons assigned to certain roles in Service NSW.

made by the repository of the power in circumstances where, without the approval of the staff member, no garnishee orders would be made.

78. It is not, however, possible to say that the interposition of the staff member has addressed the issue relating to s 73(2) of the *Fines Act*. On the materials available to us, it is not apparent that the Commissioner, their delegate or an authorised person forms, as part of the Check Summary Report process, the state of satisfaction required by s 73(2).[10]

79. Nor is it apparent whether the Check Summary Report provides a basis for the Commissioner, their delegate or an authorised person to form the requisite state of satisfaction. The Check Summary Report, and the DPR system, appear to only be directed to fine defaulters falling within Pt 4, Div. 4 of the *Fines Act* because the fine remains unpaid after the Commissioner directed RMS to take enforcement action (ie persons falling within s 71(1)(b) and not s 71(1)(a) or 71(1A)): see Steps 6 and 7 above. The Check Summary Report does contain a rule check for "Period for Issue after EN" of 21 days, but we are not aware whether this is a reference to the period after the Commissioner directed RMS to take enforcement action and, more importantly, whether the Commissioner, their delegate or an authorised person understands that that is what the reference is to.[11]

80. Even assuming that the threshold in s 73(2) is met, there would appear to be a question about the lawfulnesss of the issue of garnishee orders under the Current Version of the process. While we are of the view that the Commissioner (or delegate or authorised person) may, as a general matter, consider the issue of garnishee orders to multiple fine defaulters simultaneously (at least with respect to fine defaulters within s 71(1)) and that the matters raised by the Check Summary Report are permissible considerations, for the reasons that follow, we do not consider that it is sufficient for the purposes of s 73(1) of the *Fines Act* for the staff member to simply give effect to the activity selection of the DPR (see [6] above) or rely on the fact that the Check Summary Report showed green lights in order to lawfully make a garnishee order. But we nevertheless think that the decision-maker might, when dealing with a fine defaulter falling within s 71(1), properly follow a course of

[10] Given that the function in s 73(2) has not been expressly delegated in the instruments of delegation with which we have been briefed, we note that a delegate may exercise any function that is incidental to the delegated function: s 49(4) of the *Interpretation Act*.

[11] We note that, according to Step 7, the DPR begins assessing fine defaulters for civil enforcement action after only 14 days (rather than 21 days) after the Commissioner directed RMS to take enforcement action under Pt 4, Div. 3.

reasoning that means they do not need to review each file, provided they have properly considered the nature of the information that they are disregarding and formed the view, on a reasonable or rational basis, that such information would not alter their decision.

81. In order for there to be a lawful exercise of a statutory discretion, we consider that generally a human needs to consider the relevant factors and reason to the relevant outcome. In the case of the *Fines Act*, the decision-maker is required to consider the relevant factors (see [43]-[47] above) and decide, *in fact*, whether to make a garnishee order. In the case of fine defaulters falling within s 71(1), the Commissioner is required to decide whether a garnishee order is the civil enforcement action that should be imposed rather than, or in addition to, a property seizure order or a charge on land. In the case of fine defaulters falling within s 71(1A), the Commissioner is empowered to decide whether or not a garnishee order should be made.

82. Although the response of administrative law to the use of information technology may be nascent, ordinary administrative law principles require there to be a "process of reasoning" for the exercise of discretions (*Li* at [23]). This can also be seen in our conceptions of what it means to make a "decision", with two members of the Full Federal Court (Moshinsky and Derrington JJ) accepting that one of the elements generally involved in a "decision" is "reaching a conclusion on a matter as a result of a mental process having been engaged in": *Pintarich v Deputy Commissioner of Taxation* (2018) 262 FCR 41 at [141] and [143], quoting *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422 at [19].

83. Absent express statutory amendment (discussed below), we accordingly do not think that a statutory discretion can be lawfully exercised by giving conclusive effect to the output of an information technology application. We do not think that the unlawfulness is altered by that output being broken down into component parts (ie the considerations raised in the Check Summary Report) and the decision-maker proceeding, *as matter of course*, to exercising the power (ie issuing the garnishee orders because all the traffic lights were green) without engaging in a mental process to justify that conclusion.

84. For similar reasons, we do not consider that statutory discretions can be lawfully exercised by pre-authorising the making of an order if certain outputs are obtained.

85. On the materials available to us, it is not apparent whether the staff member involved in the Check Summary Report is undertaking any process of reasoning or is issuing the

garnishee orders simply because the traffic lights are green. Given considerations of materiality, this departure may not be of significance in the case of fine defaulters falling within s 71(1)(a) or (b), in respect of whom civil enforcement action is effectively mandatory under the *Fines Act* (subject of course to the operation of ss 100 and 101). Our concern as to non-compliance would be more acute with respect to fine defaulters falling within s 71(1A), in respect of whom the Commissioner has a true discretion whether or not to issue a garnishee order. We repeat, however, our observation at [79] above that the Commissioner's automated process appears (at least on the materials with which we are briefed) directed to fine defaulters falling within s 71(1)(b)).

86. As to the operation of s 109 of the *Constitution,* our instructions do not allow us to say whether garnishee orders issued by the Commissioner have in fact been issued in circumstances contrary to s 62 of the *Social Security (Administration) Act*[12] or the various requirements in the *Bankruptcy Act*. As explained above, s 109 would render inoperative the provisions of the *Fines Act* to the extent that they purported to authorise the Commissioner to make garnishee orders in circumstances prohibited by the Commonwealth laws.

Third Question: Modification and/or statutory amendment

87. Modifications could be made to the Current Version of the process for issuing garnishee orders to make it lawfully permissible. As identified above, the process would need to amended to require the Commissioner, their delegate or an authorised person to reach the state of satisfaction required by s 73(2). Assuming that the staff-member is currently proceeding automatically from the traffic lights to the issue of the garnishee orders (which would not be permissible), the process could also be amended so as to ensure that the decision-maker is actually reasoning, by reference to the applicable statutory test, from the relevant inputs in the decision-making process to the output of whether or not to issue a garnishee order in respect of the fine defaulter/s.

88. Alternatively, the *Fines Act* could be amended to make permissible the Commissioner's process for issuing garnishee orders. The subjective jurisdictional fact in s 73(2) could be replaced by a jurisdictional fact (see *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 at [13]), so as to avoid the Commissioner, their delegate or an

[12] We note that the extent to which garnishee orders attached to "saved amount[s]" would likely have been reduced since Revenue NSW began applying a minimum protected amount to bank-directed garnishee orders.

authorised person needing to reach a particular state of satisfaction to have the power to issue a garnishee order. However, absent additional amendment, this would not obviate the need for human involvement in the exercise of the statutory discretion.

89. The *Fines Act* could also be amended to expressly authorise the use of information technology in the garnishee order process. To enable the Original Version, the amendment would need to expressly authorise the Commissioner to use information technology (however described) to make garnishee order decisions (see eg s 6A of the *Social Security (Administration) Act 1999*). To enable the Current Version, the amendment would need to allow the Commissioner to give effect to the outputs of any information technology used in the garnishee order process. If either amendment was made, consideration would need to be given to making consequential amendments to assist in the application of administrative law principles to any decision made by the information technology application, such as an attribution provision.

90. We advise accordingly.

James Emmett SC **Myles Pulsford**

29 October 2020

APPENDIX E

CSO Advice

ADVICE

Crown Solicitor's Office

REVENUE NSW - PROCESS FOR ISSUING GARNISHEE ORDERS UNDER PART 4 OF THE FINES ACT 1996

Executive summary

1. You seek my advice on whether the amendments proposed by Revenue NSW to its process for issuing garnishee orders address the concerns raised by James Emmett SC and Myles Pulsford in an opinion dated 29 October 2020 on the lawfulness of decisions to issue garnishee orders under s. 73(1) of the *Fines Act 1996* in accordance with that process. Counsel identified three main concerns which are summarised in [15] below.

Counsel Concern 1

2. I think that including in the Check Summary Report (or other decision record) a statement confirming that the decision-maker has formed the state of satisfaction required by 73(2) of the *Fines Act* will address this concern. I suggest some wording in [20] below.

3. I also refer to my advice in response to Counsel Concern 3 below.

Counsel Concern 2

4. The rule checks summarised in the Check Summary Report must accurately reflect the legislative requirements if the report is to be relied on to form the state of satisfaction required under s. 73(2).

5. As a general comment, any statements included on the Check Summary Report which purport to confirm the decision-maker's decision should record the basis of the decision as accurately as possible.

Counsel Concern 3

6. I think the risk of a successful challenge of decisions to issue garnishee orders under s. 73(1) in accordance with the current process is fairly low. That said, it is important that Revenue NSW adopt best practice to ensure the integrity of its decision-making processes and the lawfulness of administrative decisions, regardless of the likelihood of successful challenge.

7. Accordingly, I suggest the process for issuing garnishee orders be amended along the following lines to address Counsel Concern 3 and minimise the risk of any challenge on that basis:

   (a) Ensure that it is clear from the face of the Check Summary Report – or from a document which supports the Check Summary Report – what each of the rule checks means. If this information is included in a supporting document, then for completeness, I suggest that specific reference to that document be included in the Check Summary Report so that it is readily apparent to a person reviewing the decision that the information in the separate document is relevant and was taken into account.

(b) Include a series of statements in the Check Summary Report (or other part of the decision process) which explain how the information in the Check Summary Report links to and supports a decision to issue a garnishee order under s. 73(1) of the *Fines Act*. I suggest some wording in [49(b)] below.

(c) Ensure any policies clearly state that a decision-maker is not *bound* to issue a garnishee order under s. 73(1) of the *Fines Act* merely because the traffic lights in a Check Summary Report are green.

8. Merely including in the Check Summary Report additional rule checks concerning the availability of other enforcement action will not address counsel's concern. In my view, counsel's concern will be addressed by including statements which explain how the rule checks informed the decision-maker's decision to issue the garnishee orders under s. 73(1).

Background

9. In October 2020, Mr Emmett SC and Mr Pulsford provided an opinion on the validity of Revenue NSW's processes and systems for issuing garnishee orders under the *Fines Act*. Counsel's opinion was based on an agreed statement of facts ("SOF") between the Ombudsman and Revenue NSW on the process for issuing garnishee orders. I briefed counsel to provide the opinion on the instructions of the Ombudsman.

10. The key provisions of the *Fines Act* for present purposes are ss. 71 and 73, which are in the following terms:

> "**71 When enforcement action taken under this Division**
>
> (1) Enforcement action is to be taken against a fine defaulter under this Division if the fine defaulter has not paid the fine as required by the notice of the fine enforcement order served on the fine defaulter and—
>
> (a) enforcement action is not available under Division 3 to suspend or cancel the driver licence or vehicle registration of the fine defaulter, or
>
> (b) the fine remains unpaid 21 days after the Commissioner directed Transport for NSW to take enforcement action under Division 3.
>
> (1A) Enforcement action may be taken under this Division before or without taking action under Division 3 if the fine defaulter is an individual and the Commissioner is satisfied that civil enforcement action is preferable because, having regard to any information known to the Commissioner about the personal circumstances of the fine defaulter—
>
> (a) enforcement action under Division 3 is unlikely to be successful in satisfying the fine, or
>
> (b) enforcement action under Division 3 would have an excessively detrimental impact on the fine defaulter.
>
> (1B) The Commissioner may decide that civil enforcement action is preferable in the absence of, and without giving notice to or making inquiries of, the fine defaulter.
>
> (2) Enforcement action may be taken under this Division by means of a property seizure order, a garnishee order or a charge on land, or by all or any combination of those means.
>
> **Note—**

If enforcement action under this Division has not been or is unlikely to be successful in satisfying the fine, enforcement action can be taken against the fine defaulter under Division 5 (Community service orders).

…

73 Order to garnishee debts, wages or salary of fine defaulter

(1) The Commissioner may make an order that all debts due and accruing to a fine defaulter from any person specified in the order are attached for the purposes of satisfying the fine payable by the fine defaulter (including an order expressed to be for the continuous attachment of the wage or salary of the fine defaulter). The order is called a ***garnishee order***.

(2) The Commissioner may make a garnishee order only if satisfied that enforcement action is authorised against the fine defaulter under this Division.

(3) The order may be made in the absence of, and without notice to, the fine defaulter.

…"

11. The process for issuing garnishee orders is described in detail in the statement of facts and counsel's opinion (see [34]-[54] of the SOF). I will only set out those aspects of the process which are relevant to this advice, and I rely on the SOF when doing so. In this advice, I will use the following abbreviations which were also used in those documents (see [28]-[33] of the SOF):

    (a) "FES" for the "fine enforcement system". The FES is a core information technology application used in the process for issuing garnishing orders. It contains a database of record about a customer (for example, name, fine information, contact details) drawn from Revenue NSW's system and the systems of other government agencies. The FES also handles the processing of transactions, including civil enforcement action.

    (b) "DPR" for "dept profile report". The DPR is a business rule engine that takes the data in the FES ("inputs"), applies analytics that reflect business and prioritisation rules ("analytics"), and generates profiling and activity selection ("outputs"). A detailed description of how the DPR works is at Attachment B to the SOF.

12. From January 2016, if the DPR assessed that a garnishee order should be issued in respect of the debt of a fine defaulter, the fine defaulter was "pooled" by the DPR in the relevant queue in accordance with priority rules (Steps 7 and 8 of the process outlined in the SOF). Garnishee orders were then issued in bulk by the FES to one of the Commonwealth Bank, ANZ, Westpac or NAB without human intervention (although human intervention may have been required for garnishee orders issued to other banks) (Step 9).

13. In March 2019, Revenue NSW introduced an additional manual step in the process for issuing garnishee orders between Steps 8 and 9 described above. In this amended process, once the DPR has selected fine defaulters to be "pooled" for the purpose of bulk processing garnishee orders, and before the electronic file is transmitted to the relevant banks for action, a "Check Summary Report" is produced (see [76] of the SOF). The Check Summary Report is a single consolidated report for all files selected by the DPR for the issue of a garnishee order, accompanied by a spreadsheet of the raw data from all relevant files.

14. The Check Summary Report uses a "traffic light" system to indicate whether the files meet certain inclusionary or exclusionary criteria. The criteria reflect the DPR's business rules and some criteria prescribed by legislation. If the traffic lights are all green, a delegate approves the garnishee orders and the files are transmitted to the relevant banks. If a traffic light is red, the relevant fine defaulter's file is removed, and so no garnishee order will be made in respect of that fine defaulter's debt.

15. Counsel expressed the following concerns with the process as amended in March 2019, which could affect the lawfulness of decisions made in accordance with that process:

    (a) It is not apparent on the material available to counsel that the Commissioner, their delegate or an authorised person ("decision-maker") forms, as part of the Check Summary Report process, the state of satisfaction required by s. 73(2) of the *Fines Act*: at [78] ("Counsel Concern 1").

    (b) It is not apparent whether the Check Summary Report provides a basis for the decision-maker to form the state of satisfaction required by s. 73(2) of the *Fines Act*: at [79] ("Counsel Concern 2").

    (c) It is not sufficient for the purposes of s. 73(1) of the *Fines Act* for the decision-maker to simply give effect to the activity selections of the DPR or rely on the fact that the Check Summary Report showed green lights in order to lawfully make a garnishee order: at [80]. The decision-maker must undertake a process or reasoning to justify that conclusion: at [83], [85]. For similar reasons, a statutory discretion cannot be lawfully exercised by pre-authorising the making of an order if certain outputs are obtained: at [84] ("Counsel Concern 3").

16. I note that counsel was particularly concerned about the process for issuing garnishee orders in respect of the debts of fine defaulters against whom civil enforcement action is authorised under Pt 4, Div. 4 of the *Fines Act* because they fall within s. 71(1A). In Tab C to your instructions, you clarify that the DPR process removes any fine defaulters who fall (or potentially fall) within s. 71(1A). Accordingly, any decision to issue a garnishee order using this process – that is, after reviewing a Check Summary Report – will only relate to fine defaulters who fall within s. 71(1), and so it is not necessary to consider s. 71(1A) for the purposes of this advice.

17. In May 2021, Revenue NSW made further refinements to the process for issuing garnishee orders to address counsel's concerns in [15] above. These refinements are described in Tab C to your instructions. In summary:

    (a) The Check Summary Report has been amended to include the following statements, which I understand are together intended to confirm that the decision-maker has formed the state of satisfaction required by s. 73(2):

        (i) "All customers included in this report fall within section 71(1)(a) or (b) of the *Fines Act*"; and

        (ii) "The officer authorising this report confirms the condition precedent to making a garnishee order under s. 73(1) of the *Fines Act* has been met".

(b) The Check Summary Report has been amended to include as "rule checks" certain criteria that indicate whether other civil enforcement action under Pt 4, Div. 4 (that is, a property seizure order or a charge on land) may be appropriate, or whether ss. 100 or 101 of the *Fines Act* may be engaged. These rule checks will each have a traffic light indicator – if green, the material available does not indicate that a garnishee order should not be issued; and if red, the decision-maker will investigate whether the relevant alternative is more appropriate.

18. I will address each of counsel's concerns, and in doing so, make some comments on these proposed refinements where relevant.

Analysis

Counsel Concern 1

19. In counsel's view, it is not clear from the record of the decision-making process that the decision-maker has formed the state of satisfaction required by s. 73(2) of the *Fines Act*.

20. I think that including a statement along the lines of your proposed refinement (see [17(a)] above) will address Counsel Concern 1. However, I suggest the following wording to reflect the language of the legislation:[1]

> "I am satisfied that enforcement action is authorised under Div. 4 of Part 4 of the *Fines Act 1996* against the fine defaulters included in this report because each of the fine defaulters included in this report fall within s. 71(1)(b) of the *Fines Act 1996*."

21. I also think it would be preferable to amend the Check Summary Report (or other decision record) to reflect how the decision-maker reasons from the relevant rule checks to the above conclusion. In this regard, I refer to my advice in response to Counsel Concern 3 below.

Counsel Concern 2

22. In counsel's view, it is not apparent whether the Check Summary Report provides a basis for the decision-maker to form the state of satisfaction required by s. 73(2) of the *Fines Act*.

23. Counsel note that there is a rule check for "Period for Issue after EN" of 21 days, which is presumably directed to the 21-day period from the date the Commissioner directs TfNSW to take action for the purposes of s. 71(1)(b). Counsel state that they are not aware whether this presumption is correct "and, more importantly, whether the [decision-maker] understands that that is what the reference is to": at [79]. It appears to me that counsel are simply emphasising that the rule checks must accurately reflect the legislative requirements if the Check Summary Report is to be relied on to form the state of satisfaction required under s. 73(2) of the *Fines Act*. In relation to the decision-maker's understanding, I refer to my response to Counsel Concern 3 below.

[1] I have included a reference to s. 71(1)(b) only. See my comments in [28] below.

24. Counsel also note that, according to the SOF, the DPR begins assessing civil enforcement action 14 days after the Commissioner directs TfNSW to take action, which is different from the 21-day requirement in s. 71(1)(b): at [79], footnote 11. I do not know whether this is in fact an issue, as it may be that the DPR begins its assessment at one time (14 days) but the particular fine defaulter will not be included as a "green light" in the rule check for "Period for Issue after EN" in the Check Summary Report until 21 days has elapsed. In any event, I reiterate that the rule checks must accurately reflect the legislative requirements if the Check Summary Report is to be relied on to form the state of satisfaction required under s. 73(2).

25. Counsel note that the Check Summary Report and DPR system only appear to be directed to fine defaulters within s. 71(1)(b). It seems the concern here is that there may be no basis to conclude, on the basis of the Check Summary Report, that action is authorised against a fine defaulter because they fall within s. 71(1)(a) or s. 71(1A).

26. As set out in [16] above, based on your instructions, s. 71(1A) is not relevant for the purposes of this advice. In relation to s. 71(1)(a), it appears that counsel is querying how the DPR makes an assessment that someone falls within that paragraph, or how the Check Summary Report provides a basis for drawing that conclusion.

27. Section 71(1)(a) and (b) are expressed in the alternative, and so civil enforcement action will be authorised against a person who falls within *either* paragraph. So, provided there is a sufficient basis for the decision-maker to be satisfied that enforcement action is authorised against all fine defaulters in the report because they fall within s. 71(1)(b), the requirements of s. 73(2) and s. 71(1) will be met. The fact that there may be other fine defaulters who fall within in s. 71(1)(a) and so a garnishee order *could have* been made in respect of their debts is irrelevant when considering the lawfulness of the decision-maker's decision regarding the actual fine defaulters within s. 71(1)(b).

28. I note that the statement on the Check Summary Report should record the basis of the decision as accurately as possible. There is a small risk that the wording you proposed in Tab D to your instructions – namely, "All customers included in this report fall within section 71(1)(a) or (b) of the *Fines Act*" – could give the impression that one or more fine defaulters fall within s. 71(1)(a). If that is not the case, or there is insufficient information in the Check Summary Report to form that view, the safer approach would be to remove the specific reference to subs. (1)(a) to avoid any confusion. If all fine defaulters fall within s. 71(1)(b), then that paragraph should be referred to on its own.

Counsel Concern 3

29. In counsel's view, it is not sufficient for the purposes of s. 73(1) of the *Fines Act* for the decision-maker to simply give effect to the activity selections of the DPR or rely on the fact that the Check Summary Report showed green lights in order to lawfully make a garnishee order. The decision-maker must undertake a process or reasoning to justify that conclusion. Counsel note at [85], that "[o]n the materials available to us, it is not apparent whether the staff member involved in the

Check Summary Report is undertaking any process of reasoning or is issuing the garnishee orders simply because the traffic lights are green".

30. You instruct me that the decision-maker is usually a senior officer who is familiar with the legislative requirements for issuing a garnishee order and who understands what the DPR does, what the traffic lights on the Check Summary Report represent, and how they relate to the statutory test and decision to issue a garnishee order under s. 73(1) of the *Fines Act*. In those circumstances, the question is not necessarily whether the decision-maker *in fact* engages in a process of reasoning, but rather how the process for issuing garnishee orders and/or the record of decisions made in accordance with that process can be amended to better reflect the decision-maker's reasoning process.[2]

31. In expressing this particular concern, counsel refer to the High Court's decision in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ("*Li*"), which deals with the administrative law review ground of "unreasonableness". So, it appears that, in counsel's view, a lack of "process of reasoning" in a decision to issue a garnishee order could render the decision "unreasonable".

32. In *Li*, the judgments identify two different contexts in which the concept of "unreasonableness" is employed: first, it can be a conclusion reached by the court after identifying an underlying jurisdictional error in the decision-making process; or secondly, it can be focused on the outcome, without necessarily identifying another underlying jurisdictional error.[3] In the second context, the plurality in *Li* described this as an inference to be drawn because the court cannot identify how the decision was arrived at. The exercise of the discretion may be viewed by the court as lacking "an evident and intelligible justification": *Li* at [76] (Hayne, Kiefel and Bell JJ).

33. In light of the above, if the process for issuing a garnishee order and/or the record of decisions made in accordance with that process do not demonstrate the decision-maker's process of reasoning, there is a risk that a court could find that the decision is unreasonable on the basis that there is no "evident and intelligible justification".

34. In addition, counsel make several references to the decision-maker effectively acting as a "rubber stamp" for the DPR and Check Summary Report process. For example, counsel opine that it would be unlawful to proceed "*as a matter of course*, to exercising the power (ie, issuing the garnishee orders because all the traffic lights were green" (at [83], counsel's emphasis); and it would not be sufficient to "simply give effect to the activity selection of the DPR … or rely on the fact that the Check Summary Report showed green lights" (at [80]).

[2] I note [87] of counsel's opinion, where they suggest that the process could be amended "[a]ssuming that the staff member is currently proceeding automatically from the traffic lights to the issue of the garnishee orders (which would not be permissible)". It is clear from this statement that decisions would not be unlawful if a decision-maker does not *in fact* proceed automatically from the Check Summary Report to issuing garnishee orders.

[3] See discussion in *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1 ("*Singh*") at [44]ff. I note the comments of Allsop CJ in *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 ("*Stretton*") at 5-6 that the concept of legal unreasonableness is "not amenable to minute and rigidly-defined categorisation or a precise textual formulary", and so these two contexts should not be read as creating something in the nature of two different "tests".

35. In light of these comments, counsel's concern could also be characterised as, in effect, the exercise of a discretionary power in accordance with an inflexible application of policy or under direction. I do not think much turns on how counsel's concern is characterised, as the substantive issue identified by counsel – the lack of a process of reasoning by the decision-maker themselves – is the same.

36. In my view, the risk of a successful application for review on this basis is fairly low.

37. First, there is no requirement to give reasons when making a decision under s. 73(1) of the *Fines Act*. In such cases:[4]

> "It is permissible to look behind the decision to the material before the decision-maker, in an attempt to discern the reasons for the decision. Documents place before the decision-maker may be considered. The court may be able to say that the decision could be explained by such material. The inference may then be available that the information contained in the documents was taken into account and provided the reason for the decision."

38. These comments indicate that a court may infer that a decision-maker had regard to the matters contained in the Check Summary Report and that those matters formed the basis for their decision. It would be difficult in those circumstances to conclude that the decision had no evident or intelligible justification.

39. Secondly, it is not uncommon for a decision-maker to rely on summaries and recommendations prepared by other people. The quintessential example would be a minister relying on a brief or other report when exercising a discretion personally. The minister's decision will not be unlawful merely because they relied on the brief and did not review the underlying material.[5] Significantly, this has not been limited to the personal exercise of discretion by ministers, and has been applied in the context of a decision by a delegate of the Federal Commissioner of Taxation.

40. In *Asiamet (No 1) Resources Pty Ltd v Federal Commissioner of Taxation* (2003) 126 FCR 304 ("*Asiamet*"), it was contended that the decision-maker did not given real or genuine consideration to the merits of the question before him but, rather, blindly adopted the views and advice of other persons within the ATO: at [114]. The applicants argued that an inference should be drawn that "no independent or genuine discretion was exercised by [the decision-maker] following receipt of the report" of the relevant internal division of the ATO. Justice Emmett said at [116]:

> "However, taking advice within the ATO would not, of itself, result in the decision-maker failing to give proper genuine or realistic consideration to the merits of the case. A decision-maker who takes into account the recommendations and advice of departmental officers, who are responsible for providing that advice, does not, on that account alone, fail to consider the merits of a particular case. Decision-makers who make a large number of decisions do not act unlawfully by acting on the basis of facts found by their advisors, rather than performing every step of the decision-making process personally, provided they act on the basis of an accurate summary of the relevant evidence and submission that has been heard by their advisors. The fact that Mr Bridge had regard to the ATO Advice does not, of itself, give rise to an inference that he did not exercise his own judgment in relation to the decision that was required of him."

[4] *East Melbourne Group v Minister for Planning* [2008] VSCA 217; (2008) 23 VR 605 at [312] (Ashley and Redlick JJA), citations omitted. See also *Telstra Corporation v Hurstville City Council & ors* (2002) 189 ALR 737 at [50] (Sundberg and Finkelstein JJ).

[5] *Minister for Aboriginal Affairs v Peko-Wallsend* Ltd [1986] HCA 40 (1986) 162 CLR 24.

41. It is arguable that the Check Summary Report is in a similar category to a summary of the relevant facts prepared by a person assisting a decision-maker. As I understand it, the DPR effectively "reviews" the information held by Revenue NSW about a fine defaulter and excludes fine defaulters who meet certain exclusionary criteria for the purposes of s. 73(1) of the *Fines Act*. The Check Summary Report summarises the outcome of this review and consolidates multiple fine defaulters in the one document. In this sense, it is akin to a brief that:

    (a) informs the decision-maker that it is open to them to issue garnishee orders in respect of the fine defaulters in the Check Summary Report; and

    (b) recommends that garnishee orders be issued.

42. The facts the subject of *Asiamet* are not necessarily on all fours with the issue identified by counsel in this case. However, the comments of Emmett J are still helpful. The fact that a decision-maker has regard to the Check Summary Report does not, of itself, give rise to an inference that the decision-maker did not exercise their own judgment in the decision that was required of them – that is, a decision to issue a garnishee order under s. 73(1) of the *Fines Act*.

43. Together with the matters in [37]-[38] above, this would support an argument that the decision-maker had regard to the matters summarised in the Check Summary Report and that those matters provided the reason for the decision to issue garnishee orders.

44. Finally, the "standard of legal reasonableness will apply across a range of statutory powers, but the indicia of legal unreasonableness will need to be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case": *Singh* at [48]. It is necessary to have regard to the "framework of rationality provided by the statute", and such framework is "defined by the subject matter, scope and purpose of the statute conferring the discretion": *Li* at [26]. A court will "evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful": *Stretton* at 5-6.

45. A decision to issue a garnishee order under s. 73(1) of the *Fines Act* is in the context of a statutory scheme which effectively obliges the Commissioner to take enforcement action to recover fines in accordance with Pt 4 (subject to certain exceptions like ss. 100 and 101). Section 71(1) provides that enforcement action "is to be taken" under Div. 4 of Pt 4 (which includes issuing a garnishee order) if a person falls within paras. (a) or (b) of that subsection. Other than the precondition in s. 73(2), there are no mandatory considerations prescribed by the legislation before a garnishee order may be issued. Section 71(2) expressly provides that (civil) enforcement action under Pt 4, Div. 4 of the *Fines Act* may be taken "by means of a property seizure order, a garnishee order or a charge on land, or by all or any combination of those means". The legislation is not prescriptive about which type of enforcement action should be taken, whether one or more should be taken, or in what order. Those matters are left to the Commissioner (or other decision-maker).

46. It was based on these factors, and the fact that procedural fairness requirements are modified by s. 73(3) and there is no mechanism for a fine defaulter to make submissions, that counsel appear to have expressed the view that it would be open to the Commissioner to adopt a policy that the making of a garnishee order would ordinarily be appropriate in identified circumstances (at [51]).

I agree with counsel's view. I also agree that a lawful decision under s. 73(1) – in relation to fine defaulters within s. 71(1) – does not *require* that the decision-maker review the fine defaulters' files, provided there is sufficient information in the Check Summary Report for them to make a decision to issue a garnishee order (see [44] of counsel's opinion).

47. These factors will also inform an assessment of the "reasonableness" of a decision to issue a garnishee order under s. 73(1) of the *Fines Act* by defining the parameters of what, in the context of the Act, is required for a decision to be lawful. Provided that the information summarised in the Check Summary Report is accurate and there is nothing before the decision-maker to suggest that a garnishee order cannot or should not be issued, it may be difficult to argue that the decision was legally unreasonable.

48. For the above reasons, I think the risk of a successful challenge of decisions to issue garnishee orders under s. 73(1) in accordance with the current process is fairly low.

49. That said, it is important that Revenue NSW adopt best practice to ensure the integrity of its decision-making processes and the lawfulness of administrative decisions, regardless of the likelihood of successful challenge. Accordingly, I suggest the process for issuing garnishee orders be amended along the following lines to address Counsel Concern 3 and minimise the risk of any challenge on that basis:

    (a) Ensure that it is clear from the face of the Check Summary Report – or from a document which supports the Check Summary Report – what each of the rule checks means. If this information is included in a supporting document, then for completeness, I suggest that specific reference to that document be included in the Check Summary Report so that it is readily apparent to a person reviewing the decision that the information in the separate document is relevant and was taken into account.

    (b) Include a series of statements in the Check Summary Report (or other part of the decision process) which explain how the information in the Check Summary Report links to and supports a decision to issue a garnishee order under s. 73(1) of the *Fines Act*.

    For example, further to my comment at [20] above, the Report could state something along the following lines (assuming it is factually accurate):

    > "The "green light" in rule check #10 in the "DPR Go inclusions Check" section of this Check Summary Report indicates that, according to Revenue NSW's records, at least 21 days has elapsed since the Commissioner directed TfNSW to take enforcement action under Div. 3 against all of the fine defaulters included in this report."

    It is not strictly necessary to include a statement of this nature in relation to each of the rule checks specifically, especially if a description of them is set out in a document which is incorporated into the Check Summary Report (see para. (a) above). That said, the safer approach would be to ensure the decision-maker's thinking is recorded in the Check Summary Report (or at another appropriate step in the process).

    (c) Ensure any policies clearly state that a decision-maker is not *bound* to issue a garnishee order under s. 73(1) of the *Fines Act* merely because the traffic lights in a Check Summary Report are green.

50. I would be happy to review and advise on any proposed amendments to the process.

51. For completeness, I refer your proposed refinement in Tab C to your instructions and summarised in [17(b)] above. I understand that this refinement has been proposed to address counsel's concern that the decision-maker may not be engaging in a deliberative process when deciding to issue garnishee orders after reviewing the Check Summary Report.

52. Counsel state at [83] that their view on the lawfulness of the process for issuing garnishee orders is not altered by the output of the DPR being "broken down into component parts (ie, the considerations raised in the Check Summary Report)". The issue for counsel is that the decision-maker must engage in a "mental process" to justify issuing garnishee orders on the basis of the information contained in the report.

53. Accordingly, counsel's concern is not addressed by adding more rule checks to the Check Summary Report. As set out in [49] above, in my view, counsel's concern will be addressed by including statements which explain how the rule checks informed the decision-maker's decision to issue the garnishee orders under s. 73(1). That said, including these additional rule checks (with an explanation along the lines of my suggestions in [49]) will likely reduce any perceptions that the process automatically proceeds to garnishee orders without any consideration of alternatives under Pt 4, Div. 4 of the *Fines Act*. Whether or not a consideration of alternatives is required for a valid decision under s. 73(1), demonstrating that other options were in fact considered may further reduce the prospects of a successful challenge.

[redacted]

Michael Granziera
Director
for Crown Solicitor

[redacted]

Nicholas Borger
Senior Solicitor
for Crown Solicitor

[redacted]

[redacted]

From: Nicholas Borger
Sent: Friday, March 25, 2022 5:25 PM
To:
Cc: Michael Granziera; [redacted]

Subject: RE: Request for advice - Fines Act 1996 - garnishee orders

Dear

In my advice dated 18 February 2022, I suggested further changes which could be made to the Check Summary Report to address counsel's concerns with Revenue NSW's process for issuing garnishee orders. My suggested changes may be summarised as follows:

1. Include a statement in the Check Summary Report which expressly states that the decision-maker has formed the requisite state of satisfaction under s. 73(2) of the *Fines Act*, and preferably identify the rule checks which led the decision-maker to form this state of satisfaction (at [20]-[21]).
2. Ensure that references to the legislation are accurate. In particular, when stating the basis for the decision-maker's satisfaction that enforcement action is authorised, only refer to the specific parts of s. 71(1) which actually apply (at [28]).
3. Ensure that it is clear from the face of the Check Summary Report, or from a document which supports it, what each of the rule checks means (at [49(a)]).
4. Include a series of statements in the Check Summary Report which explain how the information in the Report links to and supports a decision to issue a garnishee order (at [49(b)]).
5. Ensure that any documents clearly state that a decision-maker is not *bound* to issue a garnishee order merely because the traffic lights in the Check Summary Report are green (at [49(c)]).

A revised Check Summary Report was provided by email on 22 March 2022 and marked "Tab A". You now seek my advice on whether the revised report effectively implements my suggested changes summarised above.

I have reviewed the revised Check Summary Report and make the following comments, with the numbers corresponding to the numbered suggested changes summarised above:

1. The first bullet point in Statement 3 of Part A, combined with the requirement for the decision-maker to check the box, clearly records that the decision-maker has formed the requisite state of satisfaction and that their decision to issue garnishee orders is made (in part) on that basis. The two sub-bullet points tie this state of satisfaction to the rule checks which inform the decision-maker that the express statutory requirements have been met.
2. The first bullet point in Statement 3 of Part A refers only to s. 71(1)(b) of the *Fines Act*. Noting the subsequent bullet point, I assume that all of the fine defaulters the subject of the Check Summary Report fall within that subsection.
3. The first sentence in the "Explanation" column for each rule check in Part B explains what the relevant rule check means. I suggest that consideration be given to redrafting inclusionary rule check number 8 ("Minimum Period for DP Client Before GO Issue (No REX Referral)") for clarity, as I am not sure what the rule check means based on the current explanation.
4. The second sentence in the "Explanation" column for each rule check in Part B explains what the green light means with respect to the fine defaulters the subject of the Check Summary Report (in other words, how the rule check has been applied). When considered with Statement 1 in Part A and the requirement for the decision-maker to check the box, this clarifies that the decision-maker understands the effect of the rule checks and the significance of the green lights. The fourth bullet point in Statement 3 in Part A confirms that the decision-maker is making their decision on this basis.

5. Statement 2 in Part A, combined with the requirement for the decision-maker to check the box, clearly records that the decision-maker understands they are not bound to issue garnishee orders merely because the indicators are green.

In my view, the revised Check Summary Report effectively implements my suggested changes and is likely to reduce the risks associated with Revenue NSW's process for issuing garnishee orders in light of counsel's concerns. However, these risks (and counsel's concerns) involve matters of degree, and so it is not possible to state definitively that Revenue NSW's processes are now perfect or immune from successful challenge.

Finally, as a stylistic matter, consideration may be given to redrafting the second sentence in the "Explanation" column of each rule check in Part B to reflect that Part B is contained within the particular Check Summary Report itself. For example, the sentence could be redrafted along the following lines: "A green light in the ~~Check Summary Report~~ "Success/Fail Traffic Light" column means that none of the fine defaulters the subject of ~~that~~ this report … ".

You may also wish to consider amending the second sentence in the "Explanation" column along the following lines: "… means that none of the fine defaulters the subject of this report ~~has~~ have …". I acknowledge that I am commenting on my own drafting, but after reading it again, the sentence may flow more naturally with this proposed amendment. For completeness, I note that these stylistic matters do not affect the substance of my advice.

Please feel free to contact me if you would like to discuss.

Regards
Nick

Nicholas Borger
Acting Principal Solicitor
for Crown Solicitor

Crown Solicitor's Office 60-70 Elizabeth Street, Sydney NSW 2000 | GPO Box 25 SYDNEY 2001 | DX 19 SYDNEY
w www.cso.nsw.gov.au

I acknowledge the traditional owners and custodians of country throughout NSW and their continuing connection to the land, culture and community. I pay my respects to Elders past, present and future.

From:
Sent: Tuesday, 22 March 2022 3:42 PM
To: CrownSol <CrownSol@cso.nsw.gov.au>
Cc:
Subject: Request for advice - Fines Act 1996 - garnishee orders

Sensitive | Legal

Dear [redacted]

Please see attached letter of instructions in the abovementioned matter.

Regards

| Director, Policy & Legislation| TAS | revenue.nsw.gov.au

APPENDIX F

Second Emmett Opinion

Legality of automated decision-making procedures

for the making of garnishee orders

Supplementary Joint Opinion

1. We are instructed by the NSW Ombudsman.

2. In October 2020, on instructions from the Crown Solicitor, we provided advice to the NSW Ombudsman in relation to the lawful issue of garnishee orders under the *Fines Act 1996* (**the Act**). Our advice was sought to assist the NSW Ombudsman to prepare a report on automated decision-making and was ultimately annexed to the NSW Ombudsman's special report in November 2021 to Parliament under s 31 of the *Ombudsman Act 1974*, titled "The new machinery of government: using machine technology in administrative decision-making".

3. The NSW Ombudsman now seeks our advice whether the NSW Court of Appeal's decision in *GR v Secretary, Department of Communities and Justice*[1] (***GR***) changes our view on the interpretation of s 71(1) of the Act as set out in our previous advice.

4. The answer is yes. *GR* provides an alternative way to understand the words "is to be taken" in s 71(1) of the Act, that is, that the provision is directory and does not compel the taking of civil enforcement action under Div. 4 of Pt 4 of the Act. While the issue is attended by real doubt, further consideration of the Act, its legislative history and the consequences of the competing interpretations means we prefer the view that "is to be taken" does not compel action under Div. 4 of Pt 4 of the Act, but rather requires consideration of the powers in that Division, each of which is stated to be discretionary.

5. We remain of the view, however, that s 71(1) of the Act is relevant to the extent of the Commissioner's discretion in exercising the Commissioner's power to make property seizure orders (s 72), garnishee orders (s 73) or charges on land (s 74). In particular, where s 71(1)(a) or (b) applies, even if there is no compulsion to take civil enforcement action,

[1] [2021] NSWCA 156.

there is a statutory expectation that at least one of the three civil enforcement actions will be taken. The discretion that arises under ss 72, 73 and 74 should be exercised in that statutory context. We make brief observations at the end of this advice about the consequences of this view in relation to permissible procedures. You have indicated you will seek advice in conference about these matters in further detail, following receipt of this advice, before considering whether to seek more specific advice about the current procedures.

Background

6. Our previous advice, with which this supplementary advice should be read, focused on the legal requirements for the Commissioner of Fines Administration (**the Commissioner**) to make garnishee orders pursuant to s 73 of the Act.

7. In Pt 4 of the Act (headed "Fine enforcement action"), Div. 4 (titled "Civil enforcement"), s 73(1) confers a discretionary power on the Commissioner to make garnishee orders ("may make an order"), with s 73(2) of the Act providing that "[t]he Commissioner may make a garnishee order only if satisfied that enforcement action is authorised against the fine defaulter under this Division".

8. In our previous advice, we considered that s 71(1), in Pt 4, Div. 4, was relevant to the extent of the Commissioner's discretion under s 73 of the Act: see our previous advice at [3](b), [32]-[33], [44], [51], [80], [81] and [85]. Section 71(1) of the Act provides that enforcement action "is to be taken" under Div. 4 if:

> … the fine defaulter has not paid the fine as required by the notice of the fine enforcement order served on the fine defaulter and—
>
> (a) enforcement action is not available under Division 3 to suspend or cancel the driver licence or vehicle registration of the fine defaulter, or
>
> (b) the fine remains unpaid 21 days after the Commissioner directed Roads and Maritime Services to take enforcement action under Division 3.

9. Section 71(2) of the Act states that "[e]nforcement action may be taken under this Division by means of a property seizure order, a garnishee order or a charge on land, or by all or any combination of those means."

10. Having identified the discretionary nature of the power in s 73(1) (see at [29]-[31]), at [32]-[33] of our previous advice we advised (original emphasis):

> The *scope*, however, of the Commissioner's discretion under s 73(1) of the *Fines Act* is not without some complexity. Given the provision's mandatory language, in cases falling within s 71(1) of the *Fines Act*, the Commissioner's discretion would appear to be limited to selecting whether a garnishee order is *the* civil enforcement action that should be imposed rather than a property seizure order or a charge on land or, given s 71(2), is *one of the* civil enforcement actions that should be imposed. See also s 58(1)(c) of the *Fines Act* (describing Div. 4 as the part of the procedure where "civil action *is taken* to enforce the fine" (emphasis added)).
>
> Sections 100 and 101 (see [24] above), and potentially s 78(b) of the *Fines Act*, would appear to provide the only bases for the Commissioner not to undertake any civil enforcement action in cases falling within s 71(1). Section 78(b) provides that enforcement action may be taken under Div. 5 (community service) if "civil enforcement action has not been *or is unlikely to be successful in satisfying the fine*" (emphasis added). While s 78(b) could be read as indicating that the Commissioner is not compelled to take civil enforcement action (being entitled to proceed directly to Div. 5 where action is unlikely to be successful), consistently with the chapeau of s 71(1), it can be read as allowing the Commissioner to proceed under Div. 5 where civil enforcement action has been taken but its outcome is not yet known and is likely to be unsuccessful.

11. Our previous advice, at [85], went on to describe civil enforcement action for fine defaulters falling within s 71(1)(a) or (b) of the Act as "effectively mandatory under the *Fines Act* (subject of course to the operation of ss 100 and 101)".

***GR v Secretary, Department of Communities and Justice* [2021] NSWCA 156**

12. The Court of Appeal's judgment in *GR*, delivered in July 2021, concerned the proper construction of s 98(2A) of the *Children and Young Persons (Care and Protection) Act 1998*, which, at the relevant time, provided that:

> If the Children's Court is of the opinion that a party to the proceedings is incapable of giving proper instructions to a legal representative, the Children's Court is to appoint a guardian ad litem for the person under section 100 or 101 (as the case may require).

13. Section 100 of the *Children and Young Persons (Care and Protection) Act* provided that the Children's Court may appoint a guardian ad litem for a child or young person if it is of the opinion that: (a) there are special circumstances that warrant the appointment; and (b) the child or young person will benefit from the appointment.[2] Section 101, which conferred a

[2] Section 100(2) of the *Children and Young Persons (Care and Protection) Act* identified certain circumstances as "special circumstances".

power to appoint a guardian ad litem for the parents of a child or young person, was not relevant in *GR*.

14. The question in *GR* was whether s 98(2A) *required* the Children's Court to appoint a guardian ad litem where it was of the opinion that a party to the proceedings was incapable of giving proper instructions or whether it only directed the Children's Court to consider appointing a guardian ad litem under s 100: see *GR* at [19].

15. The Court of Appeal, in a decision of Gleeson JA, with whom White JA and Emmett AJA agreed, held that s 98(2A) did not require the Children's Court to appoint a guardian ad litem and only directed the Children's Court to consider whether to appoint a guardian ad litem under s 100: see *GR* at [100](1). While recognizing that "the words 'is to appoint' in s 98(2A) read literally and in isolation, appear to be a command admitting of no discretion or exception", Gleeson JA identified that the words of s 98(2A) must be read as a whole: *GR* at [60]. His Honour explained at [61] that:

> When s 98(2A) is read as a whole, the obligation it imposes is not an obligation to appoint a guardian ad litem simpliciter, but an obligation to appoint a guardian ad litem "under" ss 100 or 101. The correct reading of s 98(2A) is that it directs the Children's Court to the relevant provision for the appointment of a guardian ad litem; in the case of a child or young person, the power is in s 100.

See also *GR* at [65] and [67].

16. Justice Gleeson observed that the words of s 100, which conditioned the appointment power on the Children's Courts on the opinion that there are special circumstances and that the child or young person will benefit from the appointment, would have "no work to do if the words 'is to appoint' in s 98(2A) are read in isolation and as a mandatory command" (*GR*, [63]).

Construction of s 71(1) of the Act

17. There appear to us to be two different ways that s 71(1) of the Act can be interpreted.

    a. Section 71(1) can be read, as we did in our previous advice, as mandating, subject to the exercise of any other applicable power in the Act (such as ss 100 and 101 of the Act), that the Commissioner to take civil enforcement action under Pt 4, Div. 4, if the fine defaulter falls within sub-paragraph (a) or (b) of s 71(1) (**the mandatory interpretation**).

b. Alternatively, s 71(1) can be read, like the provision in *GR,* as directory in nature, directing the Commissioner to consider the taking of civil enforcement action under the provisions of Pt 4, Div. 4 of the Act if the fine defaulter falls within sub-paragraph (a) or (b) of s 71(1) (**the directory interpretation**). As we explain below, even if s 71(1) is directory, its language may inform the exercise of any discretion, including by manifesting a statutory expectation that civil enforcement action will be taken if the fine defaulter falls within sub-paragraph (a) or (b) of s 71(1).

18. There are a number of aspects of the Act which support the directory interpretation of s 71(1) of the Act.

a. The directory interpretation reflects the discretionary nature of the civil enforcement powers in Pt 4, Div. 4 of the Act. Each of the Commissioner's civil enforcement powers are discretionary in nature, with the Act providing that the Commissioner "may": make a property seizure order (s 72(1)); a garnishee order (s 73(1)); and/or apply to the Registrar-General for a charge on any land owned by the fine defaulter (s 74(1)). Section 9 of the *Interpretation Act 1987* provides that, subject to any contrary intention, "the word 'may', if used to confer a power, indicates that the power may be exercised or not, at discretion". As identified at [30]-[31] of our previous advice, we do not consider that Pt 4, Div. 4 of the Act indicates any such contrary intention.

b. As explained in *Project Blue Sky Inc. v Australian Broadcasting Authority,*[3] "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'". Given the discretionary nature of each individual civil enforcement power, it does not seem that the Act can be coherently construed to be read as mandating that the Commissioner take *at least one* of those actions, notwithstanding that the Commissioner would not otherwise be minded to exercise the power. The absence of any specified timeframe in which the Commissioner is to take civil enforcement action further tells against a mandatory interpretation of s 71(1).

[3] (1998) 194 CLR 355 at [69] (McHugh, Gummow, Kirby and Hayne JJ).

c. A directory, rather than mandatory, interpretation is supported by the character of the civil enforcement powers. While it must be accepted that the premise of the Act is that the person is a fine defaulter, the issue of property seizure orders, garnishee orders or charges on land involve a significant intrusion on property (see [31] of our previous advice), which occurs without further notice to the person in question: see ss 71(1B), 72(3) and 73(3) of the Act. That intrusion may include persons who are in vulnerable circumstances. The Act clearly evinces an intention to intrude on property rights, so that the principle of legality may have limited work to do,[4] but we nevertheless think a court is likely to prefer an interpretation, if accepted as reasonably available, which preserves an element of discretion or evaluation before imposing a garnishee order, which may have serious consequences for an individual.[5]

d. The directory interpretation of s 71(1) accords with the various other provisions of the Act which make indicate that civil enforcement action under Div. 4 is *not* mandatory in all cases: see eg ss 78, 100 and 101 of the Act.

    i. Division 5 of the Act confers a discretionary power on the Commission to require a final defaulter to perform community service work in order to work off an outstanding fine if the fine defaulter has not paid the fine as required by the notice of the fine enforcement order served on the fine defaulter and civil enforcement action has not been or is unlikely to be successful in satisfying the fine: see ss 78 and 79 of the Act. In our previous opinion, at [33], we expressed the view that s 78(b) was confined to circumstances where civil enforcement action had been taken but its outcome was not yet known and likely to be unsuccessful. On further consideration, that reading is not supported by the Act and is inconsistent with the note to s 71 in Div. 4, which provides that "[i]f enforcement action under this Division has not been or is unlikely to be

[4] See, eg, *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [317] (Gageler and Keane JJ).

[5] Notwithstanding the observations of Gageler and Keane JJ in *Lee v NSW Crime Commission*, there is an unresolved issue about the extent to which the principle of legality may nevertheless be called in aid, as French CJ, Kiefel and Bell JJ indicated it could, to support a "construction, if one be reasonably open, which involves the least interference with [the liberty of the subject]": *Northern Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569 at [11].

successful in satisfying the fine, enforcement action can be taken against the fine defaulter under Division 5 (Community service orders)".

ii. Section 101(1A) provides that the Commissioner may, on the fine defaulter's application or at the Commissioner's own discretion, write off, in whole or in part, an unpaid fine in certain circumstances. The Commissioner may do so where the Commissioner is satisfied that, due to any or all of the financial, medical or personal circumstances of the fine defaulter, the fine defaulter does not have sufficient means to pay the fine and is not likely to have sufficient means to pay the fine, civil enforcement action has not been or is unlikely to be successful in satisfying the fine and the fine defaulter is not suitable to be subject to a community service order under Div. 5: s 101(1A)(a) of the Act. Separately, the Commissioner may write off a fine in accordance with guidelines issued by the Minister under s 120 of the Act: s 101(1A)(b) of the Act.

e. It is worthy of remark that s 101 expressly empowers the Commissioner to write off an unpaid fine at the Commissioner's "own discretion" whereas such language is absent from s 100 (which empowers the Commissioner to give time to pay or to allow the fine to be paid in instalments): contrast s 100(1) with s 101(1A) of the Act. We see scope for debate about whether the Commissioner has the power under s 100 of the Act on the Commissioner's own motion, or only upon application by a fine defaulter under s 100(1).[6] Whatever the position under s 100, it highlights that s 71 imposes no express time limit upon any mandatory requirement to take civil enforcement action. It must be a matter for the Commissioner, informed inter alia by matters such as resource allocation, to decide when to take enforcement action in respect of particular fine defaulters. There is a real artificiality in concluding that the Commissioner has an unconstrained discretion as to when any action is taken, but that s 71(1) is nevertheless mandatory.

19. These arguments, while strong, are not decisive. One significant indicator to the contrary is that, in many other provisions in the Act, the words "is to" or "is to be" are used in a

[6] Note also the reference to the Commissioner's "own initiative" in s 100(4A) and (4C) of the Act.

context where it is reasonably clear that it is mandatory: see, eg, ss 5(1)(b), 9(1), 9(3), 9(4), 11(4), 13, 15, 16(3) etc. Particular contrast may also be drawn between the introductory language of s 59(1), which introduces Div. 2 of Part 4 in terms including "is to" that appear intended to be mandatory, subject to the specific exception in s 59(2), and s 78, which introduces Div. 5 using "may" thereby clearly indicating the discretionary operation of Div. 5. A similar contrast exists for the introductory "is to be taken" language of ss 65(1) and 71(1) which introduce Divs. 3 and 4 of Pt 4 of the Act.

20. The Explanatory Note to the *Fines Bill 1996*, while equivocal, tends to support the directory interpretation. When the Act was first enacted, s 71(1) and (2) were in substantially the same terms as s 71(1) and (2) (see [8]-[9] above) and there was no equivalent to s 71(1A), which was only inserted into the Act by the *Fines Amendment Act 2017*. The Explanatory Note to the Bill explained that its "principal object" was to "introduce new procedures for the enforcement of fines". In explaining the main features of the procedures for enforcement, the Explanatory note set out a series of steps, including that "[i]f enforcement action cannot be taken by the Roads and Traffic Authority or it is unsuccessful, the State Debt Recovery Office will authorise civil enforcement of the fine (including the seizure of the fine defaulter's property by the Sheriff)". In explaining the procedure under Pt 4 of the Bill, the Explanatory Note for the Bill said:

> **Civil enforcement.** If the fine defaulter does not have a driver's licence or a registered vehicle or the fine remains unpaid after 6 months, civil action is taken to enforce the fine, namely, a property seizure order, a garnishee order or the registration of a charge on land owned by the fine defaulter.

21. Saliently, the Explanatory Note referred to the State Debt Recovery Office (who exercised the functions now exercised by the Commissioner) as "authoris[ing]" not "requir[ing]" civil enforcement. While the Explanatory Note went on to state that "civil action is taken", that needs to be read in context of the Act clearly contemplating exceptions (see [18.d] above) and is better understood as a description of what would occur in the ordinary course. Consistent with this, the "is taken" language simply reflects clause 58(1)(c) of the Bill, which is in the same terms as s 58(1)(c) (which is set out below at [27] below), and must be considered alongside s 58(2), which provides that s 58 does not affect the provisions that it summarises.

22. These considerations are finely balanced. If we were construing the Act as passed in 1996, we would prefer the view that s 71(1) is merely directory.

23. However, the Act in its current form must be construed as a whole, including amendments such as s 71(1A). At first blush, s 71(1A) appears to set up a contrast between s 71(1), which might then appear to be mandatory where it applies and s 71(1A), which is clearly discretionary.

24. It is not permissible to start by construing the Act prior the amendment and then ask whether the amendment discloses an intention to change any aspect of the provision. Rather, "the Act as amended and the amending Act must be read together as a combined statement of the will of the Legislature".[7] We appreciate that it might be regarded as a somewhat surprising outcome that an amendment, whose intention was to introduce a new discretionary power, might have the effect of turning s 71(1) of the Act into a mandatory obligation when it did not have that effect before – especially noting that the mandatory step purportedly required is significant intrusion on property rights. Nevertheless, we think the current appellate authority is clear on this point.

25. The focus must be on the current legislation, construed as a whole. However, it remains permissible to take into account legislative history in a different way. The contrast between s 71(1) and s 71(1A) does not expressly require that s 71(1) must be mandatory. Rather, the argument for s 71(1) being mandatory arises from the contrast between the different language used in the two subsections. There is a presumption that different words used within an Act have a different meaning, but this presumption has been described as "relatively weak".[8] As with its related presumption that the same words or the same phrase have the same meaning, it must yield to the requirements of the context.[9] Relevantly for the purpose of this advice, this presumption as to consistency of language has been described as having less force when dealing with provisions enacted at different times than in relation to provisions enacted together.[10]

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[7] *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2016] NSWCA 253 at [95] (Leeming JA, Basten JA and Meagher JA agreeing, citations omitted); see also *R v Seller* (2013) 273 FLR 155 at [100] (Bathurst CJ).

[8] *Taheri v Vitek* (2014) 87 NSWLR 403 at [124] (Leeming JA, Bathurst CJ agreeing).

[9] See *Zapari Property Coombs Pty Ltd v Commissioner for Australian Capital Territory Revenue* [2022] ACTSC 189 at [74] and [84 (Kennett J).

[10] *Zapari Property Coombs Pty Ltd v Commissioner for Australian Capital Territory Revenue* [2022] ACTSC 189 at [84 (Kennett J).

26. The presumption is even further weakened in the present case by the extrinsic materials to ss 71(1A) and (1B). We quoted an extract from the second reading speech at [27] of our previous advice. Those remarks serve to reinforce that the purpose of those subsections was to expand the Commissioner's discretion. This makes it even less persuasive that the new provisions should be construed as using different language in contradistinction to existing language, so as to indicate that s 71(1) is mandatory where it applies.

27. The difference in language in s 71(1) and (1A) of the Act is not the only indicium that could be said to support the mandatory interpretation of s 71(1). Other provisions of the Act can be said to contemplate that civil enforcement action *will* be taken against fine defaulters under Pt 4, Div. 4. We referred to some of those considerations at [19] above. The cascading enforcement procedure following the making of a fine enforcement order which is summarised in s 58(1) of the Act includes s 58(1)(c), which states "[i]f the fine defaulter does not have a driver licence or a registered vehicle or the fine remains unpaid 21 days after the Commissioner directs Transport for NSW to take enforcement action, civil action *is taken* to enforce the fine, namely, a property seizure order, a garnishee order or the registration of a charge on land owned by the fine defaulter" (emphasis added). However, as we observe above, this has much less force when considered alongside s 58(2).

28. Section 60(1)(c) of the Act requires that the notice of the fine enforcement order must inform the fine defaulter that, if the payment is not made by the final date specified in the order, "further enforcement action *will be taken* against the defaulter to enforce the fine in accordance with this Part and, in particular, that the defaulter will be liable without further notice to have any driver licence or vehicle registration suspended or cancelled or property seized and sold" (emphasis added).[11] While the provision of notice that action "will be taken" has real significance, it must be read consistently with the subsequent reference to the fine defaulter's *liability* to have their property seized. In any event, is clear that the Act contemplates that this will not occur in at least some circumstances (ie, where ss 78, 100 or 101 are engaged). That being the case, s 60(1)(c) cannot be understood as having blanket operation regardless. It is accordingly less significant as an indicator of whether s 71(1) should be read as mandatory or directory.

[11] See also s 58(1)(a) of the Act.

29. On balance, having regard to the matters set out above, and while recognising that the point is attended by real doubt, we prefer the directory interpretation even taking into account the contrast between s 71(1) and s 71(1A). We would add that we do not think this leaves the difference between "is to be taken" in s 71(1) and "may be taken" in s 71(1A) with no work to do. At the very least, s 71(1) is likely to be construed as mandating consideration of action under one or more of the provisions in Div. 4.

30. While we prefer the directory interpretation, we consider that s 71(1) and the direction that civil enforcement action "is to be taken" in the circumstances identified by s 71(a) and (b) is relevant to the extent of the Commissioner's discretion under ss 72, 73 and 74 of the Act. Section 71(1) may properly be read as establishing a statutory expectation that at least one of the civil enforcement actions "is to be taken" against a fine defaulter. This interpretation is consistent with the language used ("is to be taken" as opposed to "may be taken" or "is to" take – see [19] above). Reading s 71(1) as establishing a statutory expectation, rather as than imposing a duty on the Commission, allows the considerations supporting the mandatory interpretation to be reconciled with the considerations supporting the directory interpretation.

31. Accordingly, while on further consideration we do not consider that the Commissioner is compelled to take civil enforcement action under Pt 4 Div. 4, the directory interpretation does not alter the substance of our previous advice as to the legal requirements for the Commissioner to issue garnishee orders under s 73 of the Act. This means it would be permissible but not compulsory for the Commissioner (or their delegate) to decide that a garnishee order should be made if:

    a. s 71(1)(a) or (b) applies;

    b. the decision-maker has the state of satisfaction required by s 73(2);

    c. the decision-maker would not make a property seizure order or a charge on land; and

    d. the decision-maker concludes that the statutory expectation in s 71(1) should be given effect unless one of a number of limited grounds apply for adopting a different course.

32. For the reasons set out in our previous advice, this conclusion might properly be reached without reviewing the whole of each fine defaulter's file, but there is considerable scope for

debate about this. The extent of the doubt could be reduced by the Minister issuing guidelines under s 120 of the Act, provided such guidelines are consistent with the Act (including being made public in accordance with s 120(2)) and provided the decision-maker follows the guidelines.

33. We advise accordingly.

James Emmett SC **Myles Pulsford**

12 September 2022

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APPENDIX G

Third Emmett Opinion

Legality of automated decision-making procedures

for the making of garnishee orders

Supplementary Joint Opinion

1. We are instructed by the NSW Ombudsman.

2. In October 2020, on instructions from the Crown Solicitor, James Emmett SC and Myles Pulsford provided advice to the NSW Ombudsman in relation to the issue of garnishee orders under the *Fines Act 1996* (**the Act**) (**First Opinion**). The First Opinion was annexed to the NSW Ombudsman's special report to Parliament in November 2021 titled "The new machinery of government: using machine technology in administrative decision-making".

3. In September 2022, on instructions from the NSW Ombudsman, Mr. Emmett SC and Mr. Pulsford provided supplementary advice as to whether the NSW Court of Appeal's decision in *GR v Secretary, Department of Communities and Justice*[1] (***GR***) changed their interpretation of s 71(1) of the Act as set out in First Opinion (**Second Opinion**). The answer was yes.

4. In May 2021 and March 2022, Revenue NSW made changes to the process by which garnishee orders are issued under the Act.

5. Having regard to the Court of Appeal's decision in *GR* and to the matters addressed in the Second Opinion, the NSW Ombudsman now seeks our advice as to:

   a. whether changes made by Revenue NSW to the garnishee order process in May 2021 and March 2022 resolve concerns raised in paragraph 3(e) of the First Opinion; and

   b. whether the changes made to the garnishee order process in May 2021 and March 2022 bring the garnishee process into compliance with the Act.

6. In summary:

   a. The changes made to the Commissioner's process in May 2021 and March 2022 do not fully resolve counsels' concerns about the establishment of the subjective

[1] [2021] NSWCA 156.

jurisdictional fact or the manner in which the discretionary power is being exercised. (We observe, in fairness, that the concerns expressed in the Second Opinion post-date the most recent changes to the Commissioner's process with which we have been briefed.)

b. For that reason, the Commissioner's process does not presently comply with the Act.

Background

7. This supplementary advice deals with the process by which the Commissioner for Fines Administration (**Commissioner**) issues garnishee orders under Pt 4, Div. 4 of the Act.

8. Part 4, Division 4 of the Act governs civil enforcement action against "fine defaulters" including property seizure orders (see s 72), garnishee orders (see s 73) and the registration of charges on land (see s 74). Enforcement action may be taken by the Commissioner by one, all, or any combination of those means: s 71(2) of the Act.

9. We are instructed with a document titled "Supplementary Statement of Facts – Revenue NSW System for Issuing Garnishee Orders" (**SSOF**) which we understand was prepared by the NSW Ombudsman with input from Revenue NSW. Attached to the SSOF are the facts provided to counsel for the purpose of the First Opinion, along with documents that illustrate and describe changes made in May 2021 and in March 2022 to the Commissioner's process for issuing garnishee orders.

10. We understand that at various times through the period 2020 to 2022, Revenue NSW suspended issuing garnishee orders due to the COVID-19 pandemic. For the purpose of this supplementary advice, we assume that the SSOF and its annexures accurately represent the process of the Commissioner to issue garnishee orders between June and August 2021 (the **Revised Process**) and since May 2022 (the **Current Process**).

11. Under s 113 of the Act, the head of Revenue NSW (being the NSW government agency responsible for recovering fines and debts) holds the role of the Commissioner. For the purpose of this advice, we assume that the Revenue NSW officers who issue garnishee orders are properly authorised or delegated to exercise the Commissioner's functions in accordance with ss 116A and 116B of the Act: see the First Opinion at [35]-[40].

The First Opinion

12. The First Opinion, with which this supplementary advice should be read, focused on the legal requirements for the Commissioner to make garnishee orders pursuant to s 73 of the Act. The legislative framework is set out in detail in the First Opinion: at [13]-[24].

13. Section 73(1) in Pt 4, Div. 4 of the Act confers a discretionary power on the Commissioner to make garnishee orders. That power is subject to the requirement of s 73(2) of the Act that the Commissioner "may make a garnishee order only if satisfied that the enforcement action is authorised against the fine defaulter." The scope of the Commissioner's discretion is governed by the operation of s 71(1) of the Act which was the subject of the Second Opinion and is discussed in more detail below.

14. The First Opinion expressed the view that the Commissioner's processes for the issuing of garnishee orders departed from the requirements of the Act in a number of ways. Relevantly, for the purpose of this advice, the First Opinion concluded that:

    a. The Commissioner's satisfaction that enforcement action is authorised under Pt 4 Div. 4 of the Act for the purpose of s 73(2) is a subjective jurisdictional fact for the exercise of the Commissioner's power to make a garnishee order.

    b. Section 73(1) of the Act confers a discretionary power on the Commissioner. That power must be exercised by the Commissioner or *a person* authorised or delegated that function in accordance with the subject matter, scope and purpose of the Act.

    c. To the extent that an individual person was not involved in the making of garnishee orders prior to March 2019, the Commissioner's process was not lawful because the requisite discretion was not exercised by the repository of the power, and garnishee orders were not issued following satisfaction of the subjective jurisdictional fact.

    d. While the interposition of an individual in the process for making garnishee orders meant the order was made by the repository of the power, that change did not address concerns about the establishment of the subjective jurisdictional facts in s 73(2), or the manner in which the discretionary power is exercised under s 73(1) of the Act.

15. The conclusion summarised in paragraph 14(d) above is the focus of our instructor's questions. In short, the question is whether the Revised Process and/or the Current

Process involves a process of reasoning for the exercise of the discretion under s 73 of the Act: see the First Opinion at [72]-[85].

The Second Opinion

16. The Second Opinion, with which the First Opinion and this supplementary advice should be read, focused on the NSW Court of Appeal's decision in *GR* and how that decision affected the construction of s 71(1) in Pt 4, Div. 4 of the Act.

17. Section 71(1) of the Act provides that:

> Enforcement action is to be taken against a fine defaulter under this Division if the fine defaulter has not paid the fine as required by the notice of the fine enforcement order served on the fine defaulter and—
>
> a) enforcement action is not available under Division 3, or
>
> b) the fine remains unpaid 21 days after the Commissioner directed Transport for NSW to take enforcement action under Division 3.

18. The First Opinion expressed the view that s 71(1) of the Act is relevant to the scope of the Commissioner's discretion under s 73 of the Act: see the First Opinion at [3](b), [32]-[33], [44], [51], [80], [81] and [85]. Counsel opined that, in cases falling within s 71(1) of the Act, civil enforcement action was "effectively mandatory" in the sense that the Commissioner's discretion appeared to be limited to selecting whether a garnishee order is *the* civil enforcement action that should be imposed rather than a property seizure order or a charge on land.

19. Following consideration of the reasons in *GR*, counsel formed the view that the words "is to be taken" in s 71(1) of the Act do not compel the Commission to take enforcement action under Pt 4 Div. 4 of the Act. Instead, those words require consideration of the powers in that Division, each of which is stated to be discretionary. Accordingly, the Second Opinion preferred what was described as a "directory interpretation" of the provision over a "mandatory interpretation": see at the Second Opinion at [4]-[5], [17]-[29].

20. Although counsel took the view in the Second Opinion that s 71(1) did not mandate civil enforcement action, the Second Opinion identified a statutory expectation that at least one of three civil enforcement actions will be taken: property seizure orders, garnishee orders, or charges on land. The discretionary power conferred by s 73 of the Act should be exercised in that statutory context. Further, the interpretation preferred by counsel in the

Second Opinion does not alter the legal requirements for the Commissioner to issue garnishee orders under s 73 of the Act: as to which see the First Opinion at [26]-[70].

21. Accordingly, the starting point for our supplementary advice is that it would be permissible *but not compulsory* for the Commissioner, their delegate or an authorised person to decide that a garnishee order should be made if:

    a. section 71(1)(a) or (b) applies.

    b. the decision-maker has the state of satisfaction required by s 73(2) (i.e., the subjective jurisdictional fact);

    c. the decision-maker would not otherwise make a property seizure order or a charge on the land; and

    d. the decision-maker concludes that the statutory expectation in s 71(1) of the Act should be given effect unless one of a number of limited grounds apply for adopting a different course.[2]

Changes to the process of the issue of garnishee orders

22. Since counsel provided the First Opinion, Revenue NSW has made changes to the process used by the Commissioner to issue garnishee orders. The Current Process encompasses changes made in May 2021 and further changes made by Revenue NSW in March 2022.

23. We are instructed that there have been no substantial changes to the fundamental structure of the Commissioner's automated process for issuing garnishee orders described in the First Opinion at [5]-[11]: SSOF at [2]. That is, Revenue NSW uses two core information technology applications to assess fine defaulters for all potentially applicable enforcement actions, allocate the fine defaulter to a garnishee order, and produce a Garnishee Order Check Summary Report (**Check Summary Report**) which is to be used by a designated Revenue NSW staff member to authorise the issuing of a garnishee order.

24. While that fundamental process is unchanged, Revenue NSW has made material changes to the Check Summary Reports, including the inclusionary and exclusionary rules for

[2] Pursuant to ss 100 and 101 of the Act, the Commission may allow a fine defaulter further time to pay the fine by instalments and may also write off, in whole or in part, the unpaid fine in the circumstances specified in s 101(1A) having regard to the fine defaulter's financial, medical or personal circumstances.

allocating a fine defaulter to a garnishee order: SSOF at [4], [7]-[17] and Attachment B. Those changes (described in paragraphs 26-37) are the focus of this supplementary advice.

25. There have been two other changes to the process since October 2020 which do not change the advice given in the First Opinion and the Second Opinion. *First*, the "minimum protected amount" which must be left in any bank account subject to a garnishee order has increased by around $30 (see First Opinion at [9]; SSOF at [3(i)]). *Second*, Revenue NSW has expanded the list of variables included in the machine learning model used to classify a fine defaulter as a "vulnerable person" (see First Opinion at [10]; SSOF at [3(ii)]).

The Check Summary Report

26. The Check Summary Report is a single consolidated report of all fine defaulters selected for a garnishee order from the automated process. It uses a traffic light system in respect of inclusionary and exclusionary criteria ("rule checks") applied by the automated system to select a garnishee order as the enforcement action. Prior to May 2021, if the traffic lights were green, a Revenue NSW officer would approve the garnishee order; a red traffic light resulted in the removal and review of the fine defaulter's file: see First Opinion at [11]-[12].

27. The description of the Commissioner's process prepared by Revenue NSW in connection with changes made to the process in May 2021 (Attachment C) states that the Check Summary Report only allocates garnishee orders in respect of fine defaulters who fall within s 71(1)(a) or (b) of the Act. As noted in the First Opinion (at [79]), it is not apparent on the material available to us how the automated system is calibrated to ensure that the Check Summary Report only includes fine defaulters who fall within s 71(1) of the Act, but it appears that the Check Summary Report only deals fine defaulters within s 71(1)(b) of the Act. For the purpose of this advice, we assume that is the case.

28. Accordingly, the effect of the automated process is to filter out fine defaulters who may fall within s 71(1A) of the Act, and also people who have applied for more time to pay a fine (s 100) or to have a fine written off (s 101), or in respect of whom other enforcement action may be more suitable: see SSOF, Attachment C at p1. Notably, there does not appear to be any mechanism by which the automated process can identify and filter out those fine defaulter who had not made an application under ss 100 or 101 of the Act, or had no other record of a hardship write-off within the previous 12 months, but whose personal circumstances may nevertheless be a relevant factor in deciding whether a write-off, other enforcement action, or no enforcement action is a more appropriate response.

29. On that basis, we understand that the Check Summary Report used under the Revised Process was designed by Revenue NSW to satisfy the decision-maker that:

a. fine defaulters against whom a garnishee order is proposed are persons in respect of whom enforcement action is authorised under s 71(1) of the Act; and

b. as a result of the filtering process, there is no reason not to proceed with a garnishee order which, as a matter of Revenue NSW policy, is the preferred civil enforcement action for fine defaulters against whom enforcement action is authorised under Pt 4, Div.4 of the Act: see SSOF, Attachment C at p1.

The Revised Process: changes to the Check Summary Report in May 2021

30. We are instructed with a copy of the May 2021 version of the Check Summary Report along with an explanation prepared by Revenue NSW of changes made to the Check Summary Report in May 2021: see SSOF, Attachment B and Attachment C.

31. In May 2021, Revenue NSW changed the Check Summary Report so that it expressly stated *first,* that all fine defaulters included in the report fall within s 71(1)(a) or (b) of the Act, and *second,* that "the officer authorising this report confirms the condition precedent to making a garnishee order under s 73(1) of the Fine Act has been met." We have already addressed the limitations of that first statement in paragraph 27 above.

32. As to the second statement, there is nothing on the face of the May 2021 Check Summary Report which explains what is meant by the "condition precedent". The explanation provided by Revenue NSW (in Attachment C) appears to intend that the officer authorising the Check Summary Report will confirm the subjective jurisdictional fact that they are authorised to take enforcement action under Pt 4, Div. 4 of the Act, that is, the condition precedent under s 73(2) of the Act. On the materials available to us, it is not clear whether that requirement to confirm the subjective jurisdictional fact is clear to staff members of Revenue NSW and/or clear from the Commissioner's process itself.

33. In addition, the Revised Process introduced five new traffic light rule checks on the Check Summary Report. The new traffic lights indicate to the decision-maker if

i. a property seizure order is preferred (**PSO Indicator**),

ii. a charge on land is preferred (**CoL Indicator**),

or if there is a basis for the Commissioner not to take enforcement action because

iii. a payment plan application is pending,

iv. a work development order (**WDO**) application is pending, or

v. there is a basis to consider writing off the fine.

34. We are instructed that under the Revised Process (in effect between June and August 2021):

a. the PSO Indicator would be green if sheriff information from the previous six months does not identify a likelihood of a successful property seizure order (on the information available to us we do not know if the PSO Indicator takes account of any other information about the fine defaulter);

b. the CoL Indicator would be green if no payment had been received after the Commissioner registered a charge on land in respect of the same fine defaulter in the previous six months;

c. if the PSO or the CoL Indicators were red, the NSW Revenue officer would not issue a garnishee order and would investigate whether the applicable enforcement actions under ss 72 or 74 of the Act were preferrable; and

d. red lights in respect of a payment plan application, a WDO application, or a potential write-off (that is, where the fine defaulter had made an application under ss 100 or 101 of the Act, or there was Revenue NSW record of a write-off for hardship within the previous 12 months) would prompt the officer to investigate if there was a more appropriate resolution of the debt under ss 99B, 100 or 101 of the Act: see SSFO, Attachment C.

35. From our review of the 2021 Check Summary Report and the explanation provided by Revenue NSW, it appears that if all the traffic lights were green, a staff member from Revenue NSW would authorise the issue of a garnishee order under s 73 of the Act. It appears that this step would involve a NSW Revenue officer giving conclusive effect to the green lights in the Check Summary Report (although that is not stated expressly). It does not appear that the Revised Process involves any staff member with appropriate authority or delegation making their own decision, using "decision" in the sense described in the

First Opinion at [82], that is, "reaching a conclusion on a matter as a result of a mental process having been engaged in".

The Current Process: changes to the Check Summary Report in March 2022

36. We are instructed with the March 2022 Check Summary Report and a description of the Current Process prepared by our instructors: see SSOF at [12]-[17] and Attachment D.

37. The Check Summary Report is now divided into two parts:

    a. Part A contains a set of statements about the decision to issue a garnishee order under s 73 of the Act (**Decision Statements**). The Decision Statements are set out in full in the SSOF at [15]. Before the decision-maker may authorise a garnishee order, they must adopt the Decision Statements by ticking a box alongside the words "By ticking this box I confirm the three statements to the right". When the box is ticked, the background of Part A changes from red to green.

    b. Part B sets out all of the exclusionary and inclusionary rule checks applied by the automated system together with green/red traffic light indicators and an explanation of what a green traffic light means for each rule check.

Validity of the Commissioner's process for the issue of garnishee orders

38. The NSW Ombudsman seeks our advice in respect two questions which are directed to the validity of the Commissioner's process for the issue of garnishee orders (see at [5.a] and [5.b] of this advice).

    a. *First*, whether the Revised Process and/or the Current Process establish a proper basis on which a decision-maker can form the state of satisfaction required by s 73(2) of the Act and undertake the requisite "process of reasoning" to exercise the discretion under s 73 of the Act: see the First Opinion at [75]-[85].

    b. *Second*, whether changes to the Check Statement Report otherwise bring the Commissioner's process in compliance with the Act.

39. As said in the First Opinion (at [81]), for there to be a lawful exercise of the statutory discretion, the decision-maker is required to consider the relevant factors and decide *for themselves* whether to make the garnishee order. Accordingly, the relevant question, and the question we are asked, is not whether the Summary Check Sheet records a proper basis on

which a decision to issue a garnishee order was made, but whether the Commissioner's process facilitates the standard of decision-making required by s 73 of the Act.

40. The requirements for the lawful issue of a garnishee order are set out in detail in the First Opinion at [26]-[70]. Those requirements are not affected by the NSW Court of Appeal's decision in *GR*. However, the non-compliance concerns raised in the First Opinion are modified by counsel's construction of the Act following the Court's decision in *GR*.

41. In the First Opinion, counsel identified that the decision to issue a garnishee order may be invalid if the decision-maker failed to undertake the necessary process of reasoning for the exercise of the discretion: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***) at [23]. This concern was more acute with respect to fine defaulters falling within s 71(1A) of the Act "in respect of which the Commissioner has a *true discretion*" than with for fine defaulters falling within s 71(1) of the Act "in respect of whom civil enforcement action is *effectively mandatory*": see First Opinion at [85] (emphasis added).

42. Following *GR*, we consider that the directory interpretation of s 71(1) heightens the risk of non-compliance in respect of fine defaulters falling within ss 71(1)(a) or (b) of the Act. That is because the decision-maker must undertake a process of reasoning to reach the state of satisfaction required by s 73(2) of the Act *and* must engage in a mental process to conclude that the statutory expectation in s 71(1) of the Act should be given effect.

43. Accordingly, we assess the validity of the Revised Process and of the Current Process from the starting point set out in paragraph 21 of this supplementary advice.

Validity of the Revised Process

44. The May 2021 changes to Summary Check Form provide a stronger, if imperfect basis, for the Commissioner, their delegate or an authorised person to be satisfied that the enforcement action is authorised under Pt 4, Div. 4 of the Act. That is because the Summary Check Form expressly states that all customers in the report fall within s 71(1) of the Act. Assuming the decision-maker read that statement, and could rely on its accuracy, they may have a basis for reaching the requisite state of satisfaction required by s 73(2) of the Act. We observe, parenthetically, that it would appear from amendments to the Commissioner's process in March 2023 that all customers in the report fall within s 71(1)(b) *and not* s 71(1)(a) of the Act, see paragraph 27 above, although we do not think anything turns on this.

45. That said, we do not think that statement clearly demonstrates that the decision-maker has determined the subjective jurisdictional fact as a precondition to the exercise of the discretionary power under s 73(1) of the Act. This problem is not cured by the subsequent statement that the officer authorising the report confirms the condition precedent has been met. There appears to be no requirement that the decision-maker actually turn their mind to whether enforcement action is authorised under Pt 4, Div. 4 of the Act, and there is no explanation in the terms of the Summary Check Report as to what is meant by "the condition precedent to making a garnishee order under s 73(1) of the Fines Act".

46. As said in the First Opinion (at [80]), a decision-maker might, when dealing with a fine defaulter falling within s 71(1) of the Act, properly follow a course of reasoning that means they do not need to review each file *provided* they have properly considered the nature of the information that they are disregarding and formed the view, on a reasonable basis, that such information would not alter their decision. But it appears to us from the terms of the Revised Process that it does not either require or evidence that the decision-maker would do any more than rely on the green lights in the Check Summary Report and give effect to the output of an automated process.

47. Notwithstanding the addition of five new traffic lights, the Revised Process does not resolve the concern that the issuing of garnishee orders may be affected by invalidity to the extent that the decision-maker does not properly consider the relevant factors (as to which see the First Opinion at [43]-[47]) before deciding to exercise the discretion conferred by s 73 of the Act to impose a garnishee order. As we indicated in the Second Opinion, such an opinion may be informed by what Mr Emmett and Mr Pulsford described as a statutory expectation in s 71(1), and a decision to give effect to that expectation in relation to the cases being considered, based on the information the decision-maker has decided to take into account.

48. We do not consider that the Revised Process requires the decision-maker to consider whether to give effect to the statutory expectation in s 71(1) of the Act. Nor do the terms of the May 2021 Summary Check Form allow the decision-maker to record or reflect any such process of reasoning.

49. Accordingly, we do not consider that the Revised Process brings the Commissioner's process for issuing garnishee orders into compliance with the Act.

Validity of the Current Process

50. The Current Process was implemented in March 2022 in direct response to concerns raised in the First Opinion. The changes were made and given effect prior to the Second Opinion which modified counsel's construction of s 71(1) of the Act.

51. Part A of the March 2022 Summary Check Form requires the decision-maker to confirm that they have reached the state of satisfaction required by s 73(2) of the Act, and ostensibly deals with the process of reasoning for the exercise of the discretion conferred by s 73(1) of the Act. The rule checks and traffic lights in Part B provides the basis on which the decision-maker apparently justifies their decision to authorise a garnishee order pursuant to s 73 of the Act, and in accordance with the legislative requirements.

52. To the extent that the Summary Check Report is designed to record that the decision-maker has a proper basis to issue a garnishee order, we think that the Revised Process achieves that objective. However, it is not clear on the face of material available to us that the Revised Process fully resolves the concerns raised by counsel in the First Opinion and having regard to the statutory expectation describe in the Second Option

53. As said in the First Opinion at [83], we do not think that a statutory discretion can be lawfully exercised by giving conclusive effect to the output of an information technology application. In that respect, we do not consider that the traffic lights in the Check Summary Report – being the output of an automated process – is analogous to a summary of relevant facts or recommendations prepared by a person assisting a decision-maker and which may be lawfully relied upon by the decision-maker in the exercise of a discretionary statutory power: see, eg, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) CLR 24.

54. If NSW Revenue officers merely give conclusive effect to the traffic lights, that is not a lawful exercise of the discretion conferred by s 73 of the Act. And we do not think that unlawfulness is altered if the automated output is broken down into component parts being *first*, considerations raised in the Check Summary Report and *second*, the decision-maker issuing a garnishee order (because the traffic lights were green) without engaging in a mental process to justify that conclusion.

55. The requirements of Part A of the Summary Check Form go some way to requiring the decision-maker to consider the relevant factors and decide (in the sense of making their own judgment as to) whether to make a garnishee order. If the Decision Statements

accurately described the decision-maker's understanding and mental process, that provides a basis to conclude that the decision-maker had the state of satisfaction required by s 73(2) of the Act, had determined that they would not make a property seizure order or a charge on the land under ss 72 or 74 of the Act, and had concluded that the statutory expectations in s 71(1) of the Act should be given effect.

56. However, each of the Decision Statements which form the basis for a garnishee order will depend on automated outputs, that is, the presence of green traffic lights in Part B of the Summary Check Form. There is nothing in the Current Process which would indicate that the decision-maker:

a. understands the process (including the limited input information);

b. understands their obligation to consider the relevant factors and make their own decision about whether it is appropriate to issue the garnishee order, to take other enforcement action, or to take no enforcement action; and

c. has determined that they have sufficient information to make the decision without reviewing each fine defaulter's file or obtaining information from some other source.

57. Accordingly, the unlawfulness does not appear to be cured by adding a third step to the process i.e., requiring the decision-maker to confirm they are not bound by, but nonetheless have relied on, green traffic lights in the Summary Check Form.

58. We also observe that the current language of the second Decision Statement adopts a mandatory interpretation of s 71(1) of the Act in that it limits the decision-maker's discretion to considering other enforcement options (whether by property seizure or charge on the land) instead of, or in addition to the garnishee order. This mandatory interpretation is not supported by the view of counsel in the Second Opinion.

59. As we have said above, our concern that the Current Process is not compliant with the Act is more acute when the decision-maker must also engage in a process of reasoning to conclude that the statutory expectation in s 71(1) should be given effect. The March 2022 Summary Check Form does not caution the decision-maker that it is *not compulsory* to take enforcement action where s 71(1)(a) or (b) applies and that the decision-maker should make their own decision about whether it is appropriate for the garnishee order to be made in relation to all cases in which the traffic lights are green. There is nothing in the Decision Statements to reflect that the decision-makers has turned their mind to that issue.

60. Although we consider that a decision-maker might properly issue a garnishee order without first reviewing each fine defaulters file (see the First Opinion at [80]-[81] and the Second Opinion at [32]), we do not think that the Current Process evidences the process of reasoning required for the exercise of the discretion in s 73(2) of the Act.

61. Accordingly, we consider that the Current Process is not in compliance with the Act.

62. We advise accordingly.

[redacted] [redacted]

James Emmett SC **Erin O'Connor Jardine**

19 May 2023

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APPENDIX H

Solicitor General Opinion

NEW SOUTH WALES
SOLICITOR GENERAL

QUESTION OF LAWFULNESS OF GARNISHEE ORDER SYSTEM EMPLOYED UNDER FINES ACT 1996

JOINT ADVICE

1. We have been asked by the Crown Solicitor, who acts for Revenue NSW, to advise on the following questions:

   Question 1: Are decisions to issue garnishee orders, made in accordance with the current version of the decision-making process described in our brief, made in conformity with Div 4 of Pt 4 of the Fines Act 1996 (NSW)?

   Question 2: With respect to an amount in any account which is a "saved amount" under s 62 of the Social Security (Administration) Act 1999 (Cth) or s 67 of the A New Tax System (Family Assistance) (Administration) Act 1999 (Cth):

   (i) Can Revenue NSW lawfully issue a garnishee order which would have the effect of purporting to require a financial institution to pay to Revenue NSW a "saved amount"?

(ii) If not, can Revenue NSW lawfully issue a garnishee order which includes an express statement to the effect that the order does not attach the debt due to Revenue NSW to any "saved amount"?

2. In summary, in our view:

In relation to Question 1, the current decision-making process as set out in our brief is consistent with the Fines Act 1996. As to the particular issues we have been asked to consider:

(a) s 71 imposes an obligation to take enforcement action under Div 4 of Pt 4 of the Fines Act, assuming the relevant statutory preconditions for the action have been satisfied, unless the power under ss 79, 99B, 100 or 101 is exercised;

(b) the Check Summary Report invites the Commissioner/delegate to consider all the matters which the decision-maker is required by the statute to consider: namely, the required state of satisfaction under s 73(2), and any pending applications that have been made under ss 99B, 100 or 101 (subject to the Check Summary Report being amended to exclude cases where there is a pending application under s 101, as we have recommended below);

(c) it is open to the Commissioner to adopt a policy that the making of a garnishee order will ordinarily be appropriate in identified circumstances, provided the policy incorporates the mandatory considerations and is otherwise consistent with the scheme of the Act;

(d) it is open to the Commissioner to proceed by reference to a summary of the facts, as reflected in the Check Summary Report, even though that summary has been prepared by an automated system;

(e) it is permissible for the state of satisfaction under s 73(2) to be reached in respect of multiple fine defaulters in a single process, and in principle there is no limit on the number of fine defaulters that may be considered in one process provided their circumstances are relevantly the same (which they should be, as a result of the automated filtering system).

While we say the current process is consistent with the Fines Act, that does not mean that every decision will *necessarily* be valid. It is of course possible that, in a particular case, there may be other reasons for the decision being an invalid one: for example, if it could be shown that the decision-maker did not read or understand the Check Summary Report before he or she completed it.

In relation to Question 2, Revenue NSW cannot lawfully issue a garnishee order that purports to require a financial institution to pay to Revenue NSW a "saved amount" as defined in s 62 of the Social Security (Administration) Act 1999 (Cth) or s 67 of the A New Tax System (Family Assistance) (Administration) Act 1999 (Cth). While a garnishee order in those terms would likely be read down under s 32 of the Interpretation Act 1987, so as to apply to money other than "saved amounts", the preferable course would be for garnishee orders expressly to state that they do not apply to "saved amounts" as defined.

Background

3. The Fines Act establishes a scheme for the notification and enforcement of fines in respect of a range of offences. The details of the scheme are set out in more detail below. In summary, it provides for the issuing of fines by courts as well as the issuing of fines by authorised officers by way of penalty notices. In the latter case, the Act makes provision for internal review, the issuing of penalty reminder notices, and the issuing of penalty notice enforcement orders. Where fines are not paid, they may be enforced under Part 4. Part 4 provides for the issuing of fine enforcement orders (Div 2), enforcement by action taken on a person's drivers licence or registration (Div 3) and civil enforcement including by way of garnishee orders, property seizure orders and charges on land (Div 4).

4. We are instructed that Revenue NSW has adopted a partly automated system for the making of garnishee orders under s 73 of the Fines Act, which is set out in detail in a document entitled Supplementary Statement of Facts – Revenue NSW System for Issuing Garnishee Orders (**SSOF**). Annexure D to that document is a "Check Summary Report", which represents the information that is currently put before the Commissioner or delegate when making a decision whether to issue a garnishee order. This document has been used since May 2022. It is the process adopted since May 2022 on which we are asked to advise.

5. In summary, without repeating the detail of the SSOF, the current process for issuing garnishee orders involves the following:

(a) an automated system identifies unpaid fines which fall within s 71(1)(b) of the Fines Act and fall within Revenue NSW's policy for the taking of enforcement action under Div 4 of Pt 4. That policy involves the exclusion of certain categories of cases (for example, those who have sufficient indicators of vulnerability);

(b) the automated system pools and prioritises a number of such unpaid fines and produces a single "Check Summary Report" in the form of Annexure D to the SSOF dealing with a bulk set of fines (which may include some thousands of fines);

(c) Part B of the Check Summary Report lists various "exclusions" and "inclusions" and indicates whether they have been satisfied by way of a green or red traffic light. For example, item 1 "Identified Overpayments" states that fine defaulters in respect of whom an outstanding overpayment is recorded against any fine are to be excluded from a garnishee order issue because the payment may be credited against the fine defaulter's outstanding balance. It states that a green light in the "success/fail traffic light" column means that none of the fine defaulters the subject of the report has an outstanding overpayment recorded against any fine. There is then a separate "success/fail traffic light" column which will generally show a green traffic light (because the automated system should only select cases which meet the criteria);

(d) Part A of the Check Summary Report requires the delegate to tick a box to confirm statements to the following effect:

(i) that they have read the report and understand that the report (by way of green traffic lights) indicates that it is open to the delegate to issue garnishee orders in respect of the fine defaulters listed in the report and that issuing a garnishee order is the recommended enforcement action;

(ii) that they understand they are not bound to follow the green traffic lights and issue garnishee orders in respect of the fine defaulters and that the delegate may consider other enforcement action (by means of property seizure orders or a charge on land) instead of or in addition to the garnishee order;

(iii) that they approve the issuing of the garnishee order in respect of each fine defaulter on the basis that they are satisfied that the enforcement action is authorised under Pt 4 Div 4 because each of the fine defaulters falls within s 71(1)(b); that each fine defaulter has been assessed as eligible for a garnishee order against criteria reflecting legislative requirements and business rules using information contained in Revenue NSW's file, which criteria are summarised in Part B; and that there is no information in the Check Summary Report to suggest that a garnishee order cannot or should not be made in respect of each fine defaulter listed in the report;

(e) if any fine captured by the Check Summary Report gives rise to a red traffic light, the particular fine giving rise to the red traffic light may be excluded from the Check Summary Report and separately reviewed;

(f) in any other case, garnishee orders may be made by the delegate reviewing the Check Summary Report and ticking the box in Part A.

6. The application of various iterations of the system described above has been the subject of investigation by the NSW Ombudsman, in the context of the preparation by the NSW Ombudsman of reports into automated decision-making.

7. In the context of that investigation, three opinions were prepared by Counsel and provided to the NSW Ombudsman and shared with Revenue NSW on the legality of the various iterations of the automated system. These are:

   (a) an opinion of James Emmett SC and Myles Pulsford, 29 October 2020 (**First Opinion**);

   (b) a supplementary opinion of James Emmett SC and Myles Pulsford, 12 September 2022 (**Second Opinion**); and

   (c) an opinion of James Emmett SC and Erin O'Connor Jardine, 19 May 2023 (**Third Opinion**).

8. Only the Third Opinion addressed the lawfulness of the current process: see at [50]-[61].

Question 1: are decisions to issue garnishee orders, made in accordance with the current version of the decision-making process, in conformity with Pt 4 Div 4 of the Act?

9. In summary, in our view the current process for issuing garnishee orders is consistent with Pt 4 Div 4 of the Fines Act. There is one exception to this: as explained at [45] below, we suggest that the Check Summary Report be amended to make it clear that it excludes cases where an application under s 101 of the Fines Act is pending.

10. Of course, we cannot exclude the possibility that there might be circumstances in a particular case that would give rise to the invalidity of a garnishee order. For example, that might occur if it could be proven that the decision-maker did not read or understand the Check Summary Report. It might also occur if there was information on file about a fine defaulter's circumstances which was required to be considered as a matter of procedural fairness or which might in some way give rise to the decision being legally unreasonable. We address those circumstances further below. The result is that, while we consider the current process is consistent with the Fines Act, that does not mean every decision made in accordance with that process will *necessarily* be a valid one.

11. In answering Question 1, we have been asked to address a series of issues set out below.

Is the Commissioner of Fines Administration required to take enforcement action under Pt 4 Div 4 in cases falling within the terms of s 71(1)?

12. Section 71(1) of the Fines Act provides that enforcement action "is to be taken" against a fine defaulter under Pt 4 Div 4 if the fine defaulter has not paid the fine as required by the notice of the fine enforcement order served on the fine defaulter and either enforcement action is not available under Div 3 (s 71(1)(a)) or the fine remains unpaid 21 days after the Commissioner directed Transport for NSW to take enforcement action under Div 3 (s 71(1)(b)). As noted above, the Check Summary Report is designed to capture fines falling within s 71(1)(b). Enforcement action under Div 4 includes property seizure orders (s 72), garnishee orders (s 73), and charges on land (s 74).

13. We have been asked whether the Commissioner is required to take enforcement action under Div 4 for cases falling within s 71(1)(b). More specifically, the question is whether, assuming the statutory requirements for the exercise of the relevant powers in Div 4 have been satisfied, the Commissioner or delegate is obliged to take enforcement action under

Div 4, or whether they have a discretion to decide not to take any enforcement action in respect of the unpaid fine. We will refer to this as a "residual discretion".

14. The Second Opinion noted that s 71 could be classified either as "mandatory" or "directory":

(a) "mandatory" meaning that the Commissioner is required to take enforcement action under Div 4 in respect of any fine defaulter who falls within s 71(1)(a) or (b), subject only to the exercise of other applicable powers under the Act (such as ss 100 or 101);

(b) "directory" meaning that the Commissioner is only required to consider taking civil enforcement action under Div 4 if s 71(1)(a) or (b) is enlivened.

15. The Second Opinion preferred the latter interpretation, but concluded there was nevertheless a "statutory expectation" that civil enforcement action under Div 4 would be taken if s 71(1)(a) or (b) were satisfied. It was noted that the factors for and against that conclusion were finely balanced. We agree that there are reasonable arguments both ways, but for the reasons set out below we prefer the view that the Commissioner is obliged to take enforcement action under Div 4 for cases falling within s 71, assuming the statutory requirements for the exercise of the relevant power are satisfied, and subject to the exercise of the powers under ss 79, 99B, 100 or 101. We address later what those statutory requirements are: see from [34] below.

16. *First*, s 71(1) provides that enforcement action "is to be taken" in the specified circumstances. In its ordinary meaning, that language imposes an obligation. That is consistent with how the words "is to" are used elsewhere in the Act, where it is reasonably clear they are mandatory: eg ss 5(1)(b), 9(1), 9(3), 9(4), 11(4), 13(1), 15(2) and 16(3): Second Opinion, [19].

17. That language is to be contrasted with the language in ss 71(1A) ("may be taken"), 71(1B) ("may decide") and 71(2) ("may be taken"), which is permissive in nature: Interpretation Act 1987, s 9. While s 9 applies subject to any contrary intention, there is none here.

18. There is a presumption that different words used within an Act have a different meaning: Paul v Cooke (2013) 85 NSWLR 167 at [50] per Leeming JA (Basten JA agreeing). We would give that difference more weight than the Second Opinion does. The Second

Opinion at [25] cites Taheri v Vitek (2014) 87 NSWLR 403 at [124] per Leeming JA (Bathurst CJ agreeing), where the application of the presumption was described as a "relatively weak consideration" in the circumstances of that case. However, the significance of the presumption ultimately depends on the particular statutory context. In our view, the presumption is fairly strong here, given the words "is to be taken" appear immediately adjacent to another sub-section which uses the words "may be taken" and which confers a different but related power. That is so despite the fact that s 71(1A) was inserted at a later time (cf Second Opinion [25]). This is not a case where "quite incongruous provisions are lumped together and it is impossible to suppose that anyone…ever considered one…in the light of the other": Inland Revenue Commissioners (UK) v Hinchy [1960] AC 748 at 766 per Lord Reid. When s 71(1A) was inserted, the relevant extrinsic materials expressly referred to the existence of s 71(1): see Explanatory Note, Fines Amendment Bill 2017, p 2. It may be presumed Parliament was aware of s 71(1) and the different language contained within it.

19. *Secondly*, other provisions in the Fines Act assume that the taking of enforcement action under Div 4 is mandatory. Section 60(1)(c) provides that a fine enforcement order notice must inform the fine defaulter that, if payment is not made by the specified date, further enforcement action "will be taken" against the fine defaulter to enforce the fine in accordance with Pt 4 and that without further notice the defaulter "will be liable" to have any driver licence or vehicle registration suspended or cancelled or property seized and sold. While the Second Opinion at [27] concludes the word "liable" undercuts the force of "will be taken", we have a different view. That word may simply signify that there is a range of enforcement action that could be taken under Div 3 or 4, such that the fine defaulter *may* be but will not necessarily be the subject of the particular examples of enforcement action given in s 60(1)(c). The Second Opinion also suggests at [27] that the words "will be taken" are undercut by the existence of the powers under ss 79, 100 and 101. We explain at [41]ff below why those provisions are consistent with a mandatory interpretation.

20. Section 58(1)(c) also provides that enforcement action in the form of a property seizure order, garnishee order or a charge on land "is taken" if enforcement action under Div 3 is unavailable or unsuccessful or if the Commissioner is satisfied that enforcement under Div 4 is preferable. However, we accept that this carries limited weight in circumstances

where s 58 is merely a summary of the enforcement procedure in Pt 4 and s 58(2) states that s 58 does not affect the provisions it summarises.

21. The Second Opinion also advised that the word "may" in each of ss 72, 73 and 74 supported a directory interpretation: at [18(a)-(b)]. However, in our view that language is consistent with a mandatory interpretation. The word "may" in those provisions could indicate a discretion as to *which* of the enforcement avenues to take: a garnishee order, a property seizure order, or a charge on land. The same explanation can be given for the word "may" in s 71(2).

22. *Thirdly*, the circumstances in which the Commissioner can write off a fine are expressly circumscribed by s 101(1A). If the Commissioner had a residual discretion to choose not to take enforcement action, the result would be practically the same as if the fine had been written off. However, in exercising that discretion, the Commissioner would not have had to be satisfied of the matters listed in s 101(1A). It would be a surprising result if the Commissioner could, by declining to take enforcement action under s 71, reach the same practical outcome as a write off but without having to find that one of the grounds in s 101(1A) is made out. This is consistent with the general scheme of the Fines Act, which involves the Commissioner being able to withdraw fine enforcement orders at various stages but only on specified grounds: see ss 17(1) and 47.

23. *Fourthly*, while the consequences of the garnishee order are undoubtedly serious, and impact the fine defaulter's property rights, in the present statutory context we do not think that is a strong factor in favour of a residual discretion: cf Second Opinion, [18(c)]. The issuing of a garnishee order under s 73 will have come after several stages in the statutory process whereby the fine defaulter is given opportunities to challenge the liability or ask for a favourable exercise of discretion. In particular (using penalty notices as an example):

    (a) a penalty notice is issued under s 21. The penalty notice will require payment, but a person can elect to have the matter dealt with by a court instead: s 23A. A person can also seek internal review of the penalty notice: s 24A;

    (b) a penalty reminder notice is then issued: s 26. At that point the person can again elect to have the matter dealt with by a court: ss 35-36. The appropriate officer also has the power at this stage to withdraw the notice: s 39;

(c) a penalty notice enforcement order is then issued: s 42. It can only be made if inter alia the person has not paid the fine, a review is not on foot, and the person has not elected to have the matter dealt with by a court: s 42(1). A person can apply for the order to be withdrawn: s 46. The Commissioner can also withdraw the order on specified grounds: s 47. If the Commissioner refuses to withdraw the order, a person can apply to the Local Court to have the notice annulled: s 50;

(d) where a penalty notice enforcement order has been made or is anticipated to be made, a person can apply for a work and development order (**WDO**) to be made under s 99B (that is, instead of a civil enforcement order). Such an order can be sought on the ground that the person has a mental illness; has an intellectual disability or cognitive impairment; is homeless; is experiencing acute economic hardship; or has a serious addiction to drugs, alcohol or volatile substances: s 99B(1)(b);

(e) the fine defaulter may apply for extra time to pay the fine (s 100) or to have the fine written off: s 101. Where the Commissioner fails to make a WDO, grant extra time, or write off the fine, a fine defaulter can seek review before the Hardship Review Board: s 101B;

(e) for cases falling within s 71(1)(b) (with which we are presently concerned), enforcement action will have also been attempted by Transport for NSW under Div 3, and yet the fine will remain unpaid 21 days later.

24. In this way, the making of the garnishee order only comes after there have been multiple opportunities given to the fine defaulter to explain why the fine should not have been issued or why, despite the liability arising, the fine defaulter's personal circumstances mean that the fine should not be required to be paid. In our view, that context significantly weakens any presumption that s 73 is to be construed in a way that minimises interference with property rights: cf Second Opinion, [18(c)].

25. That conclusion is reinforced by the following:

(a) even once a garnishee order is issued, the Commissioner has the power to cancel it by issuing a community service order (s 77(1)) and there is also a broad power to cancel the garnishee order "at any time for any good reason" (s 77(3)). The

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Commissioner can also refund amounts paid under a garnishee order on hardship grounds, either on application or on their own motion (s 77A);

(b) the powers under s 100 or s 101 also appear to be available after enforcement action has been taken under Div 4. That is suggested by s 100(5) and (6), and also s 101(3) and (4), which assume that enforcement action may have already been taken.

26. As such, if the taking of enforcement action has resulted in hardship or the like, there is scope under the Act for the fine defaulter to draw that to the Commissioner's detention and for it to be remedied.

27. We turn to address the particular factors relied upon in the Second Opinion as supporting the "directory" interpretation, to the extent not already addressed above.

28. *First*, the Second Opinion emphasised that the Fines Act provides certain alternatives to enforcement action under Div 4: see ss 78-79, 99B, 100 and 101: cf Second Opinion, [18(d)]. We accept that is probably the strongest factor counting against a mandatory interpretation of s 71(1). However, a mandatory interpretation s 71(1) can accommodate those provisions in the following way. Taking s 79 as an example: it provides that the Commissioner may make an order that the fine defaulter perform community service work in order to work off the amount of the fine if inter alia the Commissioner is satisfied that the fine defaulter has not paid the fine as required and "civil enforcement action [that is, action under Div 4] has not been or is unlikely to be successful in satisfying the fine": ss 78, 79(3). There is no doubt that the Commissioner could elect to exercise that power, instead of taking enforcement action under Div 4, if the statutory requirements under s 79 were met. But that is not grounds for concluding that there is a *separate* residual discretion sitting within s 71 or s 73 that would permit the Commissioner to decline to take enforcement action. In other words, unless the Commissioner decides to take action under s 79 (or ss 99B, 100 or 101), the Commissioner will be obliged to take enforcement action under Div 4 assuming the statutory requirements for the taking of that action are met.

29. *Secondly*, while the Second Opinion treated the absence of a specified timeframe for enforcement action as inconsistent with a mandatory interpretation (at [18(b)]), we again have a different opinion. Even where a timeframe is not specified, it is presumed that an obligation is to be carried out within a period that is reasonable in all the circumstances: Koon Wing Lau v Calwell (1949) 80 CLR 533 at 573-574. It is consistent for s 71(1) to

require enforcement action but to also allow the Commissioner a reasonable time within which to take that action.

30. *Thirdly*, the extrinsic materials are neutral on the present question: cf Second Opinion, [20]-[21] and [26]. Generally, little weight can be placed on what the drafter of such materials understood particular words in a statute to mean: see Harrison v Melham (2008) 72 NSWLR 380 at [12]-[16] (in relation to Second Reading speeches). But the materials in question provide little guidance in any event.

31. The Explanatory Note to the Fines Bill 1996 (which contained s 71(1) and (2), but not s 71(1A)) described the steps in the enforcement process and said that "[i]f enforcement action cannot be taken by the Roads and Traffic Authority or it is unsuccessful, the State Debt Recovery Office will authorise civil enforcement of the fine". We place no weight on the use of the word "authorise": cf Second Opinion, [21]. That word may simply recognise that a particular form of enforcement such as property seizure needs to be "authorised" (in the sense of a decision being made under s 72), not that the taking of any enforcement action is discretionary.

32. Section 71(1A) was inserted by the Fines Amendment Act 2017. The Second Reading speech indicated that the intention of the amendment was to give the Commissioner a discretion to take enforcement action under Div 4 without having first exhausted action under Div 3: First Opinion, [27]. The purpose was to broaden the circumstances in which action could be taken under Div 4 by relieving one precondition to its exercise. But in our view the conferral of a separate discretionary power on the Commissioner in s 71(1A) says nothing as to whether the existing power in s 71(1) is mandatory or directory.

33. *Finally*, GR v Secretary, Department of Communities and Justice [2021] NSWCA 157 provides little assistance given the different statutory context. Section 98(2A) of the Children and Young Persons (Care and Protection) Act 1998 (NSW) provided that, if the Children's Court was of the opinion that a party was incapable of giving proper instructions to a legal representative, the Court was "to appoint a guardian ad litem for the person under section 100 or 101 (as the case may require)". The question was whether, if the Court reached the relevant opinion, it was required to appoint the guardian regardless of whether the conditions in ss 100 or 101 were met. The Court of Appeal concluded the court was not so required; rather, s 98(2A) directed the court to consider appointing a guardian under

ss 100 or 101. The conclusion depended upon the particular features of the statutory scheme which are not replicated here. Further, the more analogous question for present purposes would have been: *assuming* the conditions in ss 100 or 101 were satisfied, did s 98(2A) require the appointment of a guardian or was there a residual discretion not to? The Court did not need to address that question: see GR at [62], [78].

Are there any mandatory considerations which the Commissioner is required to consider prior to exercising the power under s 73(1) and, if so, are they put before the decision-maker in the "Check Summary Report"?

Mandatory considerations

34. Under s 73(2), the Commissioner/delegate must be satisfied that enforcement action is authorised against the fine defaulter under Div 4. This can be called a mandatory consideration, or alternatively a jurisdictional fact or a precondition to the exercise of the power: First Opinion, [28]. The result is that, before a garnishee order can be made, the Commissioner must be satisfied that enforcement action is authorised under s 71(1) or (1A). We are instructed the Check Summary Report is only addressed to cases falling within s 71(1)(b), and so for present purposes the Commissioner must be satisfied that:

    (a) the fine defaulter has not paid the fine as required by the notice of the fine enforcement order served on the fine defaulter (see the chapeau to s 71(1)); and

    (b) the fine remains unpaid 21 days after the Commissioner directed Transport for NSW to take enforcement action under Div 3: s 71(1)(b).

35. Taken together, all the first element adds to the second is that the notice must have been served on the fine defaulter. We agree with the conclusion in the First Opinion at [81]-[82] that, in order to reach this state of satisfaction, the Commissioner/delegate must engage in an actual mental process (as opposed to just giving conclusive effect to the green traffic lights in the Check Summary Report, for example).

36. Although s 73(2) is the only express mandatory consideration for the purposes of s 73, other mandatory considerations may be implied from the subject matter, scope and purpose of the Act: Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24 at 40-41 per Mason J.

37. There is a question whether the decision-maker, in considering whether to issue a garnishee order under s 73, is required to consider whether to issue a property seizure order or a charge on land instead. The First Opinion suggested at [81] that the decision-maker is required to do so. Although the Fines Act identifies these as alternative enforcement actions under Div 4, in our view there is no textual indication that these alternatives *must* be considered prior to issuing a garnishee order. We think such an obligation is unlikely, having regard to the practical consequences of such a construction. There will be a high volume of decision-making to be undertaken by the Commissioner or delegates under Div 4. Undertaking a mandatory assessment in every case as to whether a property seizure order or charge on land would be more appropriate would involve a significant burden, potentially requiring investigation as to any property or land held by the fine defaulter. In circumstances where the taking of enforcement action is mandatory (in the manner described above); the action can be taken without notice to the fine defaulter (eg s 73(3)); the mandatory considerations are otherwise fairly confined; and as outlined above there are multiple opportunities for the fine defaulter to challenge the fine before and after a garnishee order is issued; we prefer the view that the Commissioner/delegate is not required to consider the alternative avenues before making a garnishee order.

38. The Third Opinion suggested at [42] and [55] that the Commissioner/delegate was required to consider whether or not to give force to the "statutory expectation" in s 71(1) that enforcement action be taken. Given our conclusion above that s 71(1) is mandatory in nature, this issue falls away. However, Counsel also suggested that the Commissioner/delegate was required to form a view that they had sufficient information to make the decision and that they did not need to review each fine defaulter's file (Third Opinion, [56(c)]) and/or to have considered the sorts of factual matters that might be covered in a fine defaulter's file and form the view that such material would not make a difference to the decision (First Opinion, [44], [80]).

39. Regardless of whether s 71(1) is mandatory or directory, we do not see any textual basis for imposing a requirement to consider the nature of the information on file and the formation of a view as to whether or not it would make a difference to the decision. We also consider that such an obligation is in tension with the statutory scheme in the same way an obligation to consider alternative enforcement mechanisms would be: see [37] above. It would of course be *permissible* for the Commissioner/delegate to consider the

information on the file in the manner suggested by Counsel, but we do not consider this is a mandatory process which, unless followed, results in the invalidity of a garnishee order made under s 73.

40. Finally, there is also a question whether the Commissioner/delegate, before making a garnishee order, is required to consider the exercise of the powers under ss 79, 99B, 100 or 101. The relationship between s 73 and these provisions is somewhat complex. In our view they interact as follows.

41. Section 79: As noted above, s 79 empowers the Commissioner to make an order requiring a fine defaulter to undertake community service to work off the fine. This is an "own motion" power, as there is no provision made for an application by the fine defaulter. Such an order may be made if the Commissioner is satisfied inter alia that "civil enforcement action [that is, under Div 4] has not been or is unlikely to be successful in satisfying the fine". It is clear that the Commissioner could choose to make such an order instead of pursuing enforcement under Div 4 provided the relevant statutory requirements in Div 5 have been met. The question is whether the Commissioner is *required* to consider doing so before issuing a garnishee order. (We note the SSOF, Tab C, "Changes to Garnishee Order Process", fn 1, records that Revenue NSW does not issue community service orders, but we have considered the effect of s 79 in any event for completeness.)

42. In our view, the answer is "no". Deciding whether or not a s 79 order should be made is a relatively fact intensive and evaluative inquiry. The Commissioner/delegate would need to assess whether enforcement under Div 4, if not already taken, is "unlikely to be successful in satisfying the fine". The Commissioner/delegate would also need to assess whether the person is "capable of performing the work" or is otherwise "not suitable to be engaged in such work" (s 79(4)(a)) and obtain a report under s 79(4)(b). Given the high volume of decision making and the statutory context referred to at [37] above, again we think an obligation of this kind is unlikely to have been intended.

43. Section 99B: Section 99B provides that a WDO may be made by the Commissioner if, inter alia, an application is made in accordance with the relevant subdivision: s 99B(1)(d). Unlike s 79, the power cannot be exercised on the Commissioner's own motion. Such an order can be made after a fine enforcement order has been made, but before a community service order or community corrections order is made under s 79: s 99B(1)(c). Thus, it

would be open to the Commissioner/delegate, if an application had been made at the point of deciding whether to issue a garnishee order, to instead issue a WDO. However, if no application has been made under s 99B, in our view the Commissioner is not *required* to consider whether to make a WDO instead of a garnishee order. If an application were made prior to the making of a garnishee order, it would be prudent to proceed on the basis that such an application should be considered prior to making a garnishee order. We note that the Check Summary Report excludes cases where an application for a WDO is pending (see item 20 in Part B Exclusions Check), so this issue does not arise on the facts.

44. Section 100: Section 100 empowers the Commissioner to extend the time for payment of a fine, or to allow the fine to be paid by instalments: s 100(3). Such an order can only be made on application by the fine defaulter, and prior to a community corrections order or community service order being issued: s 100(1). The fact that there is no mention in s 100(1) of this being done on the Commissioner's own motion, and given the express reference to an own motion power in sub-s (4A) and (4C), suggests an application is required. Thus, like s 99B, it would be open to the Commissioner/delegate, if an application had been made at the point of deciding whether to issue a garnishee order, to extend the time or allow for instalments instead of issuing a garnishee order. However, if no application has been made under s 100, in our view the Commissioner is not *required* to consider whether to make such an order. If an application were made prior to making a garnishee order, again it would be prudent to proceed on the basis that such an application should be considered prior to making a garnishee order. We note that the Check Summary Report excludes cases where an application under s 100 is pending, so this issue does not arise on the facts.

45. Section 101: Section 101 provides that the Commissioner may, on application or at the Commissioner's own discretion, write off a fine in whole or in part if satisfied of certain matters. As with s 99B and s 100, if an application has been made under s 101 before the garnishee order is issued, it would be prudent to proceed on the basis that that application should be considered prior to issuing the garnishee order. We note that the Check Summary Report does not include the making of a s 101 application as an "exclusion" (rather, item 21 only deals with whether a fine has in fact been written off in the last 12 months. While we are instructed that item 2 is intended to exclude cases where s 101 applications are pending, this is not clear on the face of the document). Consideration should be given to

amending the Check Summary Report to make it clear that it excludes cases where a s 101 application is pending.

46. If no such application has been made, the Commissioner could still use the "own motion" power and choose to make such an order instead of pursuing enforcement under Div 4 provided the relevant statutory requirements have been met. The question is whether the Commissioner is *required* to consider doing so before issuing a garnishee order.

47. Again, in our view the answer is "no". Like deciding to make an order under s 79, deciding whether or not to write off a fine under s 101 is likely to be a fact intensive and evaluative inquiry. The Commissioner would need to decide whether or not they are satisfied that, due to any or all of the financial, medical or personal circumstances of the fine defaulter, the fine defaulter does not have sufficient means to pay the fine and is not likely to have sufficient means to pay the fine; civil enforcement action has not been or is unlikely to be successful; and the fine defaulter is not suitable to be the subject of a community service order under s 79 (s 101(1A)(a)) or whether the fine falls within the guidelines issued under s 120: s 101(1A)(b)). Given the high volume of decision making and the statutory context referred to at [37] above, again we think an obligation of this kind is unlikely to have been intended.

48. In summary, in our view before making a garnishee order the Commissioner must be satisfied of the matters in s 73(2), and where an application under ss 99B, 100 or 101 is pending it should be considered prior to making a garnishee order.

Whether the Check Summary Report puts any mandatory considerations before decision-maker

49. In our view, the Check Summary Report invites the decision-maker to reach the state of satisfaction required by s 73(2) by:

    (a) setting out the necessary state of satisfaction – "that enforcement action is authorised under Division 4 of Part 4";

    (b) setting out the basis for that satisfaction: "because each of the fine defaulters falls within section 71(1)(b)";

    (c) setting out the factual basis for that conclusion, namely: that the fines of all the defaulters remain unpaid and at least 21 days has passed since the Commissioner

directed Transport for NSW to take enforcement action, and there is nothing in Revenue NSW's records to suggest there were any issues with service of the fine enforcement order; and

(d) requiring the decision-maker to tick a box which confirms the above matters.

50. We advised above that, if an application is made under ss 99B, 100 or 101, the Commissioner should consider that application before making a garnishee order. However, this issue should not arise on the facts, because the Check Summary Report excludes cases where an application under ss 99B or 100 is pending (items 19 and 20) and, if our suggestion above is accepted, will also exclude cases where an application under s 101 is pending.

51. We also advised above that s 71 requires the taking of enforcement action assuming the statutory preconditions have been satisfied, and subject to the exercise of powers under ss 79, 99B, 100 or 101. Arguably, the second statement in Part A of the Check Summary Report – "I understand that I am not bound to follow the indicators" – implies that the decision-maker has a residual discretion contrary to our advice above. Alternatively, it might simply indicate the decision-maker has a discretion to choose which enforcement action under Div 4 is adopted, which would be consistent with our advice above. Consideration might be given to clarifying this aspect of Part A.

52. In the Third Opinion at [55], Counsel advised that *if* the Check Summary Report accurately describes the decision-maker's understanding and mental processes, that would provide a basis to conclude that the decision-maker had the state of satisfaction required by s 73(2), had determined they would not make a property seizure order or a charge on the land under ss 72 or 74, and had concluded that the statutory expectation should be given effect. That suggests that the authors considered the Check Summary Report addressed the necessary elements of the decision making process under s 73. We agree with that conclusion, for the reasons given above.

53. However, Counsel went on to conclude that the process was nevertheless non-compliant with the Fines Act because the statutory discretion under s 73 cannot be lawfully exercised by giving conclusive effect to the green traffic lights, and there is nothing in the Check Summary Report which indicates that the decision-maker understands the process (including the limited input information) or their obligation to consider the relevant factors

and make their own decision about whether it is appropriate to issue the garnishee order: Third Opinion, [56]. (Counsel also doubted that the traffic lights are analogous to a summary of relevant facts or recommendations on which the decision-maker is entitled to rely: Third Opinion, [53]. We address this separately at [63] below.)

54. We agree that the decision-maker needs to engage in an "active intellectual process" (Carrascalao v Minister for Immigration and Border Protection (2017) 252 FCR 352 at [45]) and cannot give conclusive effect to the traffic lights without actually forming the required state of satisfaction. But we do not agree that the design of the Check Summary Report will necessarily result in the decision being invalid.

55. As explained above, the Check Summary Report sets out the required state of satisfaction and the legal and factual basis for it. It explains what all of the "green traffic lights" signify in narrative form. It also notes that the decision-maker is not bound to issue a garnishee order, and could consider property seizure orders or charges on land. It also requires the decision-maker to tick a box and thereby positively confirm that they have read and understand the report and have reached the required state of satisfaction.

56. Assuming that box is ticked, the Check Summary Report will provide prima facie evidence that the decision-maker engaged in the required statutory process. Of course, it will always be *possible* that in a given case a decision-maker might not read or understand the Check Summary Report before ticking the box. Such an allegation would have to be proven by admissible evidence by a person seeking to challenge the validity of the garnishee order, for example by demonstrating the limited time the decision-maker had to consider a lengthy document. Such is the case with any sort of brief to the decision-maker, even one prepared by a human: see eg Minister for Immigration, Citizenship and Multicultural Affairs v McQueen (2022) 292 FCR 595 ("McQueen") at [44]-[73]. But absent such evidence, a court is likely to infer that the decision-maker actually read and understood the Check Summary Report: see Stambe v Minister for Health (2019) 270 FCR 173 at [74]-[76]; Makarov v Minister for Home Affairs (2021) 286 FCR 412 at [88]; East Melbourne Group v Minister for Planning (2008) 23 VR 605 at [312] per Ashley and Redlick JJA. For those reasons we do not share Counsel's concern that the Check Summary Report establishes a process that is not compliant with the Fines Act. In our view it is consistent with the Fines Act, but obviously cannot guarantee that every decision made in accordance with the process will be valid: see again at [10] above.

Is it open to the Commissioner to adopt a policy that the making of a garnishee order under s 73(1) would ordinarily be appropriate in identified circumstances? If so, to what extent would the Commissioner or delegate be required to consider the unique circumstances of each case?

57. The current version of the garnishee order system, including the Check Summary Report, reflects a policy that garnishee orders will ordinarily be made for cases falling within s 71(1)(b) where the various indicators in the Check Summary Report are given a green traffic light. While it is possible that a decision-maker will depart from that policy in a given case, it is also very unlikely given there is no process in place for the decision-maker to be briefed with any material other than what is contained in the Check Summary Report.

58. We agree with the legal principles set out in the First Opinion at [48]-[50]. In short, there is no problem in principle with adopting a policy to guide the issuing of garnishee orders under s 73 provided it is consistent with the statute: in particular, provided it accounts for mandatory considerations and does not incorporate prohibited considerations; does not give effect to a purpose inconsistent with the statutory purpose; and leaves the scope of statutory discretion intact without creating fixed rules that must be adhered to regardless of the facts.

59. We agree with the conclusion expressed at [51] of the First Opinion as follows:

> *In respect of fine defaulters falling within s 71(1) of the Fines Act, having regard to the limited nature of the of the decision-maker's function, the modification of procedural fairness effected by s 73(3) and the absence of any mechanism for fine defaulters to make submissions with respect to the exercise of the power in s 73, we consider it would be open to the Commissioner to adopt a policy that the making of a garnishee order would ordinarily be appropriate in identified circumstances.*

60. That reasoning applies with even more force, given s 71 is mandatory in nature, in the sense outlined above. Adopting a policy of the kind reflected in the Check Summary Report does not, in and of itself, give rise to an error of law which would result in the invalidity of a garnishee order. As we have explained in the previous section, the policy, as reflected in the exclusions/inclusions in the Check Summary Report, sufficiently addresses all the matters which the Fines Act requires the decision-maker to consider (subject again to it being amended to exclude cases where applications under s 101 are pending). None of the indicators are incompatible with the purpose of the Fines Act. The Check Summary Report also makes clear that the decision-maker is not bound to follow the recommendation to

issue the garnishee order and may consider other enforcement action such as property seizure orders or registration of charges on land.

61. It is relevant to note that the policy is designed to take into account the circumstances of the fine defaulter to some extent. The Check Summary Report goes beyond the mandatory considerations by inviting the decision-maker to consider for example whether the fine defaulter is a client of NSW Trustee and Guardian (which might indicate a degree of vulnerability) (item 5); or is bankrupt (item 6); or has a "vulnerability score" above 35% (item 11); or is affected by a natural disaster (item 12). Thus, this is not a case where a policy is applied inflexibly without regard to the merits: indeed the policy *incorporates* some consideration of the merits that might be relevant to the decision.

62. As noted above, we cannot exclude the possibility that a decision made in accordance with this policy may be affected by jurisdictional error. For example, that might arise if there were some information on file, such as a submission from the fine defaulter, which if not addressed might give rise to a denial of procedural fairness or legal unreasonableness. However, the risk of this seems to be relatively low, given:

    (a) the limited nature of the mandatory considerations, as described above;

    (b) the fact that the fine defaulter will have had multiple opportunities in the statutory process to challenge the fine, as described above;

    (c) the fact that garnishee orders can be made without notice to the fine defaulter (s 73(3)), so the prospect of the fine defaulter making a submission about the making of the garnishee order is low. We note that the Check Summary Report also excludes cases where the fine defaulter has been in contact with Revenue NSW in the last 8 days (item 3) or has lodged an application (item 19 and 20); and

    (d) the automated system is calibrated to exclude some fine defaulters in vulnerable categories, as described above.

Is it open to the Commissioner or delegate to proceed by reference to a summary of the facts or recommendations prepared by a human? If so, is the legal position relevantly different if the

summary is prepared by an automated system, including if the summary is in the form of the "Check Summary Report"?

63. Whenever a decision-maker relies on a summary of material, there will be a question whether it accurately covers all the matters which the statute requires the decision-maker to consider. We have already advised above that the Check Summary Report puts before the decision-maker the mandatory considerations (of course, we are not in a position to assess whether the factual information contained in the Check Summary Report is an accurate summary of the information held on Revenue NSW's files).

64. A further question arises as to whether, assuming the Check Summary Report accurately addresses the mandatory considerations, the decision-maker is entitled to rely on a summary of the material held in Revenue NSW's files, or is required personally to review that material. This is a question of statutory construction.

65. The issue has recently been addressed by the Full Federal Court in McQueen, cited above. There, the relevant statute imposed an obligation on the Minister to consider representations made by the respondent for the purposes of deciding whether to revoke a visa cancellation. The question was whether the Minister was entitled to rely on a summary of those representations prepared by departmental staff, or whether the Minister was required to read the representations himself. The Full Court adopted the latter construction (though the decision is subject to a special leave application). The Full Court's decision turned on the particular features of the statutory scheme. The Court placed significance on the fact that the Minister had chosen to exercise the power personally instead of delegating it (with the consequence that it was not subject to merits review); the purpose of the representations was to persuade the Minister to exercise a broad discretionary power to revoke the visa cancellation; the exercise of the power affected liberty; and it was not possible to discern the full sense and content of the representations without regard to the documents in which the representations were expressed: at [82], [89]-[91].

66. A decision made under s 73 is of an entirely different kind. As explained above, there are limited matters the decision-maker is required to take into account, and there is no residual discretion that is required to be considered. The statute does not impose an obligation to consider any particular document or material. It is significant that the matters the decision-maker is required to consider are factual as opposed to evaluative in nature: the primary

matter being whether the fine remains unpaid 21 days after Transport for NSW was directed to take enforcement action (s 71(1)(b)). It is also significant that the decision can be delegated (s 116A) and is likely to be high volume, meaning consideration of the source material in every case would impose a significant burden on the decision-making process that is unlikely to have been intended: compare Asiamet (No 1) Resources Pty Ltd v Federal Commissioner of Taxation (2003) 126 FCR 304 at [116]. Further, there is scope for review of the decision in the sense that a garnishee order can be cancelled for "any good reason" (s 77(3)) and money can be refunded on hardship grounds (s 77A).

67. For those reasons, in our view the Commissioner/delegate is not required to review all the material held by Revenue NSW that underlies the green traffic lights set out in the Check Summary Report; rather, they are entitled to review those indicators and proceed to make a decision on that basis: cf Third Opinion at [56].

68. We cannot see why there would be any difference in principle where information of the kind included in the Check Summary Report is generated by an automated system as opposed to a human. As we understand it, Revenue NSW's automated system effectively reviews the information held by Revenue NSW about a fine defaulter for the purposes of excluding/including fine defaulters who meet the exclusion/inclusion criteria. The Check Summary Report then summarises the outcome of that review, indicating that for the fine defaulters dealt with in that report they all satisfy the relevant criteria. It is akin to a brief that informs the decision-maker of those factual matters, says that it is open to the decision-maker to issue a garnishee order on that basis and recommends that course.

Is it permissible for the state of satisfaction required under s 73(1) to be reached in respect of multiple fine defaulters in a single process? If so, is that course subject to a limitation referable to the number of decisions which fall to be made?

69. We agree with the conclusion in the First Opinion at [80] that a person exercising a power under s 73 "may, as a general matter, consider the issue of garnishee orders to multiple fine defaulters simultaneously".

70. The process of reasoning that is required in a given case will again depend upon the statutory context. As explained above, here the context is that the necessary process of reasoning is attenuated: there are limited matters which the Fines Act requires the decision-maker to consider, and no residual discretion. By virtue of the automated filtering process,

in respect of those mandatory considerations all the fine defaulters should be in relevantly the same position factually (unless a red traffic light is shown, which will then prompt further investigation of that case). For example, as a result of the filtering system they will necessarily all be cases satisfying s 71(1)(b) and will all be cases where there is no application pending under ss 99B or 100 (We are instructed they will also be cases where there is no application pending under s 101 but, as noted above, this should be made clear in the Check Summary Report). In circumstances where the situation of each fine defaulter is relevantly the same, in our view the Commissioner/delegate is lawfully able to engage in the required process of reasoning for each fine defaulter by considering multiple fine defaulters simultaneously.

71. As a matter of principle, in this statutory context we cannot see why there should be any particular limit on the number of fine defaulters that the decision-maker can consider at one time. However we accept that this conclusion may be considered unattractive, and a court may conclude it is artificial to suggest a human decision-maker is capable of engaging in a mental process in respect of thousands of fine defaulters at once. There is therefore a risk a court would reach a contrary view to the one we prefer, particularly if the number of defaulters is considerable.

Question 2: Is there inconsistency with Commonwealth legislation?

Can the Commissioner lawfully issue a garnishee order which would have the effect of purporting to require a financial institution to pay to Revenue NSW a "saved amount" within the meaning of s 62 of the Social Security (Administration) Act 1999 (Cth) or s 67 of the A New Tax System (Family Assistance) (Administration) Act 1999 (Cth)?

72. This question is addressed at [63]-[66] of the First Opinion, with which we generally agree.

73. Section 60(1) of the Social Security (Administration) Act 1999 provides that a social security payment is "absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy or otherwise". Section 62(1) provides:

> If:
>
> (a) a person has an account with a financial institution; and
>
> (b) either or both of the following subparagraphs apply:

(i) instalments of a social security payment payable to the person (whether on the person's own behalf or not) are being paid to the credit of the account;

(ii) an advance payment of a social security payment payable to the person (whether on the person's own behalf or not) has been paid to the credit of the account; and

(c) a court order in the nature of a garnishee order comes into force in respect of the account;

the court order does not apply to the saved amount (if any) in the account.

74. The "saved amount" is deduced by working out the total social security payment paid into the account during the four week period immediately before the court order came into force, and subtracting from that amount the total amount withdrawn from the account during the same four week period: s 62(2).

75. Sections 66(1) and 67 of the A New Tax System (Family Assistance) (Administration) Act 1999 are relevantly similar to ss 60(1) and 62 of the Social Security (Administration) Act 1999 respectively, but apply in relation to certain payments such as family tax benefits.

76. The Commonwealth provisions are directed to "court orders in the nature of garnishee orders". Under s 73 of the Fines Act, the garnishee order is made by the Commissioner/delegate, not a court. However, by virtue of s 73(4), the garnishee order operates as a garnishee order made by the Local Court under Pt 8 of the Civil Procedure Act 2005 (NSW), and for that purpose the Commissioner is taken to be the judgment creditor. We therefore consider a garnishee order would fall within the meaning of "court order" in the Commonwealth legislation. Part 8 includes s 117, which provides that, subject to the UCPR, a garnishee order "operates to attach, to the extent of the amount outstanding under the judgment, all debts that are due or accruing from the garnishee order to the judgment debtor at the time of service of the order" and that "any amount standing to the credit of the judgment debtor in a financial institution is taken to be a debt owed to the judgment debtor by that institution".

77. If s 73 purported to authorise the making of a garnishee order applying to a "saved amount" as defined in s 62(2) of the Social Security (Administration) Act 1999, in our view it (together with s 117) would be directly inconsistent with s 62 for the purposes of s 109 of the Constitution and not operative to that extent. Likewise, if s 73 purported to authorise

the making of a garnishee order attaching to a "saved amount" as defined in s 67(2) of the A New Tax System (Family Assistance) (Administration) Act 1999, it (together with s 117) would be directly inconsistent with s 67 for the purposes of s 109 of the Constitution and not operative to that extent.

78. Section 73 does not specify the particular moneys to which the garnishee order should apply (although it gives examples of wages and salary). On its face s 73 permits garnishee orders applying to "saved amounts". Section 31 of the Interpretation Act 1987 is not engaged, because that only applies where the issue is one of absence of legislative power, not inconsistency for the purposes of s 109: Bell Group NV (in liquidation) v Western Australia (2016) 260 CLR 500 at [71] per French CJ, Keifel, Bell, Keane, Nettle and Gordon JJ. Rather, that part of s 73 which permitted orders applying to "saved amounts" would be rendered inoperative by virtue of s 109. We do not think this results in a statutory provision which Parliament cannot have intended to enact: Bell Group at [71].

79. It follows that the answer to this question is "No": the Commissioner cannot lawfully issue a garnishee order which would have the effect of purporting to require a financial institution to pay to Revenue NSW a "saved amount" as defined above.

If not, can Revenue NSW lawfully issue a garnishee order which includes an express statement to the effect that the order does not attach the debt due to Revenue NSW to any "saved amount"?

80. A garnishee order is probably an "instrument" within the meaning of s 32 of the Interpretation Act, since it is a written document which gives rise to certain rights and obligations: see Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 2) (2010) 172 LGERA 25 at [84]. If a garnishee order is directed to a bank account which happens to contain "saved amounts", then, pursuant to s 32, the garnishee order likely would be construed so as not to attach to the "saved amount" and would be valid and effective insofar as it attaches to amounts other than "saved amounts".

81. As such, strictly it may not be necessary for garnishee orders expressly to state that the order does not attach to "saved amounts". However, it would be preferable to do so, not only to guard any risk that s 32 may not save the valid operation of the order but also to give the financial institution notice of the issue and reduce the risk of it inadvertently and unlawfully garnisheeing a "saved amount".

82. It follows that the answer to this question is "Yes, and that is the preferable course".

83. We note that the First Opinion also addressed at [67]-[69] a potential inconsistency between the Fines Act and the Bankruptcy Act 1966 (Cth). We have not been asked to advise on that or any other potential inconsistency with Commonwealth law. We note the Check Summary Report in any event excludes fine defaulters who are bankrupt: see item 6.

MG Sexton SC

ZCF Heger*

23 August 2023

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