Revenue NSW – The lawfulness of its garnishee order process

A special report under section 31 of the Ombudsman Act 1974

Pursuing fairness for the people of NSW.

Ombudsman
New South Wales

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The Hon. Ben Franklin, MLC
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The Hon. Greg Piper, MP
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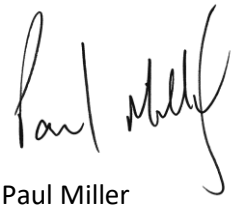
Dear Mr President and Mr Speaker

Pursuant to s 31 of the *Ombudsman Act 1974*, I am providing you with a report titled *Revenue NSW – The lawfulness of its garnishee order process*.

I draw your attention to the provision of s 31AA of the *Ombudsman Act 1974* in relation to the tabling of this report and request that you make the report public forthwith.

Yours sincerely



Paul Miller
NSW Ombudsman
30 April 2024

OMBUDSMAN
ORTA RECENS QUAM PURA NITES
NEW SOUTH WALES

Executive Summary

Revenue NSW has the power, in certain circumstances, to recover overdue debts, including unpaid fines, directly from the bank accounts of defaulters. Revenue NSW has had this power in respect of fines debts since 1998 when the *Fines Act 1996* (**Fines Act**) commenced.

In the early years a staff member manually issued garnishee orders to banks. From around 2013, the process was assisted by electronic transmittal of garnishee orders to banks.

Since 2016, the system for issuing garnishee orders, which we refer to in this report as the garnishee order system (**GO system**), has involved the use of technology that assists Revenue NSW to issue high volumes of garnishee orders on a daily basis. The extent of 'automation' involved in the GO system has varied over that time.

Since 2018, Revenue NSW has also had the power to issue garnishee orders to recover State debts under the *State Debt Recovery Act 2018* (**SDR Act**), and it used the GO system for that purpose between March 2018 and March 2020.

Our investigation

In June 2023, we commenced an investigation into Revenue NSW's conduct in its design and use of the GO system.

The primary focus of the investigation has been on whether the use of the GO system has been a legally permissible and compliant manner of exercising the relevant statutory functions (of debt recovery by way of garnishee orders) that are conferred on Revenue NSW.

In the investigation we considered the different versions of the GO system that have been in operation at different times since 2016. We have also considered various expert legal opinions about those versions, including most recently advice Revenue NSW obtained after we commenced this investigation from the NSW Solicitor General.

Findings

I have found that Revenue NSW engaged in maladministration of a kind specified in s 26 of the *Ombudsman Act 1974* (**Ombudsman Act**), as follows:

Conduct in using the GO system to recover fines debts under the Fines Act

Revenue NSW has used various versions of the GO system to recover fines debts by way of garnishee orders between 2016 and 2023 (subject to some periods when the system was wholly or partially suspended).

I have found that:

- Revenue NSW's conduct in operating the GO system to recover fines debts from **January 2016 to March 2019** was **contrary to law** within the meaning of s 26 of the Ombudsman Act, as it did not comply with the Fines Act.
- Revenue NSW's conduct in operating the GO system to recover fines debts from **March 2019 to March 2022** was **wrong** within the meaning of s 26 of the Ombudsman Act, as the system was defective in that, even if it is possible that lawful decisions were being made, the GO system did not provide decision-makers with a clear and complete basis for those decisions, and did not clearly and fully record those decisions and evidence the decision-making process.

At the time we commenced our investigation, Revenue NSW had suspended the operation of its GO system to recover unpaid fines.

After commencing our investigation, Revenue NSW obtained advice from the Solicitor General to the effect that the version of the system since May 2022 is compliant with the Fines Act for the recovery of unpaid fines. It is reasonable for Revenue NSW to rely on this advice in deciding whether to now resume operation of the current GO system for the purpose of recovering fines debts under the Fines Act.

Conduct in using the GO system to recover State debts under the SDR Act

Revenue NSW used relevant versions of the GO system to recover State debts by way of garnishee orders between March 2018 (when the relevant provisions of the SDR Act commenced) until March 2020. The use of the system for that purpose was suspended in March 2020, and has not recommenced.

I have found that:

- Revenue NSW's conduct in operating the GO system to recover State debts from **March 2018 to March 2019** was **contrary to law** within the meaning of s 26 of the Ombudsman Act, as it did not comply with the SDR Act.
- Revenue NSW's conduct in operating the GO system to recover State debts from **March 2019** until **March 2020** (when it ceased doing so) was **wrong**, due to the unacceptable risk that it did not comply with the SDR Act.

Recommendations

Minor adjustments to the GO system suggested by the Solicitor General

Although finding that the GO system for the recovery of fines debts is now compliant with the Fines Act, the Solicitor General Opinion suggested that the 'Check Summary Report' element of the GO system be amended to make clear that any fines that are subject to pending 'write offs' are excluded from the GO process.

The Solicitor General Opinion also identified a risk (albeit considered to be low) that a particular decision made under the GO system may be unlawful if there is some information on a fine defaulter's 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.

I have recommended that Revenue NSW amend the GO system to address these issues, and in particular that:

1. If it has not done so already, Revenue NSW should:
    (a) amend the Check Summary Report to make clear that it excludes any case where a s 101 application (that the debt be written off, in whole or in part) is pending, and
    (b) ensure that it has robust processes for identifying and recording any relevant individual submissions by fine defaulters or their representatives (whether made orally or in writing) and either redirecting these to manual processes or flagging them in the Check Summary Report for the decision-maker to read and consider before issuing a garnishee order.

Protected amounts that should not be the subject of garnishee order

Since March 2019, Revenue NSW has applied a 'minimum protected amount' being a minimum bank account balance which will not be the subject of a garnishee order. The current minimum protected amount is $587.50.

Further, under Commonwealth legislation, where certain social security and family assistance payments are made into a person's bank account, there is a 'saved amount' to which a garnishee order cannot apply. The saved amount is equal to the social security payments and/or certain family assistance payments paid into the account in the last 4 weeks (including any advances) minus the amount withdrawn from the account in the same period. Revenue NSW cannot lawfully recover debts from these 'saved amounts'.

I have recommended that:

2. Revenue NSW should:
    a) include an instruction in its garnishee orders reminding financial institutions not to recover any social security (Centrelink) or family assistance 'saved amounts' (this action was also suggested in the Solicitor General Opinion)
    b) continue to engage with financial institutions to promote their compliance with the 'protective terms' in its garnishee orders (i.e., the terms or other instructions within notices to preserve the minimum protected amount and quarantine any social security or family assistance 'saved amounts')
    c) refer any suspected instances of non-compliance by financial institutions with protective terms to the Australian Financial Complaints Authority if a person complains, or it appears to Revenue NSW staff, that a financial institution may have failed to comply with the protective terms of its notices. If Revenue NSW considers it does not currently have the power to make such a referral, it should seek legislative amendment to enable it to do so.
    d) remind people of, and where necessary assist them to exercise, their rights and complaint pathways in respect of any non-compliance by financial institutions with protective terms.
3. Revenue NSW should provide information on its website about garnishee orders, including that they take effect as a garnishee order made by the Local Court under Part 8 of the Civil Procedure Act 2005, and how they may be challenged.

Contents

Part 1 - The garnishee order system

Revenue NSW

1. Revenue NSW is the Government's taxation and debt recovery agency. It is responsible for managing state taxes, fines, and debts, and administering certain grants. Its powers are exercised by the head of Revenue NSW, who is both the Commissioner for Fines Administration and the Chief Commissioner of State Revenue.

2. Just over 40%[1] of the NSW government's funding is derived from state taxes and fines, which help fund its provision of government and community services. Fines are generated in the context of the enforcement of road and other rules, often with a view to protecting public safety. Fines are inherently regressive, causing disproportionately greater disadvantage to those on lower incomes or otherwise already financially disadvantaged. In this context, Revenue NSW must perform its statutory function of effective and efficient debt collection, while also fulfilling its responsibility to ensure fair and reasonable treatment of all citizens, and especially those who may be experiencing hardship or vulnerability.

Garnishee orders

3. Revenue NSW's enforcement powers include the power to issue garnishee orders. A garnishee order is a way that a person who is owed money by another (**debtor**) can collect the money directly from a third person. They do this by collecting the money from a person who owes the debtor money.

4. Examples of garnishee orders include:

   - if the debtor is in paid employment, an order to the debtor's employer requiring some of the debtor's wages or salary to be used to repay the debt
   - if the debtor is a landlord, an order to the debtor's property agent or tenant requiring the debtor's rental income to be taken to repay the debt
   - if the debtor holds funds in a bank account, an order to the debtor's bank requiring money in the debtor's account to be taken to repay the debt.

5. In each case, the third person pays the money without any notice to the debtor.

6. Historically, garnishee orders could only be made by courts. The person owed money would ask the court to make a garnishee order and, where possible, would give the debtor notice that they had made the application. If the court, having considered the nature and size of the debt and the circumstances of the debtor, decided that a garnishee order should be made, it would make that order. Courts still can and do, issue garnishee orders. In NSW, these orders are made under the *Civil Procedure Act 2005* Part 8 Div 3.

7. Now, however, a number of government agencies have the statutory power to make garnishee orders without a court order. These include the Australian Taxation Office and, at the NSW state level, Revenue NSW.

8. Revenue NSW (formerly the State Debt Recovery Office (**SDRO**)) has had the power to issue garnishee orders to recover unpaid debts from fine defaulters since 1998 with the commencement of the *Fines Act 1996* (**Fines Act**). Since March 2018[2], it also has power to issue garnishee orders to recover State debts under the *State Debt Recovery Act 2018* (**SDR Act**).

Public policy objectives

9. The inclusion of a power to make garnishee orders in respect of fine defaulters was part of a larger reform to the system of fines enforcement provided for in the 1996 Fines Act.

10. The new system was introduced in response to concerns about the large numbers of fine defaulters; delays, inefficiency and inequity of enforcement; the rate of imprisonment for fine default;[3] and the loss of revenue to the Government from unpaid fines. When introducing the bill for the Fines Act, the Minister explained its objective as follows:

    '*The main objective for the Government is to ensure that the integrity of the fine as an order of the court, or as an administratively imposed sanction, is maintained by providing an effective sanction against non-compliance.*

    Implicit in this objective is the need to ensure equity of treatment by preventing people from avoiding the effect of sanctions; to reduce the number of fine defaulters in custody; and to ensure that the fine enforcement system is efficient and effective. There is also a duty upon the agencies enforcing the system to ensure that the fine enforcement system maximises the collection of moneys due to the State. It is believed that this can be achieved by improving the certainty of the enforcement process and improving the knowledge of the enforcement procedures within the general community….'[4]

11. It is noteworthy, given this current investigation, that the focus of Parliamentary debate at the time was on other elements of the new enforcement regime rather than the new power to issue garnishee orders – indeed, we found no mention of the power to issue garnishee orders in the second reading speech, or in the ensuing debate.

12. Instead, the Parliamentary debate was focussed primarily on the new power to suspend a fine defaulter's driver licence and car registration and (if the fine subsequently remained unpaid) to then refer matters to the Sheriff's Office for property seizure. After explaining the process for licence and registration suspensions, the Minister explained the next steps in the process as follows:

    '*The SDRO will refer matters to the Sheriff's Office for civil enforcement where the RTA [Roads and Traffic Authority] is unable to match a fine with a licence or car registration, or a licence has been suspended or car registration cancelled and the fine remains outstanding after six months. The SDRO will assess each matter prior to forwarding a warrant of execution to the Sherriff's Office… The Sherriff's Office will be authorised to seize and sell goods and property and, if necessary, land. If no goods are found to levy, the sherriff's* [sic] *officer will serve the offender with a community service order – CSO. In the event of a default on a community service order, a warrant for arrest will issue and the police may take the offender into custody.*'[5]

13. It appears likely that the omission of any reference to garnishee orders in the Parliamentary debate reflects the fact that it has only been more recently that garnishee orders have become the more prevalent civil enforcement action where licence or registration suspension has been unavailable or unsuccessful.

14. As explained below, this investigation is concerned with the question of the *legality* of Revenue NSW's practices for the issuing of garnishee orders, rather than any broader questions of public policy.

15. However, by way of background, it is relevant to acknowledge that, even if the manner and scale of their use was not contemplated by Parliament at the time, the use by Revenue NSW of garnishee orders to recover fines debts appears to be consistent with Parliament's stated policy objectives in

relation to the Fines Act. They evidently constitute a highly effective and cost-efficient means of ensuring fine defaulters do not avoid paying their fines, as well as being consistent with the 'duty…to ensure that the fine enforcement system maximises the collection of moneys due to the State'.[6]

16. However, enforcement by garnisheeing bank accounts has the potential to operate in ways that are harsher, and potentially generate greater hardship, than other civil enforcement actions, even such as property seizure. Property seizure, for example, would typically involve the taking of a person's durable and non-essential assets, while garnishee orders could take a person's basic source of funding for essential items (such as groceries) or services (such as transport and education). It is relevant too that, comparing property seizure with garnishee order, the former inherently requires a manual person-by-person process[7] whereas technology could enable garnishee orders to be executed impersonally and remotely using automation technology.

17. Revenue NSW is not required to, and in practice does not, give specific notice to a person before a garnishee order is made. However, the use of garnishee orders or any other form of enforcement action is only available after all prior steps required by legislation to recover the debt from the fine recipient have been exhausted. Typically, in respect of fines, this means that the fine has remained unpaid after:

    - at least three notices have been issued (the original penalty notice, a penalty reminder notice and a penalty notice enforcement order), and
    - either licence or vehicle registration restrictions are not available to be imposed by Transport for NSW for the fine recipient in question, or such restrictions have been imposed and the fine remains unpaid.

18. Each of the notices contains warnings that further enforcement action may be taken if the fine remains unpaid.

Automation of the garnishee order system (GO system)

19. Originally, to the extent that Revenue NSW (then SDRO) used garnishee orders as a civil enforcement tool, it would issue and serve them manually. From around 2013, Revenue NSW began increasing the volume of garnishee orders it issued to financial institutions (banks), following a successful pilot using direct electronic transmittal to serve the order on banks. The number of orders increased progressively in response to increases in the banks' capacity to manage the volume of orders. The number of orders issued annually increased from 6,905 in the 2010-11 financial year to 1,517,748 in the 2017-18 financial year.

20. In 2016, Revenue NSW advised us that it had decided to increase its garnishee order activity in this way to meet its strategic priority: to 'reduce the incidence of debt', in circumstances where annual unpaid fines at that time amounted to around $400m.

21. Following the adoption of electronic *transmittal* of garnishee orders to banks, Revenue NSW also began to automate its process for electronically *issuing* garnishee orders on the four major banks (**GO system**). This occurred from the beginning of 2016.

22. When this GO system was first introduced, it was 'fully automated' in the sense that, at the point when a decision was to be made to issue any particular garnishee order, the action of doing so was automatically effected by the system and did not require the deliberation or approval of any human decision-maker. (Revenue NSW advises, however, that even in the first version of the GO system

there was the possibility of some manual intervention in initial stages of the process, such as during data input and verification processes).

23. The basic elements of the system are as follows:

- Two core information technology applications are used, the Fines Enforcement System (**FES**) and the Debt Profile Report (**DPR**). Together, these manage the end-to-end lifecycle of an enforced fine.
- The FES is essentially a database of the details of individual fine defaulters and the debts they owe. The information is uploaded to the FES directly by the government agency that has issued the fine.
- The DPR is what is referred to as a 'business rule engine'. It applies business and prioritisation rules to FES data, to determine whether enforcement action should be applied to a fine defaulter, and the type of action to be applied. Other than a garnishee order, enforcement action could include property seizure or a charge on land.
- The DPR creates a list of fine defaulters in respect of whom a garnishee order is proposed to be made. This list is compiled using inclusion and exclusion criteria coded into the business rules. The inclusion criteria include certain pre-requisites that the legislation says must be met before a garnishee order can be issued – for example, the time that must have passed since the fine was first issued. The exclusion criteria remove fine defaulters from the list – for example, where there is information that the fine defaulter is a deceased person.
- The DPR 'queues' the garnishee orders, and an electronic file of garnishee orders is issued to certain banks on a nightly basis. The file typically includes the names and contact details of thousands of fine defaulters, together with a direction to the bank that it is to attempt to garnishee funds up to a certain amount if an account in the individual name of the fine defaulter is held with that bank.

24. These basic elements of the system have remained in place since 2016, but additional elements have been added to the system by Revenue NSW from time to time. One such change – which is a central issue in this investigation – has been (from March 2019) the inclusion of processes to be performed by a human delegate in the system. The exact nature of those processes has also changed since that time (see **next section**).

Changes to the GO system over time

Minimum protected amount

25. In August 2016, Revenue NSW introduced a 'minimum protected amount'. At that time the minimum protected amount was $447.70.

26. Our office had been raising concerns about the unfairness and hardship that was being caused by the GO system in circumstances where, in some cases, the entirety of a person's bank balance had been taken. We noted that when NSW Courts made garnishee orders in respect of wages under the *Civil Procedure Act 2005,* the amount paid could not reduce the wage below a certain minimum. In other words, no garnishee order made to a debtor's employer could take a person's entire salary or wages.

27. In its submissions to this investigation, Revenue NSW pointed out that others around this time had also been raising issues about the desirability of a minimum amount protection, including the Department of Communities and Justice. Revenue NSW also noted that its decision to introduce the minimum protected amount was not a result only of the NSW Ombudsman having raised concerns.

28. Now when it issues the GO order to the bank, Revenue NSW instructs the bank to leave this minimum amount in the person's account. In other words, banks are told not to recover the full garnishee order amount if it would mean the person is left with less than the minimum amount in their account.

29. Following submissions made by our office and others to a parliamentary inquiry into debt recovery in May 2014[8], the government adopted the minimum amount into legislation. This minimum protected amount is indexed in line with the CPI – since 1 April 2024 the minimum protected amount is $587.50.

Vulnerability model

30. In September 2018, Revenue NSW introduced a machine learning model designed to identify fine defaulters likely to be 'vulnerable', so that they can be excluded from the system.

31. Our office had been raising concerns about the hardship that was being caused by the GO system on people experiencing vulnerability. Even if those people might subsequently be able to successfully request a refund of the garnisheed amount on hardship grounds, we were concerned that they were unfairly impacted.

32. Again, Revenue NSW in its submissions told us that its decision to introduce the vulnerability model did not result only from the Ombudsman raising concerns, and that it was also engaging at the time with other government agencies about excluding vulnerable people from the GO system.

33. Revenue NSW has told us that the vulnerability model uses machine learning technology. Revenue NSW says that it took the data of 60,000 customers (from over 4 million customer records) that it had previously (manually) assessed to be eligible for a refund and used this data to train the model to then (automatically) identify similarly 'vulnerable' customers.

34. A list of the original variables considered by the model can be found in the Statement of Facts[9] at **Appendix A**. Revenue NSW told us that it later added external data from the then NSW Families and Community Services (**FACS**), which enabled the machine to 'learn' the correlation between a person being assessed by Revenue NSW as vulnerable and the person having a residential address that was a FACS owned address (for example, being a tenant in public housing).

35. Revenue NSW has reported that, when tested against 250,000 Revenue NSW customers in 2018, the model was found to be 96% accurate in terms of (automatically) identifying people as vulnerable that Revenue NSW itself would otherwise (manually) have assessed as vulnerable (in the sense of being eligible for a refund if their funds had been garnisheed).

36. In May 2022 the list of variables used by the vulnerability model was further expanded, and the model now accesses data from additional Revenue NSW and external sources. The current variables, and corresponding data sources, are listed in the Supplementary Statement of Facts at **Appendix B**.

37. With the introduction of the vulnerability model, the DPR business roles were modified so that fine defaulters with a vulnerability score above a certain threshold (35%) are excluded from the list of files to be garnisheed.

38. The design and application of the vulnerability model was not within the scope of our investigation.

The Check Summary Report and delegated officer ('human-on-top') approval process

39. In March 2019, Revenue NSW introduced a process that required a human delegate to manually review an automated output known as the Garnishee Order Issue Check Summary Report (**Check Summary Report**) prior to issuing garnishee orders. In this report we refer to this as a 'human-on-top' approval process.

40. This change was made after we raised doubts about the legality of the GO system in circumstances where garnishee orders were being issued 'automatically' and without a delegated officer of Revenue NSW making the decision to issue an order in each case.

41. Following this change, the electronic file of fine defaulters (selected by the DPR) ceased to be automatically (that is, without human involvement) transmitted to the bank for action on any given day. Instead, the DPR produced a Check Summary Report which a delegated officer reviewed prior to approving the electronic file being transmitted to the bank.

42. The Check Summary Report is a single consolidated report for all the fine defaulters selected for a garnishee order, and is accompanied by a spreadsheet of raw data from all relevant files. Typically, on any day it will include thousands of names. An example of the Check Summary Report from 2020 (without the attached list of fine defaulters' names) is set out at the end of the Statement of Facts at **Appendix A**.

43. The Check Summary Report uses a traffic light system. If all the traffic lights are green, the delegated officer of Revenue NSW approves the garnishee orders, and the files are transmitted to the relevant banks. The Check Summary Report traffic lights are shown against each of the:

    - 'inclusion criteria' – these are the rules that must be met for a garnishee order to proceed under the GO system (e.g. one of the green lights indicates that all of the fine defaulters listed in the report are aged over 18 and under 70), and
    - 'exclusion criteria' – these are the rules that, if met, would result in the fine defaulter not being included in the list (e.g. one of the green lights indicates that none of the fine defaulters is known to be deceased, or has a certain vulnerability score (from the vulnerability model)).

44. In other words, green lights are meant to show the decision-maker that the fine defaulters who are selected have met the criteria for inclusion, and do not include any fine defaulters who are supposed to be excluded.

45. Because these criteria are already applied by the DPR business rules prior to producing the report, the traffic lights in the report should logically always show green, and in practice they almost always do.

46. However, there can be a red traffic light in the Check Summary Report if there have been errors in coding of the business rules or an inconsistency between the criteria for the report for a particular fine defaulter listed in the report. If a red traffic light did show, the relevant fine defaulter to whom the anomaly relates would be removed from the list for manual file review. The Check Summary Report would then be run again and, if it then shows all green traffic lights, the delegated officer would approve the electronic transmission of all of the other files listed in the report to the banks for garnishee.

Additional statements added to the Check Summary Report

47. In May 2021, Revenue NSW made changes to the form of the Check Summary Report. These changes are set out in the Supplementary Statement of Facts at **Appendix B**. The changes were made after we obtained and published legal advice (**First Emmett Opinion)** (see **paragraphs 76 – 79** below).

48. In February and March 2022, further changes were made to the form of the Check Summary Report. These further changes were made after Revenue NSW had obtained legal advice from the NSW Crown Solicitor's Office (**CSO Advice**) (see **paragraphs 80 – 82** below).

49. An example of the Check Summary Report in use after May 2021 and March 2022 is set out in **Appendix B**.

Detailed information about the various versions of the GO system

50. **Appendices A and B** of this report provide more detailed descriptions of how the various versions of the GO system have worked at various points in time since 2016. These descriptions were developed in consultation with Revenue NSW, which confirmed that they accurately describe the operation of the system at those times. Visual aids/flow charts are also included at **Appendix C** to illustrate the system workflows of the GO system in its current form.

System suspensions

51. Revenue NSW has informed us that the GO system was wholly or partially suspended at various times. The following table summarises the suspension activity.

Table 1: GO system suspensions March 2020 to May 2022

Period	Suspension applied to
24 March 2020 to 10 March 2021	All classes of debts
11 March 2021 to 31 May 2021	All classes of debts, except COVID-19 fines
1 June 2021 to 12 July 2021	*NA - no suspensions*
13 July 2021 to 6 December 2021	All classes of debts, except COVID-19 fines
7 December 2021 to 27 May 2022	All classes of debts

52. The GO system was also suspended from June 2023, after Revenue NSW received from the NSW Ombudsman further legal advice about the operation of the system (**Third Emmett Opinion**) (see **paragraphs 86 – 88**). After our investigation commenced, Revenue NSW informed us that it would suspend the system and seek advice from the Solicitor General, which was obtained on 23 August 2023. On 20 September 2023, Revenue NSW staff advised us that it was intending to recommence the system once adjustments advised by the Solicitor General had been made.

Decline in complaints

53. Overall, complaints about garnishee orders issued by Revenue NSW have declined significantly since 2016 when the first Ombudsman investigation (see **Part 2** below) was commenced. This is likely due to the changes that were made by Revenue NSW to its system, including the introduction of the minimum protected amount and the application of the vulnerability model.

54. Some of the decline in recent years (from 2020) may also be due to the fact that there have been significant periods when the GO system has been suspended. The recent increase in complaints in 2022 coincides with the lifting of a suspension of the GO system in May 2022 (see **paragraphs 51 – 52** above). However, as the trend in complaints data in **Table 2** below shows, even accounting for the impact of the pandemic and other temporary suspensions of the GO system, complaints about the GO system have significantly decreased from their peaks in 2014 and 2016.

Table 2: Actionable garnishee complaints – July 2011 to June 2023

Financial Year	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	2021-2022	2022-2023
Actionable garnishee complaints	38	68	90	220	214	118	96	40	28	4	6	18

*Note that these figures are for all complaints about garnishee orders (and may include complaints about garnishee orders issued manually).

55. In complaints the Ombudsman's Office has received since 2021 about garnishee orders, complainants have claimed that:

- large amounts of money were garnished from their bank account in one go
- Centrelink payments had been inappropriately garnished (certain Centrelink payments are 'protected' from garnishee, see **paragraphs 204 – 211** below)
- the minimum protected amount had not been left in the complainant's bank account (see **paragraphs 200 – 203** below).

56. One complainant also told us that the garnishee order on her bank account had resulted in funds being transferred to Revenue NSW that had previously been deposited into her account from her superannuation, following a successful hardship claim made to her superannuation trustee.

57. These complaints have not been the subject of investigation by us, as they were each dealt with either by referral to Revenue NSW for direct resolution or (in those cases alleging wrong conduct by the bank itself) to the Australian Financial Complaints Authority (**AFCA**).

Part 2 - Our investigations

Initial inquiries

58. The NSW Ombudsman began to notice a marked increase in complaints about Revenue NSW's garnishee practices from the early 2010s, which we later discovered coincided with its decision to dramatically increase the volume of garnishee orders it issued. In the 2014-15 financial year, complaints and enquiries to the Ombudsman about the administration of garnishee orders and associated refund requests more than doubled from the previous year and continued to increase in the following year (see **Table 2** above).

59. At some point after it began increasing its garnishee activity, Revenue NSW implemented a policy where any fine defaulter whose account had been garnisheed could obtain an initial refund of $100 for 'hardship'. They could also write and send in documentation asking for a further refund, although at that time Revenue NSW did not recognise financial hardship as a ground for refund in its refund policy. The $100 refund practice was introduced in response to the high and growing volume of contact from fine defaulters who had been left with a nil balance in their bank accounts following a garnishee order. The $100 was intended to enable them to cover basic expenses, such as food.

60. In response to increasing enquiries and complaints to the NSW Ombudsman, Ombudsman staff had numerous meetings with, and made inquiries to, Revenue NSW about both individual matters as well as broader systemic issues.

61. By mid-2014, the Ombudsman had already made several formal suggestions that Revenue NSW change its policy and practices, including suggestions that it:

    - take steps to ensure a minimum protected amount was left in bank accounts following a garnishee order
    - review its refund policy and include financial hardship as a ground for seeking a refund
    - develop detailed criteria for assessing requests for refunds, including taking into consideration factors such as whether the fine defaulter has children or other dependents, together with a training program for staff in undertaking those assessments.

62. These suggestions were not implemented in 2014 or 2015, although Revenue NSW commenced work to review its refund policy. In the meantime, complaints to the Ombudsman continued, peaking in 2016.

63. In many complaints there was no dispute as to whether the fine had been issued or the debt was owed. Rather, the issue concerned the immediate and serious impact of the garnishee order. Complainants told the Ombudsman about discovering at the cash register that they were unable to pay for groceries or being unable to purchase a bus or train ticket home. Complaints were also received from parents concerned about how they would provide for their children.

64. Concerns were also raised with the Ombudsman about the way Revenue NSW staff were responding to claims of hardship, with a consistent theme being a lack of empathy. For example, some complainants told the Ombudsman that Revenue NSW staff suggested they should just borrow money from family members to get by.

First investigation

65. Given the volume of garnishee orders and the issues being raised by complainants, in March 2016 the then NSW Ombudsman commenced a formal investigation.

66. The focus of that investigation was the impact of garnishee orders on people whose accounts were garnished, particularly people experiencing vulnerability, and whether there were sufficient protections for those who would experience or be at risk of hardship as a result of a garnishee order. The investigation also considered how Revenue NSW dealt with hardship and requests for refunds.

67. While the investigation was on foot, Revenue NSW implemented changes including:

    - Adopted, from August 2016, a practice of instructing banks to leave a minimum protected amount in the accounts of fine defaulters following a garnishee order. (This was later made a requirement of legislation, which commenced in June 2018.[10] See **paragraphs 25 – 29** above.)
    - Ceased imposing garnishee order 'costs' of $65 on fine defaulters each and every time a garnishee order was issued to a bank, noting that in some cases it could take multiple orders before the full debt was recovered. Instead, the $65 cost was imposed only once on a fine defaulter. Revenue NSW also ceased imposing that cost at all if the total debt was less than $400.
    - Instructed staff, when a hardship application was made, to look at an individual's circumstances and to provide an appropriate refund where hardship was apparent, rather than simply applying a $100 refund.
    - Adopted, from September 2018, the use of a 'vulnerability model' that was programmed to help identify people who would have a likelihood of being vulnerable and should be excluded from enforcement action including garnishee orders. (See **paragraphs 30 – 38** above.)
    - Implemented and published a documented hardship policy.

68. These changes addressed many of the fairness concerns that had been raised by the Ombudsman's Office. Some of them had been the subject of formal comments made by the Ombudsman's Office to Revenue NSW under s 31AC of the Ombudsman Act.

69. Comments under s 31AC are not findings of wrong conduct but are a way for us to inform an agency of actions that we believe may be required to ensure its actions going forward are lawful, reasonable and fair. One of those s 31AC comments (which the Ombudsman's Office made formally on 19 December 2018) was also that Revenue NSW should:

    '*Seek external legal advice about Revenue's authority to automate the issuing of GOs [garnishee orders] and provide the Ombudsman with a copy of the advice. In particular, the advice should set out:*

    a. Whether the Fines Act permits automation of the process to issue a garnishee order.

    b. If the Fines Act does not currently permit automation of the process to issue a garnishee order, what action should be taken by Revenue to rectify the issue.

    c. *Given the decision to issue a garnishee order involves the exercise of a statutory discretion, whether such a decision can be fully automated and, if not, which parts of the decision might be automated, taking into consideration administrative law requirements and the Better Practice Guide*.'[11]

Discontinuation of the first investigation

70. In May 2019, the then Ombudsman formally discontinued the investigation. At the time of discontinuing the investigation, complaints to our office had decreased significantly, and most of the suggestions that had been made by the Ombudsman by way of formal comments under s 31AC of the Ombudsman Act during the investigation had either been agreed to or had already been substantially implemented by Revenue NSW (see **paragraphs 67 – 68** above). While Revenue NSW had not indicated that it would implement the suggestion that it obtain legal advice, it had undertaken to review its system against the anticipated Automated Assistance in Administrative Decision-Making Better Practice Guide which was in the process of being updated by the Commonwealth Ombudsman.

71. In discontinuing the investigation, the then Ombudsman stated that he was 'satisfied by the actions taken and undertakings given by Revenue to strengthen and further review its garnishee processes based on the Australian Government's Automated Assistance in Administrative Decision-Making Better Practice Guide once it has been revised'.[12] This guidance was relevantly concerned with the application of administrative law principles to automated assistance in decision-making (i.e., ensuring lawfulness of decisions that involve automation).[13]

Our concerns about legality

72. In November 2019, we sought advice from Revenue NSW about the actions it had taken since the investigation had been discontinued.

73. At that time, the revised Australian Government guidance had still not been released, so Revenue NSW had not yet been able to audit its system against that guidance.[14] One of the questions we asked was whether the suggested legal advice had been obtained.[15]

74. We were told that Revenue NSW had not obtained any legal advice, internal or external, and that it was of the view that legal advice was not required. Revenue NSW told us that it had instead decided to introduce (in March 2019) a Check Summary Process, which involved a manual step in the process of issuing garnishee orders (see **paragraphs 39 – 46** above). Revenue NSW's view was that this change avoided legal doubt as to the lawful exercise of power under the Fines Act and obviated the need for it to seek legal advice.[16]

75. Notwithstanding Revenue NSW's view, my office and I held doubts about the legality of the process which, even with that March 2019 modification, was being used to issue garnishee orders. Those doubts were the impetus for us to obtain a legal opinion on that question.

Legal opinions and the current investigation

The First Emmett Opinion

76. We obtained a legal opinion from James Emmett SC and Myles Pulsford on 29 October 2020 (**First Emmett Opinion**).

77. This opinion considered the lawfulness of the GO system in operation from its inception in 2016 to March 2019, as well as the lawfulness of the GO system after the modifications were made to it in March 2019 to add a Check Summary Report process with a 'human-on-top'. The First Emmett Opinion is set out in full in **Appendix D**.

78. This opinion was provided to Revenue NSW and also later released publicly in a case study annexed to our report 'The new machinery of government: using machine technology in administrative decision-making' (**Machine Technology Report**), which was presented to Parliament on 29 November 2021.

79. For the reasons more fully explained in the next section of this report, the upshot of the First Emmett Opinion was that, in Counsel's view:

    - Revenue NSW's practices in using the GO system had, since 2016, been unlawful (i.e., not consistent with the Fines Act).
    - The legal concerns had not been fully addressed by the changes that were made to the GO system in March 2019.

The Crown Solicitor's Office Advice

80. Following publication of our 2021 Machine Technology Report, Revenue NSW obtained written legal advice from the Crown Solicitor's Office in February and March 2022 (**CSO Advice**).[17] It is set out in full in **Appendix E**.

81. The CSO Advice considered the GO System after changes were made in May 2021 to address the concerns raised in the First Emmett Opinion.

82. Revenue NSW first asked the Crown Solicitor's Office (**CSO**) whether its May 2021 system changes had addressed Counsel's concerns, and if further changes should be made. This advice, received by Revenue NSW in February 2022, suggested some further changes to the GO system. Once these were made in February/March 2022, Revenue NSW then asked the CSO to confirm whether it had effectively implemented the CSO's advice. The CSO Advice was that its suggestions had been 'effectively implemented', while also making a few further suggested changes.[18] Those changes were also made in March 2022 while the system was suspended, and took effect from May 2022 when it recommenced.

The Second Emmett Opinion

83. We obtained a second legal opinion from Counsel in September 2022 (**Second Emmett Opinion**). The Second Emmett Opinion is set out in full in **Appendix F**.

84. That opinion reviewed a particular aspect of the First Emmett Opinion, having regard to a decision of the NSW Court of Appeal in *GR v Secretary, Department of Communities and Justice* [2021] NSWCA 157 which was handed down after the First Emmett Opinion.

85. The Second Emmett Opinion did not change the ultimate conclusion of the First Emmett Opinion set out above.[19]

The Third Emmett Opinion

86. In February 2023 we instructed Counsel to provide a further legal opinion from Counsel (**Third Emmett Opinion**). This opinion was again obtained from James Emmett SC, this time with Erin O'Connor Jardine.

87. This opinion considered the GO system taking into account the different versions of the system in place after May 2021 and after March 2022,[20] when the changes were made to it by Revenue NSW in response to the CSO Advice. They considered whether those changes had addressed Counsel's earlier concerns. The Third Emmett Opinion is set out in full in **Appendix G**.

88. The Third Emmett Opinion, received in May 2023, concluded that:

    - the changes made to Revenue NSW's process in May 2021 and February/March 2022 had not fully resolved Counsel's concerns, and
    - for that reason, 'the Commissioner's process does not presently comply with the Act'.[21]

The current investigation

89. Under the Ombudsman Act, I may investigate the conduct of a public authority where it appears to me that its conduct is of a kind referred to in s 26, which includes conduct that is 'contrary to law'. If, following investigation, I find that such conduct has occurred I am required to make a report of my investigation.

90. Following receipt of the Third Emmett Opinion, and given Counsel's view that the GO system was, and continued to be, not compliant with the legislation, on 2 June 2023 I commenced the current investigation. The scope of the investigation was Revenue NSW's design and use of its garnishee order system for recovering overdue debts from bank accounts since early 2016 to date. The primary purpose of the investigation has been to consider and make findings as to whether the conduct of Revenue NSW in operating the GO system at various times since 2016 has been contrary to law or otherwise wrong.

The Solicitor General Opinion

91. After we commenced this investigation, Revenue NSW obtained a further legal opinion from the Solicitor General and Zelie Heger in August 2023 (**Solicitor General Opinion**). In this opinion, the Solicitor General and Ms Heger state that they are considering the lawfulness of the GO system from May 2022.[22] The Solicitor General Opinion is set out in full in **Appendix H**.

92. In this report, for simplicity we refer to Mr Emmett SC and Mr Pulsford/Ms O'Connor Jardine as 'Counsel' or 'Emmett', and we refer to the Solicitor General, Michael Sexton SC, and Ms Heger as simply 'the Solicitor General'.

Timeline of key events

Table 3: GO system timeline – key events

Version	Suspended	System iterations and legal opinions
Original version – Early 2016 to March 2019		**January 2016**: GO system commences as an **automated** end-to-end garnishee process **August 2016:** Revenue NSW introduces a **minimum protected amount** to be left in bank accounts **September 2018:** Revenue NSW introduces a **machine learning model** aimed at classifying certain fine defaulters as **'vulnerable persons' to be excluded** from the automated garnishee process **December 2018:** NSW Ombudsman formally outlines its **legal doubts** about the lawfulness of the GO system and suggests that Revenue NSW obtain external legal advice. [23]
March 2019 to May 2021	Suspended from 24 March 2020 (COVID 19 Pandemic)	**March 2019: Revenue NSW adds a 'human-on-top'**, with an authorised officer receiving the output of the automated process, a **Check Summary Report**, with traffic lights listing the proposed garnishee orders that have been 'greenlighted' to be issued that day, which the officer would then issue. **October 2020:** NSW obtains the **First Emmett Opinion**, which advises that the GO system was not compliant with the Act from 2016 and that their concerns in this regard were not fully addressed by the March 2019 changes. **November 2020:** A copy of this opinion is provided to Revenue NSW.
May 2021 to February 2022	Restarted 1 June 2021 Suspended again from 13 July 2021 (COVID 19 pandemic).	**May 2021:** Revenue NSW makes **changes to the Check Summary Report** to address Counsel's concerns, including adding: 1. statements that all customers fall within s 71(1)(a) or (b) and that the decision-maker confirms that the condition precedent to s 71(3) has been met 2. 5 new traffic light rule checks (property seizure (not) preferred, charge on land (not) preferred, payment plan application (not) pending, Work Development Order application (not) pending, (no) basis to consider write off). **November 2021:** NSW Ombudsman publishes its **Machine Technology Report**, which includes a copy of the First Emmett Opinion in a case study about Revenue NSW's GO system. **February/March 2022**: Revenue NSW obtains **CSO Advice** about whether further modifications should be made to the GO system.
March 2022 to August 2023	Restarted 28 May 2022 Suspended from end of May 2023 (following receipt of the Third Emmett Opinion)	**February/March 2022**: As recommended by the CSO Advice, Revenue NSW makes **further changes to the Check Summary Report** to: 1. require the decision-maker to tick a box alongside the words 'By ticking this box I confirm the three statements to the right' 2. add a new statement that the officer has formed the state of satisfaction required by s 73(2) of the Fines Act, 3. include additional text describing all of the inclusionary and exclusionary rule checks applied by the automated system, together with an explanation of what a green traffic light means for each rule check. **May 2022**: Expanded variables for identifying vulnerable persons in the vulnerability model take effect. **May 2023**: NSW Ombudsman obtains the **Third Emmett Opinion**, which advises that the GO system continues not to be compliant with the Fines Act, despite the modifications made in **May 2021** and **March 2022**. A copy of this opinion is provided to Revenue NSW on 22 May 2023. **October 2022**: CPI increase to minimum protected amount (now $587.50). **August 2023**: Revenue NSW obtains the **Solicitor General Opinion**, which advises that the GO system since **May 2022** complies with the Fines Act.

Part 3 - Whether the GO system has been operating unlawfully for fines debts

93. In this section we briefly outline, in language that seeks as far as possible to avoid undue legal technicality, our analysis of the legal issues addressed in the various legal advices that concern the lawfulness or otherwise of Revenue NSW's conduct in respect of the GO system.

94. We have not summarised all the relevant legislative provisions or the detailed arguments made in each of the legal opinions. Those opinions are set out in full in the appendices to this report.

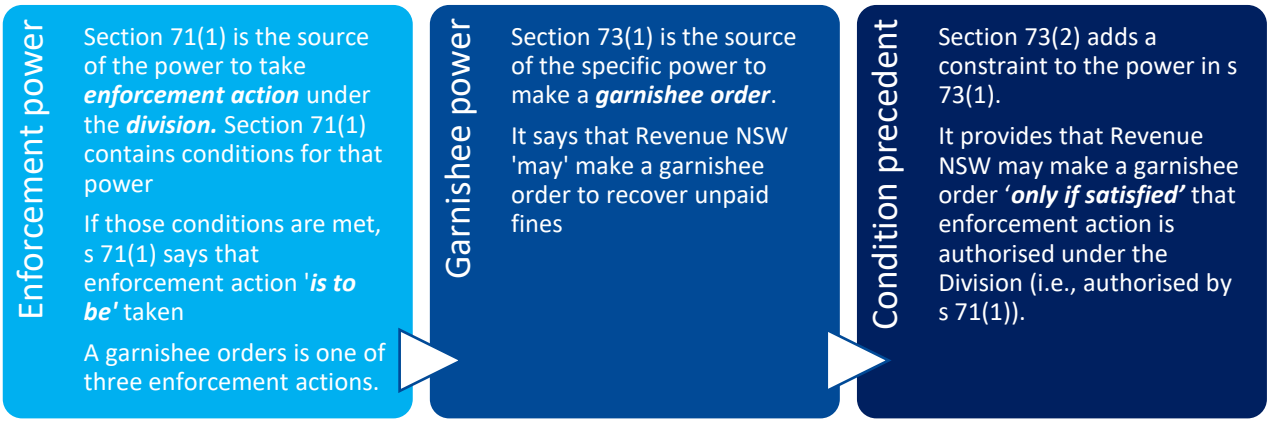
The statutory context

95. Revenue NSW's power to issue garnishee orders under the Fines Act is in Division 4 of Part 4, which deals with civil enforcement action.

96. Under the Fines Act, powers are exercised by the Commissioner for Fines Administration (the head of Revenue NSW). For simplicity, when describing the provisions of the Fines Act in this section, we have used 'Revenue NSW' rather than 'the Commissioner'.

97. The key elements of the legislation are as follows:

- s 71(1) provides that enforcement action 'is to be taken' by Revenue NSW under Part 4 Division 4 of the Fines Act against a fine defaulter if the following conditions precedent are met:
    - a notice of the fine enforcement order[24] has been served on the fine defaulter[25], and the fine defaulter has not paid the fine as required by the notice, and
    - either enforcement under Division 3 (which relates to licence and registration disqualification and other enforcement action by Transport for NSW) is not available, or the fine is still unpaid 21 days after Transport for NSW was directed to take such enforcement action.
- s 73(1) provides that Revenue NSW 'may' make a garnishee order for the purposes of recovering fines. A garnishee order is one of the three possible forms of enforcement action that can be taken under Part 4 Division 4[26] – the other two are a property seizure order (s 72) and a charge on land (s 74).
- s 73(2) provides that Revenue NSW may make a garnishee order 'only if satisfied' that enforcement action is authorised under the Division (i.e., by s71(1)).



98. Section 116A of the *Fines Act* empowers the Commissioner of Fines Administration to delegate a decision to issue a garnishee order to any person employed in the public service.

99. Although s 71(1) states that Revenue NSW 'is to' take enforcement action (i.e., a garnishee order, a property seizure or a charge on land) if the relevant conditions precedent apply, there are a number of other relevant decisions Revenue NSW can make under the Fines Act in respect of an unpaid fine debt. These will be referred to as 'hardship provisions' in this report and are explained in **Table 4** below.

Table 4: Hardship provisions

Time to pay (s 100)	Revenue NSW may allow a person extra time to pay or payment by instalments. This discretion appears only enlivened if the person makes an application. If granted, Revenue NSW may, on its own initiative, amend or revoke the time to pay order.
Write off (s 101)	Revenue NSW may write off recovery of one or more fines. This discretion is enlivened either by application from the person, or on Revenue NSW's own initiative.
Community Service Orders (s 79)	Revenue NSW may make an order requiring the defaulter to perform community service work to work off the amount of the fine that is unpaid.
Work and Development Orders (s 99B)	Revenue NSW may make a work and development order in certain circumstances involving mental illness, disability, homelessness, hardship or addiction. This provision is only enlivened if an application is made by the fine defaulter.

100. To assist readers, key terms used throughout this report are explained in **Table 5** below.

Table 5: Key terms

Discretionary decision[27]	Decisions made in circumstances where the decision-maker has some decisional freedom (choice) in whether or not (or how) to make the decision.[28] Discretionary powers can usually be identified by the word 'may' in the relevant provision that confers the decision-maker's power.
Evaluative judgement	This is where a decision-maker is required to use their judgement to reach a certain state of mind about a particular fact. This is usually identified by words indicating that the decision-maker must be 'satisfied' of, or of the 'opinion', or 'suspect' or 'believe' something, before they can exercise the relevant power.[29]
Conditions precedent	These are specific conditions or facts that must exist before something else can occur (e.g., things that must be true or that must have happened before a power can be exercised). Conditions precedent are also known as jurisdictional facts – facts that must be true before the decision-maker has 'jurisdiction' to exercise the relevant power.
Subjective jurisdictional fact	This is a kind of condition precedent that requires the decision-maker to be personally satisfied that some fact exists before a power is enlivened. It is 'subjective', because the decision-maker must be *personally* satisfied (an evaluative judgment) and it is 'jurisdictional' because their power is not enlivened unless they have that state of satisfaction.

Key legal issues

The absence of express authorisation to use automation technology

101. The Fines Act does not contain any provision that expressly authorises the use of a computer program or other technology to automate (in whole or in part) the issuing of, or the decision-making process for issuing, a garnishee order.

102. The legal opinions accept that the absence of such express authorisation does not of itself mean that the use of technology is not permissible, provided that its use is otherwise consistent with legislation.

Functions that require a subjective evaluative judgment by an authorised decision-maker cannot be fully automated

103. The reasoning in the legal opinions confirms that, where a decision requires a subjective evaluative judgment to be made (e.g. that a particular decision-maker be 'satisfied' of something), the decision-making process cannot be *fully* automated. This is because the authorised decision-maker must engage in a mental reasoning process in order for them to genuinely form such a judgment.[30] The Solicitor General Opinion notes the requirement for an 'active intellectual process'.[31]

104. In respect of the power to issue garnishee orders, a condition for the exercise of that power is that the Commissioner or their delegate must first be 'satisfied' that enforcement action is authorised under the division. The legal opinions confirm that this means that the Commissioner or delegate (i.e., a human) must reach a mental state of being 'satisfied'. Reaching this level of satisfaction is a condition precedent to their power to issue a garnishee order or take other enforcement action, and as such it is a jurisdictional fact for the exercise of the power.[32] In other words, the power cannot lawfully be exercised if this condition is not met.

105. Consequently, a fully automated GO process would not be compliant with the Act: such a system would not allow for any authorised (human) decision-maker to undertake the mental process required to form the required mental state (of being 'satisfied'), which is essential before a garnishee order can be issued under the Act.

Whether Revenue NSW has a 'residual discretion' not to take enforcement action

106. Once the relevant condition has been met (that is, the decision-maker reaches the relevant state of satisfaction that enforcement action is authorised), s 71(1) provides that enforcement action 'is to be taken'.

107. Revenue NSW's view is that this means that enforcement action is then mandated, and the Commissioner or delegate does not have any discretion *not* to take enforcement action.

108. The legal opinions on this issue diverged. The Solicitor General Opinion preferred this 'mandatory interpretation', considering it to be consistent with the ordinary meaning of 'is to be' and reinforced by the wider statutory context.[33]

109. The First Emmett Opinion also proceeded on the basis of a mandatory interpretation.[34] However, after that first opinion was provided, the NSW Court of Appeal handed down the decision of *GR v Secretary, Department of Communities and Justice* [2021] NSWCA 157 (**GR decision**), which

considered a provision of a different Act which used language ('is to') that was in some respects similar to the language used in the Fines Act.

110. After reviewing that decision, Counsel (in the Second Emmett Opinion) advised that there was a basis for an alternative 'directory interpretation', which although attended by 'real doubt' they now preferred.[35] According to this directory interpretation, although the decision-maker is generally *expected* to take enforcement action, they retain a *discretion* not to do so (i.e., a residual discretion, in addition to any discretion associated with specific hardship provisions).[36] The Solicitor General Opinion disagreed, considering that the GR decision 'provides little assistance given the different statutory contexts'.[37]

111. Counsel acknowledged that factors for and against the mandatory and directory interpretations are 'finely balanced'[38] and the Solicitor General Opinion also agreed that there were 'reasonable arguments both ways'.[39]

112. Only an authoritative judgement from a court, or clarifying amendment by Parliament, can achieve certainty about the proper construction of s71(1) in this regard.

113. The interpretation is, however, important in the context of assessing the lawfulness of the GO system, because if the Commissioner or delegate has a general discretion (as per the directory interpretation) then this 'heightens the risk' that the GO system will be non-compliant with the Fines Act. This is because, if there is a residual discretion, the process would need to provide for the decision-maker to undertake a process of reasoning not only to reach the required state of satisfaction (see **paragraph 110** above), but also to conclude, as a matter of discretion, that enforcement action should be taken in accordance with the statutory expectation (that it will generally be).[40]

Whether Revenue NSW must consider alternative enforcement options

114. There is also disagreement among the legal opinions concerning the decision to take a particular kind of enforcement action in any case.

115. When enforcement action 'is to be taken', there are three kinds of alternative civil enforcement action that may be taken – a garnishee order, a property seizure order, or a charge on land.

116. In the First Emmett Opinion, Counsel suggests that, if enforcement action is authorised and even if it is required (as per the mandatory interpretation), the decision-maker, before deciding to exercise one particular kind of action (such as garnishee), must first consider whether to take one of the other kinds of action (i.e. property seizure or land charge). That is, the decision-maker is required to make a discretionary 'choice' among the three kinds of authorised enforcement actions.

117. The Solicitor General Opinion disagreed. In their view, 'there is no textual indication that these alternatives *must* be considered prior to issuing a garnishee order'.[41] They acknowledge that there is discretion here – the decision-maker *may* issue a garnishee order, they *may* issue a property seizure order, or they *may* impose a charge on land.[42] However, in their view this does not mean that the decision-maker must undertake a mandatory assessment in each case as to which of the three orders would be more appropriate.[43]

118. Again, this interpretative difference is important, as on the Emmett view the risk of non-compliance of the GO system with the Fines Act is heightened. This is because as well as engaging in the mental process required to form the satisfaction that enforcement action is authorised, it would also be necessary for the decision-maker to undertake an active mental process of deciding between

alternative enforcement actions in each case. According to the Solicitor General, doing this is not mandatory.

The permissibility of 'batching' decisions to issue garnishee orders

119. Both the opinions from Emmett and from the Solicitor General agreed that individual case-by-case decision-making was not a necessary requirement when issuing garnishee orders for fines falling within s 71(1)(b) of the Fines Act.[44] That is, a decision-maker may consider the issue of garnishee orders to multiple fine defaulters simultaneously or in a 'batch'.[45]

120. Reasons for this, and why individual case-by-case decision-making is not required, included:

- the limited nature of the decision-maker's functions and extent of discretion under the Act, including the fact that the decision-maker is required (or at the very least, expected) to take some form of enforcement action where conditions precedent have been met
- the express removal (by s 73(3)) of any procedural fairness requirement to provide advance notice to the defaulter, or to seek submissions from the fine defaulter about whether or not an order should be issued, and
- the fact that it would be practically possible to select a cohort of fine defaulters whose situations are, in terms of the considerations required to be taken into account when deciding whether to issue a garnishee order under the Act, relevantly the same.[46]

121. However, again there was some difference between the views of the Emmett Opinions and the Solicitor General Opinion about the matters that must be considered when making multiple simultaneous decisions.

122. According to Emmett, there is 'considerable scope for debate' about whether a decision to issue a garnishee order can be reached without reviewing the whole of each defaulter's file.[47] In Counsel's view, a decision-maker could do so (i.e. not review each file) *provided* they have properly considered the nature of the information they are disregarding (i.e., any additional information specific to that file not taken into account when it was selected for inclusion in the 'batch') and formed the view, on a reasonable basis, that such information would not alter their opinion.[48]

123. The Solicitor General Opinion disagreed, stating that '[r]egardless 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.'[49]

124. The Solicitor General Opinion also did not think there is any necessary limit on the number of garnishee orders that could be issued at once. However, they did identify a risk that a court may reach a contrary view, noting that 'this conclusion [that there is no limit at all to the number of garnishee orders that can be considered at one time] 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'.[50]

The permissibility of adopting a policy that garnishee orders will ordinarily be made in identified categories of cases

125. The GO system inherently reflects a 'policy' that garnishee orders will ordinarily be made for cases where the relevant inclusionary and exclusionary rules that govern the green lights in the Check Summary Report apply.

126. The legal opinions agree that it is open to Revenue NSW 'to adopt a policy that the making of a garnishee order would ordinarily be appropriate in identified circumstances'.[51] Such a policy will be legally permissible provided it (among other things) is consistent with the Fines Act and 'leaves the scope of statutory discretion intact without creating fixed rules that must be adhered to regardless of the facts'.[52]

127. The Solicitor General Opinion concludes that the policy reflected in the (post-May 2022) GO system meets this requirement. Reasons included that:

- the Check Summary Report makes clear that the decision-maker is not bound to follow the recommendations to issue the garnishee order and may consider other enforcement action such as property seizure orders or registration of charges on land,[53] and
- the policy 'is designed to take into account the circumstances of the fine defaulter to some extent' and 'incorporates some consideration of the merits that might be relevant to discretion' for example by inviting the decision-maker to consider whether the fine defaulter is a client of NSW Trustee and Guardian, is bankrupt or reaches a certain 'vulnerability score'.[54] (These are 'exclusionary' rules in the GO system.)

128. The First Emmett Opinion expressly notes a caveat, which is that, even where a policy has been lawfully adopted in this way:

'*[I]t would remain necessary that there be an individual, being the Commissioner, their delegate or an authorised person, who reaches the relevant state of satisfaction and decides that this is how they will exercise their discretion in the case or cases before them.*'[55]

Requirement to consider pending applications for the exercise of a hardship provision

129. There are several provisions in the Fines Act that allow alternative pathways to avoid civil enforcement action. These are s 79 (community service orders to work off a fine), s 99B (work and development orders), s 100 (extension of time to pay, or payment by instalments) and s 101 (writing-off). The powers in ss 79 and 101 can be exercised on Revenue NSW's own motion.

130. According to the Solicitor General Opinion, Revenue NSW is not required to consider whether to exercise its own motion powers under either s 79 or s 101 before issuing a garnishee order. However, if an application has been made by the fine defaulter under ss 99B, 100 or 101, then that application 'should be considered prior to making a garnishee order'.[56] Accordingly, to be consistent with the Fines Act, the GO system must exclude any cases where there is a pending application under one of those hardship provisions. (Revenue NSW advises that this is the case.)[57]

Whether the Check Summary Report puts all mandatory considerations before the decision-maker

131. The only information before a delegate when deciding to issue garnishee orders is the automated output of the GO system, being the Check Summary Report including any accompanying Decision Statements.[58] Accordingly, much of the focus of the advices has been on the adequacy of that document.

132. The Solicitor General Opinion approached this issue by considering whether the Check Summary Report (from May 2022) 'invites the Commissioner/delegate to consider all the matters which the decision-maker is required by the statute to consider'.[59] In their view, it did.

133. For the reasons outlined above, according to the Solicitor General Opinion the only 'mandatory consideration' is the required state of satisfaction under s 73(2) – i.e. whether the decision-maker is satisfied that enforcement action is authorised by the Fines Act. The Solicitor General Opinion was also of the view that it would be 'prudent'[60] (and the Commissioner 'should'[61]) consider any pending applications under ss 99B, 100 or 101 by the fine defaulter.

134. The Solicitor General Opinion considered that the Check Summary Report from May 2022 and associated processes meet the Fines Act's requirements by putting the mandatory considerations before the decision-maker.[62]

135. Because the Emmett opinions took a different view about various aspects of the decision that are required to be made by the delegate (as outlined above), the mandatory considerations that would need to be put before, and actively considered by, the delegate are more extensive on Emmett's view than on the Solicitor General's view. In particular, on the Emmett view, mandatory considerations would also include:

- whether to give effect to the statutory expectation that enforcement action will be taken or to exercise a residual discretion not to take enforcement action, and
- whether a property seizure order or charge on land would be more appropriate than a garnishee order. [63]

The impermissibility of giving conclusive effect ('rubber stamping') the Check Summary Report

136. All of the advices agree that, irrespective of what the Check Summary Report says, it would be impermissible for a decision-maker to give conclusive effect to the automated output, without engaging in the necessary active intellectual process.[64]

137. In the First and Third Emmett Opinions, Counsel was concerned that the system from March 2019 did not require decision-makers to do more than give conclusive effect to these automated outputs:

> *If NSW Revenue (sic) 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.*[65]

138. The Third Emmett Opinion stated that following the changes made to the GO system in 2021 and 2022, the Check Summary Report had achieved the objective of *recording* that the decision-maker has a proper basis to issue a garnishee order.[66]

139. However, Counsel continued to hold concerns about whether the processes required the decision-maker to properly turn their mind to the exercise of their discretion to issue a garnishee order under s 73(1).[67] There was a concern that, notwithstanding the changes that had been made to the Check Summary Report, the resulting Decision Statements depended on automated outputs and did not evidence that a decision-maker had in fact:

- understood the process (including limits in the information before them)
- understood their obligation to consider relevant factors and make their own decision about whether it is appropriate to issue the garnishee order or to take other enforcement action

- determined that they have sufficient information to make the decision without reviewing each defaulters' file or obtaining information from other sources.[68]

140. The Solicitor General Opinion came to a different conclusion. In particular:

> *[T]he Check Summary Report [as from May 2022] 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 understood the report and have reached the required state of satisfaction.*
>
> *Assuming that box is ticked, the Check Summary Report will provide prima facie evidence that the decision-maker engaged in the required statutory process.*[69]

141. The Solicitor General Opinion notes that the process 'obviously cannot guarantee that every decision made in accordance with the process will be valid'.[70] The opinion identified two examples of how an invalid (i.e. unlawful) decision might occur:

- First, it is possible in a given case (of deciding to issue a batch of garnishee orders) that 'a decision maker might not read or understand the Check Summary Report before ticking the box [that confirms that they read and understood the report]'.[71]
- The Third Emmett Opinion had expressed concern that '[t]here is nothing in the Current Process [i.e. since March 2022] which would indicate that the decision-maker…understands the process (including the limited input information).'[72] However, the Solicitor General Opinion noted that the onus would be on any person seeking to challenge a decision to prove by admissible evidence that the decision-maker did not read or understand the report and, if the box is ticked to indicate that the decision-maker had read and understood the report, a court would likely infer that the decision-maker did actually read and understand the report.[73]
- Second, a decision to issue a garnishee order might also be invalid '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'.[74]
- However, the Solicitor General considered that the risk of this happening is low, because of the limited nature of the mandatory considerations required to be taken into account by the decision-maker, the existence of procedural fairness opportunities earlier in the fines administration process, the absence of a garnishee notice requirement (so the likelihood of a submission being made by the defaulter about a proposed garnishee order is low), and the vulnerability model calibrations (which, we note, are designed to pre-emptively identify and exclude fine defaulters who might otherwise later have good reason to submit that they should not have been subject to a garnishee order).[75]

Acceptance of the Solicitor General Opinion

142. It is necessary, under the Ombudsman Act, for me to form my own view and make findings about Revenue NSW's conduct, including whether it has been 'contrary to law' or otherwise wrong within the meaning of s 26 of the Act.

143. For that purpose, I have proceeded on the basis that the Solicitor General Opinion presents a correct statement of the legal position and that, to the extent there is disagreement between the

reasoning or conclusions of that opinion and the Emmett opinions, the Solicitor General Opinion is to be preferred. I do so because:

- The legal issues raised in the opinions are evidently complex and have not been the subject of direct judicial consideration, both sets of counsel are expert in administrative law, both acknowledge (and I agree) that, on some key areas, such as the mandatory or directory interpretation, there are reasonable arguments either way and these ultimately could be resolved only by a decision of a court.
- As a general proposition, it is reasonable (at least in the absence of contrary judicial authority or obvious error) for a public sector agency to rely and act on the advice of their state's Solicitor General.
- The Solicitor General Opinion had the benefit of considering the arguments advanced in the Emmett Opinions, whereas the Emmett Opinions did not have the benefit of considering the Solicitor General's views.

The Solicitor General Opinion's reference to 'high volume' decision-making

144. Before proceeding, however, there is one aspect of the Solicitor General Opinion which I consider it important to comment on. I do so in order to raise a broader point that may be relevant whenever assessing the lawfulness of adopting large-scale automated decision-making systems in the exercise of a statutory function.

145. A number of the Solicitor General's conclusions about the way the Fines Act should be interpreted are based, in part, on a premise that the relevant function under the Fines Act involves 'high volume' decision-making. These include their conclusions that the Fines Act:

- imposes no obligation on Revenue NSW, before it decides to issue a garnishee order, to consider alternative enforcement action (i.e. property seizure or land charge)[76]
- imposes no obligation on Revenue NSW, before it decides to issue a garnishee order, to consider whether to exercise own motion powers under hardship provisions (s 79 and s 101), including considering whether to write off a debt,[77] and
- does not require the Commissioner/delegate to review a fine defaulter's file and other material held by Revenue NSW that underlies the green traffic lights set out in the Check Summary Report.[78]

146. In respect of the first, for example, the Solicitor General Opinion stated:

> *'We think such an obligation [to consider alternatives before issuing a garnishee order] 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.'*[79] *(Emphasis added)*

147. It is important to make clear that the Solicitor General Opinion here must be referring to a view that the relevant function under the Act is *essentially* (that is, always, innately and necessarily) 'high volume', and not merely that it is, as a matter of present fact, high volume.[80] It is certainly the case that the current garnishee order process does involve high volume decision-making, in vastly higher volumes than could be produced with the technology available in 1996 when the Fines Act was enacted. It would be circular logic (i.e. begging the question) to rely on a feature that is now present

by virtue of the current process, to suggest that a particular interpretation of the Act (i.e. the one consistent with this feature) is more likely to have been intended.

Findings and recommendations

148. In this section we deal first with the early system (pre March 2019) and the current system (post March 2022), before moving on to the more complex March 2019 to March 2020 period.

Whether the GO system was lawful from 2016 to March 2019

149. Revenue NSW's conduct in issuing garnishee orders in respect of fine defaulters under the GO system between January 2016 to March 2019 (when there was no 'human-on-top') was contrary to law, in that it did not comply with provisions of the Fines Act.

150. In particular, the practice of using the system was contrary to law because garnishee orders were issued despite the fact that no authorised decision-maker was:

- forming the subjective evaluative judgement that is required to be formed by the decision-maker before enforcement action is authorised to be taken, or
- making a decision to issue the garnishee order.

151. Although the Solicitor General Opinion did not expressly consider the lawfulness of the system prior to May 2022, its reasoning (including in particular that the Commissioner or their delegate must undertake an 'active intellectual process' to form the required satisfaction before an order may be issued) is consistent with this finding.

152. As such, I am satisfied that use of the GO system to issue garnishee orders under the Fines Act during this period was contrary to law.

Finding under s 26 Ombudsman Act (1)

Revenue NSW's conduct in operating the GO system to recover fines debts from January 2016 to March 2019 was contrary to law within the meaning of s 26 of the Ombudsman Act, as it did not comply with the Fines Act.

Whether the GO system has been lawful since March 2022

153. For the reasons already explained, I accept the Solicitor General Opinion that, from May 2022, the GO system has provided for a decision-making process in respect of the issuing of garnishee orders that conforms with the Fines Act.

154. Although the Solicitor General Opinion considered the system from May 2022, the substantive elements of the system (including the content of the Check Summary Report) were in place from March 2022. Only a minor change was made in May 2022, which does not appear to affect the reasoning in that legal advice.

155. For that reason, I make no adverse finding in respect of the GO system since March 2022.

156. I note that the Solicitor General Opinion:

(a) recommended that the Check Summary Report be amended to make clear that it excludes any case where a s 101 application (that the debt be written off, in whole or in part) is pending,[81] and

(b) noted that one possible way a particular decision made in accordance with the GO system could be unlawful is if there were some information on file, such as submission from the fine defaulter, which if not addressed might give rise to a denial of procedural fairness of legal unreasonableness.[82]

157. It would be prudent for Revenue NSW to make the amendment referred to in (a) above, and to take steps to minimise the risk (albeit the Solicitor General considered it already to be 'relatively low') in (b).

Recommendation (1)

If it has not done so already, Revenue NSW should:

(a) amend the Check Summary Report to make clear that it excludes any case where a s 101 application (that the debt be written off, in whole or in part) is pending, and

(b) ensure that it has robust processes for identifying and recording any relevant individual submissions by fine defaulters or their representatives (whether made orally or in writing) and either redirecting these to manual processes or flagging them in the Check Summary Report for the decision-maker to read and consider before issuing a garnishee order.

Whether the GO system was lawful between March 2019 and March 2022

158. The question of whether Revenue NSW's use of the GO system between March 2019 and March 2022 (in this section, we refer to this as the ***relevant time***) involved conduct that was contrary to law is more difficult.

The meaning of 'contrary to law' under s 26 of the Ombudsman Act

159. Under the Ombudsman Act, one of the findings the Ombudsman may make is that conduct of a public authority is 'contrary to law'. The Ombudsman can also find that conduct, while not contrary to law, is still wrong – including where it is unreasonable, unjust or otherwise 'wrong'.

160. The various legal advices that have been considered in this investigation use terms, such as 'unlawfulness',[83] 'not comply with the Act'[84] and 'inconsistent with the Act'[85], which appear to be broadly synonymous with 'contrary to law'.

161. However, it is important to note that 'contrary to law' in the context of the Ombudsman Act encompasses a broader field of conduct than the making of decisions that, if challenged, a court would find to be unlawful or invalid.[86] Indeed, conduct may be contrary to law (for the purposes of the Ombudsman Act) even in cases where there is no legal right to appeal or challenge the decision or action.

The opinions of legal counsel

162. Emmett's view was that the GO system did not comply with the Act[87] during the relevant time.[88]

163. The Solicitor General Opinion did not address the lawfulness of the GO system during the relevant time. However, in assessing the GO system *after* the relevant time (from May 2022), the critical

features the Solicitor General Opinion pointed to as relevant to the conclusion that the system was *then* compliant with the Act included:

- The Check Summary Report invites the decision-maker to reach the state of satisfaction required by s 73(2), by:
    - setting out the necessary state of satisfaction ('that enforcement action is authorised under Division 4 of Part 4')
    - setting out the basis for that satisfaction ('because each of the fine defaulters falls within section 71(1)(b)')
    - setting out the factual basis for that conclusion (namely that the fines of all 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
    - requiring the decision-maker to tick a box which confirms the above matters.[89]
- The Check Summary Report excludes cases where an application under a hardship provision is pending.[90]
- The Check Summary Report's exclusions/inclusions 'sufficiently address all the matters which the Fines Act requires the decision-maker to consider'. [91]
- None of the indicators is incompatible with the purpose of the Fines Act.[92]
- The Check Summary Report makes clear that the decision-maker is not bound to follow the recommendation to issue the garnishee order and may consider other enforcement action.[93]
- The Check Summary Report explains what all of the green traffic lights signify in narrative form.[94]
- The Check Summary Report requires the decision-maker to tick a box and thereby positively confirm that they have read and understand the report.[95]

The question of whether the system was contrary to law at the relevant time

164. It is evident that, at any time when the GO system had all of the features above, the reasoning in the Solicitor General Opinion would mean that the system would (on the Solicitor General's view) be compliant with the Act. However, this was not the case during the relevant time:

- It was only in May 2021 that the Check Summary Report included any statement at all concerning the condition precedent in s 71(3). And the statement that was included at that time was to the effect that all identified fine defaulters fall within s 71(1) (a) or (b) and that the decision-maker confirmed that the condition precedent to s 71(3) had been met. There was, however, nothing in the report that explained what those sections of the Act referred to or what was meant by the 'condition precedent'.[96]
- It was later in March 2022 that a statement was added to the effect that the decision-maker had formed the state of satisfaction required by s 73(2) of the Act, together with a requirement that they tick a box confirming that statement. It was also in March 2022 that the Check Summary Report began including text that described all of the inclusionary and exclusionary rule checks, together with an explanation of what a green traffic light meant for each rule check.

165. While the presence of all of the above features would have meant that the system was (on the Solicitor General's reasoning) compliant with the Act, it does not necessarily follow that the absence of some of those features at the relevant time necessarily means that the system was non-compliant.

166. Although the Solicitor General Opinion points to these features as relevant to their conclusion (of compliance with the law), they do not state that each of the features above is a necessary feature of a compliant system, such that the absence of any one of them would necessarily mean the system is non-compliant. As Revenue NSW submitted, these features were not described by the Solicitor General Opinion in a manner that suggests that they can be interpreted as their view as to the 'minimum necessary' for a legally compliant system.

167. Revenue NSW made very lengthy submissions related to this point, which we have considered but will not repeat in full here. Its key argument in relation to this point is most succinctly explained as follows:

'*[A]ll of the legal advices confirmed that, in order to reach the state of satisfaction required under section 73(2) and to proceed to issue garnishee orders, the decision maker must engage in an actual mental process as opposed to simply giving give [sic] conclusive effect to the green traffic lights or engaging in a rubber stamping exercise.*

In order to reach the conclusion that decision makers within Revenue NSW acted unlawfully in issuing of garnishee orders from March 2019 to May 2021, the Ombudsman must be satisfied that those decision makers did not engage in a deliberative process when reviewing the check summary report and approving the issuing of the orders…

…

[No] matter whether a process or document provides, on its face, a sound basis for lawful decision making, ultimately that process or document does not guarantee that the decision itself will be lawful. The converse is also true: even if a process or document is defective (eg in the sense that it does not expressly require the decision make [sic] to evidence a decision), that does not mean that a decision flowing from that process or document is necessarily unlawful. It is the decision maker's conduct and interaction with the process or document that is ultimately critical and needs to be considered along with all relevant factors.'

168. Clearly, if a system is such that it is not possible for decisions made, or action taken, under the system to be lawful, then it can readily be said that conduct in using the system (or, in other words, the system itself) is contrary to law at least for the purposes of a finding under s 26 of the Ombudsman Act. That, in effect, is the finding that has been made about the GO system from 2016 to March 2019.

169. However, I accept that it is *possible* that decisions made, and actions taken, using the system during the relevant period could have been lawful. That is, the GO system (whatever its defects and limitations) was not inherently incompatible with the possibility that human delegates were actually making decisions in compliance with the requirements of the legislation. That would have been the case if those delegates were *in actual practice* engaging in the required mental processes, with an adequate understanding of the considerations and of the decision/s being made, and despite those matters not being fully facilitated or evidenced by the system itself.

170. Revenue NSW submitted that it is not open to the Ombudsman to make a general finding that the *system* was contrary to law, and instead a view would need to be formed by the Ombudsman about the lawfulness of *decisions* made using the system.

171. I accept this point as fundamentally correct. In my view, unless a decision-making system is inherently incompatible with the making of lawful decisions, the use of such a system may warrant a finding of 'contrary to law' under the Ombudsman Act only if the Ombudsman concludes that the system results in the making of decisions that are 'contrary to law'.

The question of whether the system at the relevant time was resulting in lawful decisions

172. As noted above, I accept that it is possible that decisions were made lawfully under the system during the relevant time (i.e. after March 2019). However, I have limited information before me upon which to form a view as to how likely it was in fact that decisions were (or were not) being made in a manner compliant with the Fines Act.

173. Revenue NSW asserts that decisions made using the GO system during the relevant time were, in fact, made lawfully, even while accepting that the GO system itself was 'imperfect'.

174. Relevant points made by Revenue NSW in its submissions on this point include:

- '*[T]he decision-making function in relation to garnishee orders is of a particularly limited and straightforward nature. It is a function…which does not require the decision maker to do anything other than be satisfied of certain basic factual matters prior to making a decision*'.
- '[T]*he officers with delegation to review the check summary report and issue garnishee orders have, since the introduction of the report, always been of the required rank and training*.' (Revenue NSW had earlier told us that delegates range from 5/6 level classification and above and receive training in the Fine Enforcement System and the Daily GO Issue Manual Check Work Instruction.) [97]
- [Those officers] *understand:*
  - *The legislative preconditions for issuing garnishee orders;*
  - *The operation of the fine enforcement system including the process by which fine recipients are identified for garnishee action resulting in the check summary report;*
  - *The purpose of the check summary report;*
  - *The class of fine recipients to whom the report pertains;*
  - *The meaning of the traffic lights and the inclusionary and exclusionary rule checks;*
  - *That, while enforcement action is mandatory for persons falling within section 71(1)(b), it is open to the Commissioner to take enforcement action other than issuing a garnishee order; and*
  - *They must document their approval of the report*.'

Conclusion

175. In respect of the system post-May 2022, the Solicitor General's Opinion is that decisions made under that system appear *prima facie* to be lawful decisions. Furthermore, if a person sought to

challenge such a decision in court, the onus would be on them to prove by admissible evidence that it was not lawful.[98]

176. In the period from March 2019 to March 2022, however, the limited information that was put to decision-makers in the Check Summary Report did not appear to establish, even on a *prima facie* basis, that decision-makers understood the decision they were to make, and did not clearly and fully evidence or record that they had engaged in the requisite deliberative mental process to make their decision.

177. However:

- it is possible that decisions made under the GO system from March 2019 to March 2022 could have been lawfully made
- Revenue NSW asserts that those decisions were in fact lawfully made, and
- there is no direct evidence before me to contradict that assertion (such as testimony from delegates themselves indicating that they did not understand the decision they were making, or that they were routinely approving the system output without any genuine deliberation).

178. Consequently, I am not in a position to conclude that decisions made using the system during the relevant period were unlawful and I make no finding as to whether the conduct of Revenue NSW in using the GO system at the relevant time constituted or involved conduct that was contrary to law.

179. Nevertheless, it is apparent that the GO system during the period was defective in that, even if it is possible that lawful decisions were being made, the GO system did not provide decision-makers with a clear and complete basis for those decisions, and did not clearly and fully record those decisions and the decision-making process. For this reason, even assuming the decisions being made by delegates during the relevant time were lawful, in my view Revenue NSW's use of the GO system in its form at the time constituted administratively wrong conduct.[99]

Finding under s 26 Ombudsman Act (2)

Revenue NSW's conduct in operating the GO system to recover fines debts from March 2019 to March 2022 was wrong within the meaning of s 26 of the Ombudsman Act, as the system was defective in that, even if it is possible that lawful decisions were being made, the GO system did not provide decision-makers with a clear and complete basis for those decisions, and did not clearly and fully record those decisions and evidence the decision-making process.

Failure to obtain legal advice

180. The *practical* risk that Revenue NSW would at any time face any actual legal challenge to its use of the GO system appears to be quite remote. That is because, even if a fine defaulter were successful in arguing that a particular garnishee order was unlawfully issued and that the particular transaction should be reversed, that would not affect the status of the person's underlying fine debt, or the authority of Revenue NSW to recover it.

181. Of course, the fact that an agency's conduct is unlikely to be subject to legal challenge does not affect its obligation to operate strictly within the legal bounds of its authority. The absence of other practicable accountability mechanisms also makes the role of alternative oversight mechanisms, such as an Ombudsman, even more important.

182. As explained in our Machine Technology Report, proactively obtaining legal advice is a critical action that we consider agencies should take before automating any statutory decision-making process. As the Machine Technology Report explained, when new technologies and new modes of exercising a statutory function are being considered, it is essential that the source legislation be carefully considered afresh. Interpreting a statute can be complex even for highly experienced officials and lawyers. Any coding of legislation will require interpretative choices to enable it to fit within the different language and logic of machine form and must be done in a way that does not result in the meaning or effect of the law being impermissibly altered. Agencies that wish to use automation technology should ensure that they utilise legal expertise from the very outset of any design process.

183. Automation is a rapidly evolving area raising novel legal questions. Obtaining early legal advice is essential for automation projects involving high volume government decision-making, especially where it may affect a power that is, or may be, discretionary or requires evaluative judgement. This is particularly the case if the decisions may affect vulnerable people, or where the costs or savings associated with such a program may create (or be perceived to create) a disincentive to the agency to scrutinise the legal basis for decisions. In such cases, external legal advice may be essential for providing assurance about the lawfulness of such system to oversight bodies, Parliament and the public.

184. Our Machine Technology Report was not published until several years after commencement of the GO system, and in 2016 there was limited guidance and advice for NSW agencies looking to adopt automated decision-making and other machine technology systems. That said, there had been guidance from the Commonwealth Government and Commonwealth Ombudsman since 2007 about the importance of involving administrative lawyers when automating decision-making processes. That guidance also advised that discretionary decisions could not be fully automated.

185. Looking back with hindsight it seems evident that legal advice on the design of the GO system to ensure compliance with the Act should have been sought by Revenue NSW before any step was taken to implement the GO system. However, given the different circumstances and level of awareness concerning these issues at the time, I make no formal finding that Revenue NSW's failure to do so at the time was 'unreasonable' or otherwise wrong within the meaning of s 26 of the Ombudsman Act.

186. However, I now put on record that, if Revenue NSW (or any other agency) were to implement a similar system today without seeking appropriate legal advice, the failure to seek such advice could of itself be considered unreasonable conduct (i.e. maladministration).

Part 4 – State debts and other issues

Use of the GO system for *State Debt Recovery Act 2018* debts

187. During the investigation, we learned that the GO system had also been used to recover debts under s 55 of the SDR Act over a two-year period from 21 March 2018 until March 2020.[100] Revenue NSW ceased use of the system after March 2020, reverting to a fully manual process from March 2021.

188. State debts include ambulance debts, various NSW Fair Trading 'aged debts', point to point transport annual authorisation fees (taxis, hire cars, tourist services, rideshare), and State Insurance Regulatory Authority general workers compensation debts.

SDR Act powers

189. Since 2018, in addition to its power to recover fines by way of garnishee under the Fines Act, Revenue NSW has also had a separate power to issue garnishee orders for other debts under the SDR Act, under Part 6 (Debt Recovery Actions).

190. The power to issue garnishee orders for State debts is more straightforward than the power under the Fines Act. The key provisions of the SDR Act are:

- s 50 provides that Revenue NSW 'is authorised' to take debt recovery action if a debt recovery order is made, served and remains unpaid 7 days after it is due.
- s 55 provides that Revenue NSW 'may make an order (a garnishee order)' for the purposes of recovering State debts. That is, a garnishee order is a form of debt recovery action.

191. Section 50 is the authorisation provision, which describes the circumstances when recovery action is authorised. It effectively sets the 'conditions precedent' that must be met before the power in s 55 can be exercised.

192. Section 101 of the SDR Act empowers Revenue NSW (in this case, the Chief Commissioner for State Debts) to delegate powers for debt recovery and information gathering to any person employed in the Public Service (and other powers under the SDR Act to 'any person').

Lawfulness of the GO system for garnishee orders under the SDR Act

193. Our view is that the power to issue a garnishee order in s 55 of the SDR Act is a 'general' discretion that, unlike its equivalent s 73 of the Fines Act, is not constrained by its authorisation provision.[101]

194. As far as we are aware, it is not in dispute that the SDR Act garnishee power is discretionary. The decision-maker is required to decide whether or not to issue a garnishee order, although powers must be exercised with regard to the broader statutory context and function.

March 2018 to March 2019

195. The advices appended to this report concerning the issuing of garnishee orders under the Fines Act are also relevant to s 55 of the SDR Act, although none of them specifically addresses the use of the GO system for that purpose. The finding in relation to the use of the GO system prior to March 2019 in respect of fines extends to the use of the system for State debts.[102] I have therefore found that Revenue NSW's conduct in operating a fully automated GO system to recover State debts from March 2018 to March 2019 was contrary to law and wrong, as its decision-making process for issuing garnishee orders, and resulting decisions, did not comply with the SDR Act.

March 2019 to March 2020

196. Revenue NSW did not cease using the GO system to recover State debts until after March 2020.

197. Having regard to the legal principles discussed in the previous chapter, there must be serious doubts about the lawfulness of decisions to issue garnishee orders under s 55 of the SDR Act using the GO system after March 2019, particularly given the more general discretionary nature of that power.[103]

198. However, I have not made a finding that the use of the system for this purpose at that time was contrary to law, given the absence of any legal advice specifically addressing State debts.[104]

199. Nevertheless, I am satisfied that Revenue NSW's conduct in this regard was, at the least, wrong in so far as it resulted in an unacceptable risk of unlawful decision-making.

Finding under s 26 Ombudsman Act (3)

(a) Revenue NSW's conduct in operating a fully automated GO system to recover State debts from March 2018 to March 2019 was contrary to law within the meaning of the Ombudsman Act, as it did not comply with the SDR Act.

(b) Revenue NSW's conduct in operating the GO system to recover State debts from March 2019 until March 2020 (when it ceased doing so) was wrong within the meaning of the Ombudsman Act, due to the unacceptable risk that it did not comply with the SDR Act.

Recovery in excess of minimum protected amount

200. From time to time the Ombudsman has received, and continues to receive, complaints from people who say that little or no money has been left in their account after Revenue NSW's garnishee action despite the fact that the minimum protected amount (currently $587.50) is not meant to be taken.

201. Our practice has generally been to refer these matters back to Revenue NSW for consideration under its Hardship Policy which states:

'If we have taken money from your bank account

We may authorise a refund of any amount taken where…..The bank/financial institution made an error which has resulted in your money being incorrectly taken' [105]

202. We may also refer the person to make a complaint to their financial institution or to AFCA, given that the error in taking the funds is the financial institution's and not Revenue NSW's, noting that the terms of the garnishee orders require them not to transfer an amount beyond that which would preserve the minimum protected amount.

203. Although I acknowledge that it is the financial institution's responsibility to comply with Revenue NSW's instructions in the terms of garnishee orders to leave the minimum protected amount, below I have recommended that Revenue NSW continue to engage with financial institutions to promote compliance with minimum protected amount requirements.

Recovery of Centrelink 'saved' amounts

204. Under Commonwealth law, social security and family assistance payments are absolutely inalienable. This means that they cannot be sold, transferred to a third party, legally charged or be subject to bankruptcy proceedings. However, once paid into a recipient's bank account it becomes part of the recipient's funds[106], inalienability ceases, and a garnishee order can be attached.

205. However, social security and family assistance law also provides for a 'saved amount' to which a garnishee order cannot apply. The saved amount is equal to the social security payments and/or certain family assistance payments paid into the account in the last 4 weeks (including any advances) minus the amount withdrawn from the account in the same period. [107]

206. The Solicitor General Opinion has confirmed that Revenue NSW cannot recover debts from these 'saved amounts' and that if a garnishee order purported to recover a Centrelink 'saved amount' it would most likely be read down to apply to money other than saved amounts.

207. Nevertheless, the Solicitor General Opinion states that the preferable course would be for garnishee notices to expressly state this and to include in garnishee orders explicit instructions to banks to leave the Centrelink saved amount. I agree with this view and recommend that template notices be adjusted to include this additional protective term, in addition to the existing 'note' which instructs banks not to recover the minimum protected amount.

208. I also encourage Revenue NSW to proactively:

- continue to engage with financial institutions
- remind people of their rights and complaint pathways
- refer suspected instances of non-compliance to AFCA.

209. The minimum protected amount[108] will likely overlap with the Centrelink 'saved amount'. However, the formula for calculating the saved amount, and the individual's spending in a given 4-week period, can mean that the Centrelink saved amount may be considerably higher than the NSW minimum amount. While Revenue NSW may be able to identify cases of suspected non-compliance by financial institutions, it is acknowledged that they are not able or expected to calculate the Centrelink saved amount (which will vary from person to person depending on the types of Centrelink payments they receive, and their spending in relevant 4-week period).

210. Although primary responsibility for compliance with the Commonwealth social security and family assistance laws rests with the financial institution, given the severe hardship than can result if Revenue NSW is transferred 'saved amounts', it is reasonable to expect Revenue NSW to have its own systems in place to mitigate this risk to the extent that it is able.

211. Revenue NSW is also encouraged to continue to continuously improve its vulnerability model with a view to optimising its ability to identify as many vulnerable people as possible.

Recommendation (2)

Revenue NSW should:

(a) include an instruction in its garnishee orders reminding financial institutions not to recover any social security (Centrelink) or family assistance 'saved amounts', in accordance with the Solicitor General Opinion

(b) continue to engage with financial institutions to promote their compliance with the 'protective terms' in its garnishee orders (i.e., the terms or other instructions within notices to preserve the minimum protected amount and quarantine any social security or family assistance 'saved amounts')

(c) refer any suspected instances of non-compliance by financial institutions with protective terms to the Australian Financial Complaints Authority if a person complains, or it appears to Revenue NSW staff, that a financial institution may have failed to comply with the

protective terms of its notices. If Revenue NSW considers it does not currently have the power to make such a referral, it should seek legislative amendment to enable it to do so.

(d) remind people of, and assist them to exercise, their rights and complaint pathways in respect of any non-compliance by financial institutions with protective terms.

Information about review rights

212. It does not appear that Revenue NSW provides information on its website about garnishee orders, including that they take effect as a garnishee order made by the Local Court under Part 8 of the *Civil Procedure Act 2005*, and how they may be challenged, including how to request a refund.

Recommendation (3)

Revenue NSW should provide information on its website about garnishee orders, including that they take effect as a garnishee order made by the Local Court under Part 8 of the Civil Procedure Act 2005, and how they may be challenged.

Part 5 – Procedural fairness, consultation and publication

Revenue NSW's submissions

213. In accordance with s 24 of the Ombudsman Act, Revenue NSW was given the opportunity to make submissions on the conduct that was the subject of this investigation, and on the substance of the grounds of any adverse comment proposed to be made in this report. This was done by providing Revenue NSW with a statement of provisional findings and recommendations on 20 December 2023, and inviting it to make submissions on that statement.

214. Detailed submissions were received on 2 February 2024. I have taken Revenue NSW's submissions into account in preparing this investigation report, and in particular before making my findings and recommendations, and any other adverse comments in this report. Revenue NSW made further submissions in a letter dated 14 March 2024, which have also been carefully considered.

Provision of draft report to the Minister

215. As required by s 25 of the Ombudsman Act, I provided a draft of this investigation report to the Minister responsible for Revenue NSW, the Minister for Finance, Minister for Domestic Manufacturing and Government Procurement, and Minister for Natural Resources, the Hon Courtney Houssos MLC, on 8 April 2024 inviting the Minister to indicate if they wished to be consulted.

216. The Minister advised that they wished to be consulted, and a meeting was held with the Minister on 22 April 2024 at the Minister's office in Martin Place, Sydney.

217. No substantial changes (other than minor copy-editing and typographical changes) have been made to the draft Investigation Report.

Publication of a special report of this investigation

218. Investigations by the NSW Ombudsman are required to be conducted in the absence of the public, and investigation reports are provided directly to the Minister responsible for the relevant public authority whose conduct has been the subject of investigation.

219. I may, however, make a special report to Parliament at any time in relation to any matter arising in connection with the exercise of my functions. It has been my practice that any investigation completed by my office will be reported to Parliament at least by way of inclusion in a periodic 'summary' report, which sets out a summary of the investigations, including any findings and recommendations, that were completed by my office during the relevant period.

220. I have determined on this occasion that there is also a public interest in this full investigation report being made a special report to Parliament, and I intend to table that special report as soon as practicable after furnishing the final investigation report to the Minister.

Endnotes

1 2022-23 Budget Paper no, 1 – Budget Statement – Chapter 4 – Revenue at Chart 4.1. The most recent data indicates that this figure is now just over 40% (38.3% for taxation and 3.3% for fines and other revenue). Accessed 21 November 2023 at 2022-23_Budget-Paper-No-1-Budget-Statement-Revenue.docx (live.com).

2 The *State Debt Recovery Act 2018* (**SDR Act**) was assented to on 21 March 2018 and took effect from 27 August 2018. Revenue NSW advised us in its response to our s 18 Notice issued 7 August 2023 that it had commenced issuing automated garnishee orders under SDR Act on or about 21 March 2018, but reverted to manual GOs from March 2021. Source: Revenue NSW's s 18 response received 5 September 2023 - Schedule A - documents and information and Attachment G.

3 Reliance was placed particularly on the findings of a research report by the Bureau of Crime Statistics and Research (**BoCSAR**): *Fine Default: Enforcing Fine Payment*, 1995 *accessed 18 March 2024 at* <https://www.bocsar.nsw.gov.au/Publications/Legislative/l09.pdf>.

4 NSW Parliament – Legislative Assembly, The Hon. Fay Lo Po MP, *Second Reading Speech for the Fines Bill 1996*, Hansard, 30 October 1996 accessed 18 March 2024 at <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-14027>

5 Ibid.

6 Ibid.

7 Individualised execution of a property seizure warrant would also only follow individual assessment by Revenue NSW itself: 'The SDRO will assess each matter prior to forwarding a warrant of execution to the Sherriff's Office…' Ibid.

8 Inquiry into Debt Recovery In NSW, Submission number 32 to Legal Affairs Committee Parliament House 27 May 2014. A number of legal stakeholders also made submissions about garnishee of bank accounts, these are summarised in the Committee's report at p 60 ff.

9 See Appendix A - Statement of Facts (**SOF**) at [64].

10 Civil Procedure Act 2005 s 118A.

11 Commonwealth Ombudsman et al, *Automated Decision-making- Better Practice Guide*.

12 Letter dated 6 May 2019 from Ombudsman Michael Barnes to Commissioner of Fines Administration Stephen Brady.

13 Commonwealth Ombudsman et al, *Automated Decision-making- Better Practice Guide*. This guidance was originally published in February 2007 by a cross agency working group building on earlier work of the Administrative Review Council. It was updated by the Commonwealth Ombudsman, the Office of the Australian Information Commissioner and the Attorney-General's Department in 2019 and '*focussed on practical guidance for agencies* ***aimed to ensure compliance with administrative law*** *and privacy principles, and best practice administration*'(emphasis added) – p 3.

14 Undated letter received 29 November 2019 from Commissioner of Fines Administration.

15 Letter dated 21 November 2019 from Deputy Ombudsman to Commissioner of Fines Administration.

16 Undated letter received 29 November 2019 from Commissioner of Fines Administration stating '…Revenue NSW implemented some changes to the process of issuing garnishee orders to avoid any doubt that the discretion of the Commissioner of Fines Administration to issue a garnishee order is being exercised appropriately'.

17 Revenue NSW has informed us that, in addition to the written advice from the CSO, it also met with and obtained oral advice from the solicitor who was the principal author of that advice when implementing the changes the CSO had recommended.

18 Email dated 25 March 2022 from Acting Principal Solicitor, Crown Solicitor's Office to Director, Policy and Legislation, Revenue NSW: suggestions included redrafting inclusionary rule check 8 '*as I am not sure what the rule check means based on the current explanation*' and some more minor stylistic matters. The Acting Principal Solicitor also wrote: '*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*'.

19 See Second Emmett Opinion at [31].

20 Revenue NSW advised that no relevant changes were made to the GO system between March 2022 and May 2022.

21 See Third Emmett Opinion at [6b].

[22] Revenue NSW has submitted that the Solicitor Geneal's opinion can be read as referencing the GO System from March 2022 as there were no relevant changes to the GO system between March 2022 and May 2022.

[23] Email sent 20 December 2018 from Deputy Ombudsman to Commissioner of Fines Administration attaching s 31AC letter to Revenue NSW dated 19 December 2020.

[24] *Fines Act 1996* (***Fines Act***): s 57(2) A court fine enforcement order or a penalty notice enforcement order is referred to in this Act as a 'fine enforcement order'; s 40(1) A penalty notice enforcement order is an order made by the Commissioner for the enforcement of the amount payable under a penalty notice; s 12(1) A court fine enforcement order is an order made by the Commissioner for the enforcement of a fine imposed by a court.

[25] Fines Act s 57(3) the 'fine defaulter' is the person liable to pay the fine under a fine enforcement order.

[26] Fines Act s 71 (2).

[27] For a more detailed discussion about the various types of discretions see *The new machinery of government: using machine technology in administrative decision-making. A special report under section 31 of the Ombudsman Act 1974*, 29 November 2021, at 30ff.

[28] While there are some circumstances where the word 'may' in a statute does not give rise to a discretion, it ordinarily indicates that a power may be exercised or not exercised, at discretion – see *Interpretation Act 1987* s 9(1).

[29] Also known as the conditions precedent.

[30] Counsel opined that 'Although the response of administrative law to the use of information technology may be nascent, ordinary administrative law principles required there to be a 'process of reasoning' for the exercise of discretions (Li at [23])…..'.

[31] Solicitor General Opinion at [54], citing Carrascalao v Minister for Immigration and Border Protection (2017) 252 FCR 352 at 45, and at [35] '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)'.

[32] First Emmett Opinion at [28]; Solicitor General Opinion at [34] (which notes that it is also therefore a 'mandatory consideration').

[33] Solicitor General Opinion at paras [16] – [33].

[34] First Emmett Opinion at [32] – [33].

[35] Second Emmett Opinion at [4] '….While the issue is attended by real doubt, …..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'.

[36] Second Emmett Opinion at [18] – [22].

[37] Solicitor General Opinion at [33].

[38] Second Emmett Opinion at [22].

[39] Solicitor General Opinion at [15].

[40] Third Emmett Opinion at [42].

[41] Solicitor General Opinion at [37].

[42] Solicitor General Opinion at [21].

[43] Solicitor General Opinion at [37].

[44] These are the only fines that the garnishee system is used for, as Revenue NSW has advised that fines under s 71(1)(a) and s 71(1A) are excluded from the GO system and continue to be dealt with manually.

[45] First Emmett Opinion at [80]; Solicitor General Opinion at [69].

[46] Solicitor General Opinion at [70]; First Emmett Opinion at [51].

[47] Second Emmett Opinion at [32]. Counsel suggested that the extent of the doubt in this regard could be reduced by the Minister issuing guidelines under s 120 of the Act expressly providing for batched decisions to be made.

[48] First Emmett Opinion at [80]; Third Emmett Opinion at [46].

[49] Solicitor General Opinion at [39].

[50] Solicitor General Opinion at [71].

51 First Emmett Opinion at [51], cited with agreement by the Solicitor General Opinion at [59].

52 Solicitor General Opinion at [58], agreeing in this respect with the First Emmett Opinion at [48]-[50].

53 Solicitor General Opinion at [60].

54 Solicitor General Opinion at [61].

55 First Emmett Opinion at [53].

56 Solicitor General Opinion at [48].

57 See note 62 below.

58 See Solicitor General Opinion at [57] ('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.').

59 Solicitor General Opinion at [2(b)].

60 Solicitor General Opinion at [43] – [47].

61 Solicitor General Opinion at [48].

62 The Solicitor General Opinion noted that the Check Summary Report does not expressly state that cases where an application is pending under s 101 of the Fines Act are excluded, and recommends that the Report be amended to do so: at [9]. Although this observation is expressed in the opinion as an 'exception' to the view that 'the current process for issuing garnishee order is consistent with…the Act' (at [9]) it does not appear that the Solicitor General is saying that the absence of such an express statement means that the current process is not consistent with the Act, provided that cases where a s 101 application is pending are, in fact, being excluded – see [45].

63 Third Emmett Opinion at [21].

64 Solicitor General Opinion at [35] and [54].

65 Third Emmett Opinion at [54]. See also First Emmett Opinion at [83].

66 Third Emmett Opinion at [52].

67 Note that, concerns relating specifically to exercise of a 'residual discretion' have not been included in this section, on the basis of our view that it is reasonable for Revenue NSW to proceed on the basis of a mandatory interpretation of s 71(1).

68 Third Emmett Opinion at [56].

69 Solicitor General Opinion at [55] and [56].

70 Solicitor General Opinion at [56].

71 Solicitor General Opinion at [56].

72 Third Emmett Opinion at [56]. They further consider that 'the unlawfulness does not appear to be cured by…requiring the decision-maker to confirm they are not bound by, but nonetheless have relied on, green traffic lights in the Summary Check Form': at [57].

73 Solicitor General Opinion at [56].

74 Solicitor General Opinion at [10].

75 Solicitor General Opinion at [62].

76 Solicitor General Opinion at [37].

77 Solicitor General Opinion at [42] and [47].

78 Solicitor General Opinion at [66] and [67].

79 Solicitor General Opinion at [37].

80 'High volume' here presumably means of such a high volume that a contrary interpretation of the Act (to that preferred by the Solicitor General Opinion) would result in practical difficulties for the proper exercise of the function, such that it could not have been intended. The Solicitor General Opinion does not expand on this argument. It is not entirely clear whether the function under consideration here is the function of civil recovery generally or the function of issuing garnishee orders specifically. In terms of the latter – and albeit acknowledging the limited weight that can be placed on secondary materials and the subjective intentions of legislators when assessing the legislative intent of an Act (see Solicitor General Opinion at [30]) – it may be relevant to observe that:

- The secondary materials suggest that other elements of the Fines Act regime – and in particular licence and registration suspensions – were expected in many cases to be sufficient to prompt the payment of fines, and thereby limit the volume that would progress to civil enforcement action.
- The secondary materials also appear to point to an expectation that, if civil enforcement action were to be taken, the standard course would be for the Sherriff to be authorised to pursue property seizure. The power to issue garnishee orders does not appear to have been mentioned in the second reading speech, or in the ensuing debate.
- The Act explicitly created the power to issue 'garnishee orders' (picking up that term's long-established and well-understood meaning from the judicial context), and provided for these orders to take effect as a garnishee order of the Local Court (Fines Act s 73). Garnishee orders issued by the courts require the kind of decision-making (i.e. a case-by-case consideration) that the Solicitor General Opinion considered would not have been intended in respect of orders under the Fines Act.
- The fact that the power to take civil enforcement action can be delegated was considered by the Solicitor General Opinion to be "significant" and (together with the fact decisions are high volume), as suggesting that a detailed examination of source material by decision-makers on a case-by-case basis was not intended (at [65]-[66]). However, an ability to delegate could arguably point the other way. That is, the inclusion of a power to delegate arguably establishes a practical mechanism under the Act (i.e. having multiple authorised decision-makers making decisions concurrently) that might enable detailed case-by-case consideration to be given in circumstances where the volume of cases would otherwise mean that a single decision-maker could not practically have done so.

81 Solicitor General Opinion at [45].

82 Solicitor General Opinion at [62].

83 E.g. Third Emmett Opinion at [54] and [57].

84 E.g. Third Emmett Opinion at [6b] and similarly 'not in compliance with the Act' at [61].

85 E.g. Third Emmett Opinion at [59].

86 Although not relevant here, it could, for example, also include conduct that is in breach of contract, or that would constitute a tort.

87 The Third Emmett Opinion expresses this conclusion clearly. That opinion concerned the system as it was operating in the period from May 2021 until March 2022, as well as from March 2022 until the date of that opinion (May 2023). In that opinion, Emmett states that the system (at those relevant times) does 'not comply'/is 'not in compliance' with the Act' [6], [49], and [61].

The earlier Emmett opinions dealt with the system as it was operating before May 2021. Revenue NSW in its submissions referred to what it describes as a 'hardening of stance' between the First Emmett Opinion and the Third Emmett Opinion. It noted that, in the First Emmett Opinion, *'[w]hile Mr Emmett expresses concerns as to the lawfulness of the system [from March 2019], his observations are nonetheless qualified and fall far short of a firm conclusion as to lawfulness'*.

Certainly, the Third Emmett Opinion (concerning the system from May 2021) expresses in more direct language than the First Emmett Opinion (in so far as it concerns the system from March 2019) Counsel's opinion that the system was unlawful. Whether that difference in language represents a 'hardening' of opinion as suggested by Revenue NSW, or merely the later advice stating more directly the same opinion, it is evident that, at least by the time of the Third Emmett Opinion, Emmett SC's view was that the system since March 2019 had not been compliant with the Act (and was still not compliant when he wrote that opinion). It is evidently the case that, if Emmett considered the system *after* the May 2021 changes to be non-compliant, then he must also hold the view that the system *before* those changes was also non-compliant. Hence, Emmett's conclusion at [49] in the Third Emmett Opinion: '*Accordingly, we do not consider that the Revised Process [i.e. the process after the May 2021 changes] brings the Commissioner's process for issuing garnishee orders into compliance with the Act.*' The May 2021 could not possibly 'bring the…process…into compliance with the Act' if the process had already been compliant.

88 Emmett SC also considered that the GO system continued not to be compliant with the Act after March 2022, and that is inconsistent with the Solicitor General Opinion (which, as explained above, is accepted for the purpose of this investigation).

89 Solicitor General Opinion at [49].

90 Solicitor General Opinion at [50].

91 Solicitor General Opinion at [60].

92 Solicitor General Opinion at [60].

93 Solicitor General Opinion at [60].

94 Solicitor General Opinion at [55].

95 Solicitor General Opinion at [55].

96 See Third Emmett Opinion at [31] - [32].

97 Revenue NSW response to s 18 Notice issued 2 June 2023 – Schedule A – Q.1 .

98 For example, it would require the person to prove that the decision-maker in a particular case did not actually read or understand the Check Summary Report: Solicitor General Opinion at [56].

99 'Wrong' conduct does not mean unlawful conduct.

100 Response to second s 18 Notice - Schedule A – Q. 9.

101 Section 50 of the SDR Act prescribes when debt recovery action is authorised. It does not mandate or direct any particular kind or kinds of debt recovery action. Rather, it contains a simple condition precedent that the order has been made, served, and remains unpaid 7 days after it is due and if so, action 'is' authorised.

102 Section 101 of the SDR Act empowers the Chief Commissioner to delegate powers for debt recovery and information gathering to any *person* employed in the Public Service. The reasoning in the First Emmett Opinion at [3b] relates.

103 The following appears to us to be relevantly applicable to the SDR Act discretion:

- Counsel's reasoning that there was a 'heightened' risk of unlawfulness based on a directory interpretation of s 71(1) of the Fines Act (i.e. existence of a limited residual discretion). See Third Emmett Opinion at [42])
- Counsel's comment that their concern as to non-compliance would be 'more acute' with respect to fine defaulters falling within s 71(1A), in respect of whom the Commission has a 'true discretion' whether or not to issue a garnishee order' (First Emmett Opinion at [85] and Third Emmett Opinion at [41]).

104 Revenue NSW declined our suggestion to ask the Solicitor General about the lawfulness of using the GO system to recover SDR Act debts, nor did it make any submissions to us on this question.

105 Hardship Policy | Revenue NSW accessed 9 October 2023.

106 8.4.3 Protection of payment | Social Security Guide (dss.gov.au) accessed 22 March 2024.

107 Social Security (Administration) Act 1999 s 62 and the A New Tax System (Family Assistance) (Administration) Act 1999 s 67.

108 Example copy provided by Revenue NSW dated 5 May 2023 and reads 'Please ensure a minimum of $563.40 remains in your customer's account'.

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