Annexure A – Revenue NSW case study

The following case study is an annexure to the special report to Parliament under section 31 of the Ombudsman Act titled 'The new machinery of government: using machine technology in administrative decision-making' (29 November 2021)

Contents

1 Overview of the Revenue NSW case study

Garnishee orders are one of a range of civil sanctions available under the *Fines Act 1996* (**Fines Act**) to recover outstanding fines debt. The orders can only be issued when a fine defaulter has not engaged with Revenue NSW following several notifications of an outstanding debt. Under a garnishee order, a financial institution (typically a bank) is ordered to transfer funds to Revenue NSW from an account held by the fine defaulter to satisfy outstanding debt. Account holders are not given prior notice of the order.

Revenue NSW now uses automation to issue large volumes of garnishee orders to banks. There are two core information technology applications used:

1. Fines Enforcement System (**FES**)
2. Debt Profile Report (**DPR**)

The FES is essentially a database of information about individual fine defaulters. The DPR is a business rule engine that takes the data in the FES (inputs), applies analytics that reflect business and prioritisation rules (analytics), and generates customer profiling and activity selection (outputs). Together, the FES and the DPR manage the end-to-end lifecycle of an enforced fine. Most steps are undertaken without staff involvement, by following pre-programmed business rules.

Revenue NSW issues an electronic file of garnishee orders to the major banks on a nightly basis. The file includes contact details of thousands of fine defaulters and an order that the bank is to attempt to garnishee funds if an account in the name of the fine defaulter, is held with that bank.

Complaints

Some time ago we commenced an investigation into a rising number of complaints we were receiving from individuals whose bank accounts had been the subject of garnishee orders by Revenue NSW.

When we first began receiving these complaints, neither we nor the complainants were aware that Revenue NSW was using machine technology for its garnishee processes. We published several case studies in our annual reports about the hardship caused by garnishee orders.[1] In a number of cases, the complainants had been left with a zero balance in their account. Some of the complainants were welfare-recipients, whose bank accounts had held the funds they were receiving from Centrelink as their only source of income.

The number of garnishee orders issued by Revenue NSW increased over time – from 6,905 in the 2010-11 financial year to more than 1.6 million in 2018-19. As the number of garnishee orders issued increased, we continued to receive a significant and increasing volume of complaints about their administration and impact.

We made detailed inquiries with Revenue NSW into whether adequate protections were being afforded to those who were at risk of hardship before, or as a result of, a garnishee order. We also made inquiries into how Revenue NSW dealt with claims of hardship and requests for a refund after a garnishee order had been actioned.

During this process we became aware of the extent of automation used in the issuing of garnishee orders, and several changes were made by Revenue NSW including:

- In August 2016 Revenue NSW implemented a 'minimum protected amount' to garnishee orders issued to banks. This meant that only amounts over a specified minimum[2] – currently $523.10 – could be subject to a garnishee order.

- In September 2018 Revenue NSW took steps to exclude 'vulnerable persons' from the making of garnishee orders. It did this by implementing a new machine learning model within their systems with the intention of identifying and excluding persons identified as vulnerable.

We also made a number of comments to Revenue NSW under s 31AC of the Ombudsman Act. Comments under s 31AC of the Ombudsman Act are not findings of wrong conduct – they are a formal means of informing an agency that we believe action is required to ensure it acts reasonably and lawfully. One of our 31AC comments was that Revenue NSW should seek expert legal advice on the legality and design of its automated system.

Revenue NSW agreed with most of the actions we suggested, including to develop and issue a consolidated hardship policy, which was published on its website.

After we raised concerns about the 'automation' of garnishee orders, Revenue NSW in March 2019 introduced an additional manual step in the process of issuing garnishee orders. This 'human-in-the-loop' process required a Revenue NSW staff member to formally authorise the issuing of the proposed garnishee orders. This is effected by way of a traffic light system that applies criteria developed from the Fines Act and business rules to a bulk number of files selected by the technology systems for a garnishee order. Where all lights are green, a Revenue NSW staff member approves the garnishee orders and the electronic file is transmitted to the banks.

Revenue NSW's view was that this change would avoid any legal doubt as to the lawful exercise of discretionary power under the Fines Act.

Although we were satisfied by the steps Revenue NSW was taking to address the particular vulnerability and hardship issues raised in complaints (as a result of which we discontinued our investigation of those complaints), we continued to hold doubts about the legality of the machine processes that it was continuing to use to issue garnishee orders.

When we later followed up to check on the legal advice we suggested Revenue NSW obtain, we were advised that no advice had been sought, either externally or from the legal branch of the Department of Customer Service, of which Revenue NSW is part.

We decided to seek our own legal advice. We worked with Revenue NSW to develop a 'statement of facts', which we agreed provided a comprehensive and accurate statement of how Revenue's NSW garnishee system was operating (**section 2**). We then provided that statement to our Senior Counsel together with a series of questions (**section 3**). Counsel's response to our questions is set out at **section 4** below.

Legal advice

The modification made by Revenue NSW in March 2019 to introduce a human-in-the-loop process meant that the systems used before and after this time differed in significant ways. Where relevant, we asked questions of Senior Counsel in relation to both systems.

Counsel's opinion was that, to the extent a person authorised by the Fines Act to make garnishee orders was not involved in the automated issue of garnishee orders under that Act between early 2016 and March 2019, Revenue NSW's processes were not lawful.

There are three relevant aspects of the Fines Act:

1. The power to make a garnishee order lies with the Commissioner of Fines Administration (**Commissioner**), delegate or a person authorised to exercise that function by the Commissioner (ss 73(1), 116A and 116B).

2. In order to make a garnishee order, the Commissioner (or delegate or authorised person) must be 'satisfied' that enforcement action is authorised (s 73(2)). That satisfaction is a condition precedent to the making of a garnishee order.
3. The Commissioner (or delegate or authorised person) 'may' make a garnishee order (s 73(1)). This is a discretionary power. However, the degree of discretion that is open to the decision-maker differs depending on the situation.

   In some situations (described in s 71(1)), the Commissioner is required to take some form of civil enforcement action, and their discretion is confined to deciding *which* particular civil enforcement action is to be taken. There are three forms of civil enforcement – property seizure orders, garnishee orders, and the registration of charges on land. Within those forms there is further optionality in terms of the particular land or property that is to be the subject of seizure order or land charge, or the particular person who is to be the subject of garnishee order. For example, a garnishee order could be directed to a person's bank, a person's employer, or any other person.

   There are other situations (described in s 71(1A)) in which the Commissioner has a broader discretion, including whether to take any civil enforcement action at all.

Counsel advised that Revenue NSW's use of machine technology for the making of garnishee orders between early 2016 and March 2019 was unlawful because no authorised person engaged in a mental process of reasoning to reach the state of satisfaction required to issue a garnishee order, and because the discretionary power was not being exercised by the authorised person.

As noted above, Revenue NSW implemented a change to the system in March 2019 whereby a designated staff member was required to first review a 'check summary report' (essentially a traffic light system) and formally authorise the issuing of garnishee orders.

Revenue NSW has also confirmed that its process (and the check summary report) only identify garnishee orders for fine defaulters whose circumstances fall under s 71(1) (and not s 71(1A)) of the *Fines Act*. That is, the discretionary power of the Commissioner in these circumstances is a limited discretion – the Commissioner 'is to' take civil enforcement action (s 71(1)), and their decision is limited to deciding what particular form of action to take and, if they decide to issue a garnishee order, in what terms that order will be issued and to whom.

Counsel's opinion was that, although the modification of including a summary check report process meant that the power to issue garnishee orders was formally being exercised by a person authorised to exercise the power, there remained doubt that the person was either forming the required state of satisfaction before making garnishee orders, or genuinely exercising the discretionary power to make the orders.

While Counsel's view was that it may be open to Revenue NSW to adopt a system under which an authorised decision maker considers issuing garnishee orders for multiple fine defaulters simultaneously, it was not sufficient for the decision maker to approve the issuing of those orders simply on the basis of a green light generated by the traffic light report process.

Counsel advised that problems described with the lawfulness of the process could be addressed by modification of the process or legislative amendment.

Counsel advised that there are two possible avenues to challenge a garnishee order issued by Revenue NSW. The first is to the Local Court under Part 8 of the *Civil Procedure Act 2005* (s 124A). The second is that a fine defaulter may in certain circumstances challenge the legality of a garnishee order in the Supreme Court.

2 Statement of Facts – Revenue NSW's system for issuing garnishee orders

This document is a description of Revenue NSW's garnishee order systems and processes, including key modifications made over time. The document was prepared by NSW Ombudsman and Revenue NSW and formed the basis of the instructions for legal advice.

PART A: PRELIMINARY

Defined terms

In this document:

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

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

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

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

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

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

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

Acronyms and abbreviations

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

List of legislation

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

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

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

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

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

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

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

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

PART B: THE LEGISLATIVE CONTEXT

Revenue NSW and the Commissioner of Fines Administration

1. Revenue NSW is the administrative agency of the NSW Government responsible for collecting revenues, administering grants and recovering fines and debts.

2. It is currently a division of the Department of Customer Service. The Department of Customer Service is a public service department established under the Government Sector Employment Act. The staff employed by the Department of Customer Service are public servants under that Act.

3. Revenue NSW was established on 31 July 2017, following a name change from the Office of State Revenue and State Debt Recovery Office.

4. The head of Revenue NSW holds the senior executive public service role of "Deputy Secretary" (of the Department of Customer Service). That person also holds the roles of "Commissioner of Fines Administration" under section 113 of the Fines Act and "Chief Commissioner of State Revenue" under section 60 of the Taxation Administration Act.

5. Functions relating to fines enforcement under the Fines Act are conferred on the Commissioner of Fines Administration.

The statutory power to make Garnishee Orders

6. Under section 73(1) of the Fines Act, the Commissioner "may make an order [i.e. a Garnishee Order] that all debts due and accruing to a fine defaulter from any person specified in the order are attached for the purposes of satisfying the fine payable by the fine defaulter."

7. The debts that can be enforced by way of a Garnishee Order are debts accruing in respect of:
   - a fine imposed by a court following the making of a court enforcement order, and
   - the amount payable under a penalty notice following a penalty notice enforcement order (s 57).

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

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

   "*(1) Subject to the uniform rules, a garnishee order operates to attach, to the extent of the amount outstanding under the judgment, all debts that are due or accruing from the garnishee to the judgment debtor at the time of service of the order.*

   (2) For the purposes of this Division, any amount standing to the credit of the judgment debtor in a financial institution is taken to be a debt owed to the judgment debtor by that institution."

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

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

The statutory process leading to the making of a Garnishee Order

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

(1) Penalty Notice

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

(2) Penalty Reminder Notice

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

(3) Penalty Notice Enforcement Notice

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

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

(4) RMS enforcement action

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

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

(5) Civil enforcement action

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

Other relevant statutory provisions

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

14. (*Service*) A Garnishee Order can be served electronically by Revenue NSW using an information system (s 73(5)).[3]

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

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

    b. information held by employers (s 117AA)

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

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

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

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

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

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

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

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

    (a) "the Commissioner may, on application under section 46 or the Commissioner's own initiative, withdraw a penalty notice enforcement order" in certain circumstances including if the Commissioner is "satisfied that there is other just cause why the application should be granted, having regard to the circumstances of the case" (s 47(1)(i)).

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

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

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

21. The GO system described in this document is the one that has been used by Revenue NSW in the administration of Garnishee Orders since at least January 2016.

22. Changes have been made to the system from time to time since then. However, despite those changes, it is recognisably the same system.

23. In this document, 'Original Version' refers to the GO system as it was in early 2016 and 'Current Version' refers to the system as it is today. The most significant changes that have been made between the Original Version and the Current Version are noted on the next section below.

Revenue NSW's published policy documents

24. Revenue NSW has no published policies specifically relating to the making of Garnishee Orders.

25. Revenue NSW has internally published business rules relating to the making of garnishee orders.

26. Other policies of relevance include:

    (a) Hardship Policy, first published on the Revenue NSW website on 1 November 2019 and available here: https://www.revenue.nsw.gov.au/help-centre/resources-library/hardship-policy

    (b) Privacy Policy, most recent version published on the Revenue NSW website on 1 May 2020 and available here: https://www.revenue.nsw.gov.au/privacy

Revenue NSW's instruments of delegation

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

Core technology elements of the GO system

28. There are two core information technology applications used in the GO system:

    a. Fines Enforcement System (FES) – database and transaction processing

    b. Debt Profile Report (DPR) – analytics

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

    - names of 'customers'[4]
    - information about the debt (fine information)
    - contact information
    - record history (e.g. former addresses, former names)
    - financial records of the customer.

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

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

    - records the Garnishee Order 'transaction'

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

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

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

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

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

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

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

37. At any time during the below process, a customer may elect to:
    - pay the fine debt in full,
    - enter into a payment plan, or
    - contact Revenue NSW for further options such as a work and development order, dispute or write off.

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

Step 1 – Fine loaded
The fine is 'loaded' from the issuing agency into the SOR (in the FES). That is, details of the relevant penalty notice, court fine, electoral fine or sheriff office jury branch fine are transmitted electronically to the FES.
Step 2 – Validation of details
The FES 'validates' the referred details, ensuring the minimum amount of customer details are present (date of birth, name, address) and the offence details are present and in the right format. Staff intervention may be required if the FES identifies a critical error.
Step 3 – Enforcement order generated
An enforcement order is automatically generated. In the case of a fine debt arising from a penalty notice, this is a 'penalty notice enforcement order'. Either a new customer file is created in the SOR or the enforcement order is linked to an existing customer.

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

Step 4 – Data matching to confirm address details

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

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

Step 5 – 'Printing' the enforcement order

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

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

Step 6 – RMS enforcement action

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

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

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

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

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

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

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

The Debt Profile Report (DPR)

38. The DPR effectively determines which potentially eligible civil enforcement actions are to be applied to fine defaulters whose fines debt is recorded in the FES.
39. Actions may include Garnishee Orders (bank, employer and third party), property seizure orders, examination summons and notices, referral of the debt to a private debt collector and/or various data matching routines with both the RMS and credit reporting bureaus.
40. Revenue NSW's analytics team maintains the DPR, which categorises all active fine defaulter records in the Fine Enforcement System (FES) and determines the next best course of action for each of them.
41. The development and creation of the DPR was the result of a long collaboration between the operational areas of Revenue NSW and its analytics team. Originally created in 2013, the DPR has continued to be enhanced over time and Revenue NSW advises that it "is continually improved and updated to ensure it is providing the maximum benefit to all business areas".
42. The DPR is a 'centralised business rules' engine. This means that customers are assessed for all potentially applicable actions in one process. The DPR replaced previous approaches that had involved 'multiple business rules' engines being applied in respect of different processes, which had created problems where the same customer could be selected for multiple actions at the same time.
43. The DPR, by contrast, ensures that only one 'next action' for any file is selected at any time, being the action that is considered most appropriate action for that customer at that time. This ensures that customers flow through a process one action at a time, before moving on to other actions.
44. Revenue NSW advises that, as well as avoiding the problem of multiple actions being selected for implementation simultaneously, the DPR also improves on previous approaches by ensuring that any actions, such as the selection of customers for Garnishee Orders, are taken in a consistent manner according to pre-approved business rules.
45. Those business rules are coded into algorithms in the DPR. The DPR does not utilise machine learning technology or other forms of 'artificial intelligence'.
46. The DPR's business rules are developed by subject matter experts in Revenue NSW's business areas, translated by its analysts into code-able instructions, and then incorporated by software coders into the DPR code.
47. All business rules and changes to business rules require approval by a senior executive (Executive Director). Once business rule amendments have been approved, changes to the DPR code are made with oversight by another executive (Director). There is no formal delegation for these business rules. The roles in the rules process have been approved by the Executive Director.
48. A more detailed description of how the DPR works is at **Attachment B**.

Further steps for enforcement by way of a Garnishee Order

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

Step 8 – Queuing of customers for Garnishee Orders
The DPR applies its coded business rules to pool customers into categories based on the next proposed enforcement action. The categorisation rules are generally aimed at assessing the potential success of each potential type of enforcement action, having regard to various customer attributes including the customer's age, the debt type and their address (see **Attachment B**).

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

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

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

Step 9 – Garnishee Orders made to the big four banks

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

- a 'straight through processing' – should be taken to mean where a particular action is done without the need for manual intervention, however does not necessarily include an entire 'end-to-end' process.
- an automated workflow – should be taken to mean where an entire 'end-to-end' function is undertaken wholly by an information system, such as 'selecting customers to issue a garnishee order then issuing a garnishee order then receiving a response back from a bank'.
- a manual workflow – should be taken to mean where one or more components of a particular process, action or transaction require human intervention.

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

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

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

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

Step 10 – Attempted compliance by the big four banks

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

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

order in the nature of a Garnishee Order comes into effect, and social security payments have been made into an account. Under the SSAA, the garnishee order does not apply to the saved amount (if any) in an account. Similar provisions apply in relation to Commonwealth family assistance payments.

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

Each financial institution is responsible for matching the Garnishee Order against its own customer information.[5] The banks also decide how to process the orders and the extent to which any of that process is automated. It is understood that the process is almost entirely automated within all of the major four banks.

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

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

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

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

If, at Step 10, a bank has returned an 'insufficient funds' notification or only a partial remittance of funds from a fine defaulter's account, the DPR business rules apply a 14 day waiting period before a follow-up Garnishee Order can be issued to the same bank. Three re-attempts can be issued at the same bank, before the customer file is re-assessed for alternative enforcement action (as per Step 7), such as a Garnishee Order to another of the four major banks, or to another financial institution.

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

Step 12 – Re-assessment for enforcement action

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

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

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

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

Notification to fine defaulters

50. Revenue NSW does not provide specific notice to the fine defaulter before the making of a Garnishee Order apart from previous notices advising this is one of the options that can be made if the fine defaulter does not pay or engage with Revenue NSW in some way. This means that a fine defaulter will typically first become aware that a Garnishee Order has been successful when they notice funds are missing from their bank account.

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

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

Enforcement fees

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

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

PART D: MODIFICATIONS TO THE GO SYSTEM

First modification – The introduction of a minimum protected amount

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

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

57. The minimum protected amount is consistent with the minimum protected amount for court-issued garnishee orders directed to employers and, since June 2018 court-issued garnishee orders directed to banks, under the *Civil Procedure Act*.[6]

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

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

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

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

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

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

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

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

    - age
    - amount of outstanding debt
    - success of previous garnishee orders issued
    - number of enforcement orders issued
    - previous payment plans
    - frequency of contact
    - type of offence
    - previous long-term hardship stay on enforcement
    - data from the Office of the Sheriff

- known incarceration history
- previous Centrepay[7] arrangements.

65. Revenue NSW also included externally-sourced data in the model, including the addresses of all Family and Community Services (FACS) owned properties and the Australian Bureau of Statistics socio-economic scores based on geographical location. This allowed the model to 'learn', for example, whether there was a correlation between persons being vulnerable and the fact that their address matched the address of FACS-owned property. If there was such a correlation, then the model could use that correlation to predict that a fine defaulter whose address is the same as a FACs-owned property is more likely to be a Vulnerable Person.

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

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

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

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

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

71. Customers who return a prediction of Vulnerability are removed by the DPR from the 'GO' (Garnishee Order) process (as well as some other processes) and are instead diverted to a special tier within the DPR. Actions applicable to this tier may include:
    - phone calls, SMS messaging and mail out campaigns by the Hardship Team
    - referral to the Interactive Voice Response (IVR) system for manual contact so they can be routed to the Hardship Team.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART E: IMPACT AND EFFECTIVENESS OF THE GO SYSTEM

Debt recovery under the GO system

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

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

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

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

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

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

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

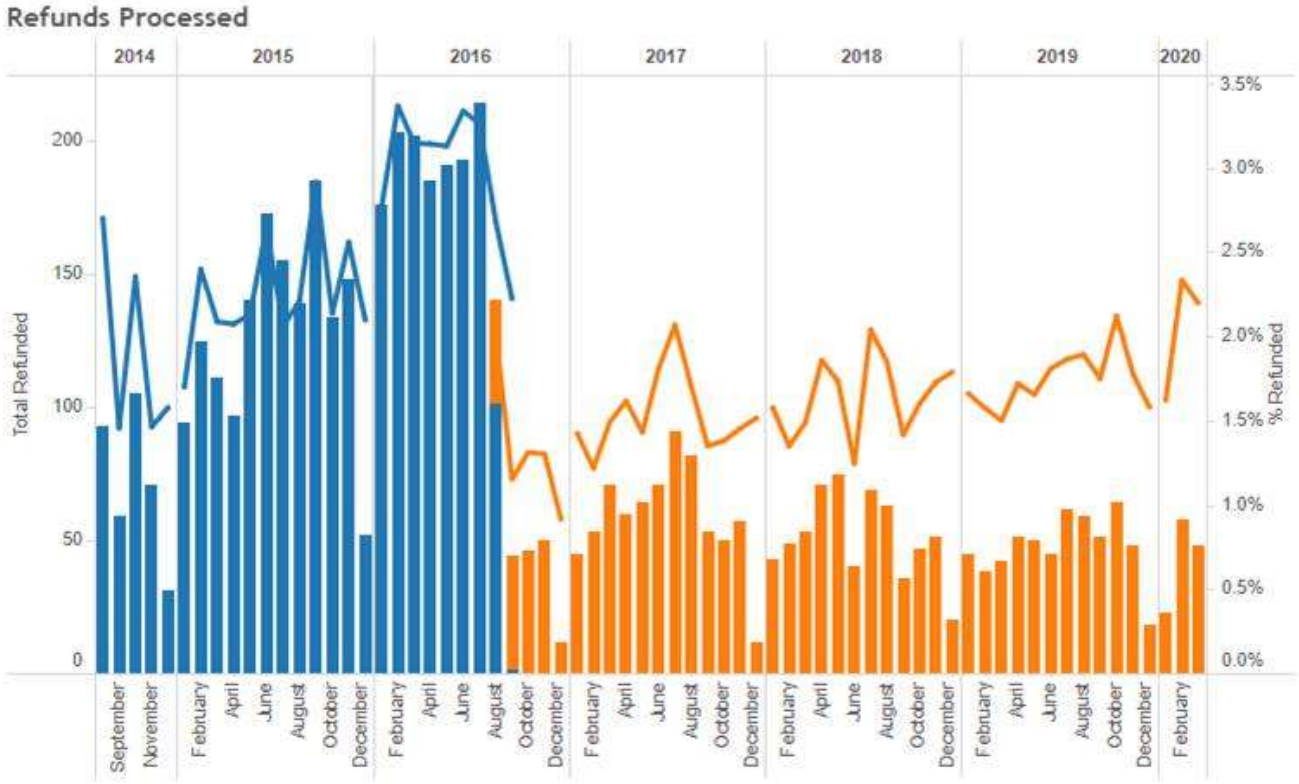
84. Revenue NSW applied the following civil sanctions for the 2019-2020 financial year:

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

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

Financial Year	# Refund Requests
2012-2013	313
2013-2014	794
2014-2015	1236
2015-2016	1963
2016-2017	870
2017-2018	677
2018-2019	557
2019-2020	431

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



Attachment A: Revenue NSW Delegation Instruments

Not attached to this report.

Attachment B: Revenue NSW Debt Profile Report

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

1. The DPR captures over 120 individual data points about a fine defaulter from the FES. This includes but is not limited to: the outstanding balance, fine defaulter age, debt age, debt type, enforcement action already conducted (and its results), fine defaulter contact information and data matching results.

2. Using this data, the DPR sorts the fine defaulters into 'tiers' within the DPR. Each tier is associated with a different next action to be taken in respect of the find defaulter.

3. The tiers themselves are generally grouped into one of the following six categories:

    (a) Time to Pay

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

    (b) Collections Paused

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

    (c) Remedial Action

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

    (d) Queued For Collections Process

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

    (e) In Collections Process

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

    (f) Write Off Consideration

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

4. The placement of a fine defaulter in a tier is undertaken on the basis of the following:

    - ***Eligibility for the relevant sanction***

Algorithms, based on simple business rules, identify which fine defaulters meet relevant inclusion criteria (and de-select fine defaulters who meet other exclusion criteria) for particular sanction, and who are therefore considered 'eligible' for that sanction.

    - ***Potential success factor***

Based on historical evidence of 'like' fine defaulters, the DPR makes an assessment of the likelihood of particular action being successful against the fine defaulter. In particular, the DPR has been configured to apply an algorithm that utilises historical data stored within FES to determine a 'potential success factor' for each fine defaulter and each sanction for which they are eligible. This algorithm was developed following a review of previous enforcement actions undertaken over a period of 12 months which allows the fine defaulter to be matched to a pool of 'like' fine defaulters who had enforcement action undertaken. (Analysis undertaken by Revenue NSW identifies several factors that contribute to determining the potential success of a sanction; these include the age of the fine defaulter, the type of debt, recidivism of the fine defaulter, amount outstanding, previous instalment plans, previous enforcement actions, address information and contact patterns). This is a rules based algorithm, however it is dynamic in that the algorithm is able to adjust as differences in the data is detected.

    - ***Priority in the queue***

The number of fine defaulters already queued for an enforcement action is taken into account. For example, a fine defaulter's file may be eligible for a Garnishee Order but if there is already a long queue of proposed Garnishee Orders, and this particular fine defaulter's file would have a low priority in that queue, then it may be streamed into another enforcement action.

5. In general terms, the following is the basic order of priority of tiers showing which enforcement methods are selected in the DPR. (However, this is subject to variation for some fine defaulters based on their own individual circumstances having regard to the matters described in paragraph 4. above):
    a. The issue of the enforcement order and attempt at an RMS sanction completed in the FES
    b. Targeted bank Garnishee Order (that is, a bank Garnishee Order that is issued to a specific bank because of a previously successful Garnishee Order at that bank in respect of the relevant fine defaulter, or because a fine defaulter's bank details are known)
    c. Employer garnishee order (if employer details known)
    d. Bank Garnishee Order
    e. Debt Partnerships Program
    f. Examination Notice
    g. Property Seizure Order.

6. Although the above suggests a linear process, the DPR applies its business rules against all fine defaulters on a daily basis. Therefore, it is possible that a fine defaulter could return a 'lower' tier allocation on day one but return a 'higher' tier on day two because of data changes within FES. For example, if a fine defaulter's file does not contain a date of birth then that fine defaulter will be ineligible for a Garnishee Order to be issued (as the DPR cannot verify that the fine defaulter is not within an excluded category, i.e., those under the age of 18). Therefore it will 'pass over' all of the Garnishee Order tiers for that fine defaulter. However, if a date of birth is subsequently found and entered into the FES, that fine defaulter may be allocated to a Garnishee Order tier based on this data change.
7. The DPR executes over 130 individual business rules to determine how a fine defaulter should be treated in the enforcement lifecycle.

8. Fine defaulters are allocated to a Garnishee Order tier based on the following general rules:
    a. The fine defaulter has not been identified in a higher priority tier
    b. The fine defaulter has at least one overdue enforcement order
    c. The fine defaulter's total overdue balance is $20 or greater
    d. The fine defaulter has at least one enforcement issued in the previous 7 years
    e. The fine defaulter had all outstanding enforcement orders issued at least 38 days ago
    f. The fine defaulter has not contacted Revenue NSW in the previous 14 days
    g. The fine defaulter has not made a partial payment to Revenue NSW in the previous 14 days
    h. The fine defaulter has not had a RMS sanction applied in the previous 14 days
    i. The fine defaulter is aged between 18 and 70 (inclusive)
    j. The fine defaulter has not had a letter advising the customer of a likely referral to an external debt collector (debt partner) issued in the previous 40 days
    k. If the fine defaulter has been previously referred to an external debt collection agency, that referral must have been returned under an acceptable reason code i.e. not deceased
    l. The fine defaulter has not already had previous Garnishee Orders issued to all major banks that have previously been unsuccessful within a specific timeframe (CBA and ANZ in the last three months and NAB and WBC in the last six months).
9. Once the fine defaulter record passes the general GO business rules, the record is then prioritised and placed in a queue with other fine defaulters in the same tier, for issue based on the fine defaulters' individual circumstances. The priority is generally as follows (from highest to lowest):
    a. A previous Garnishee Order was issued for this fine defaulter that identified an active account, but returned only partial funds or insufficient funds
    b. The fine defaulter recently defaulted on a Payment Plan arrangement
    c. The fine defaulter's bank details are known, which allows Revenue NSW to issue a targeted Garnishee Order to that specific bank. (Bank details are obtained either voluntarily by the fine defaulter or under some circumstances the financial institution can be identified if the fine defaulter has made a previous payment to Revenue NSW)
    d. The fine defaulter had recent debt re-activated from write off
    e. All remaining fine defaulters are prioritised by the age of the debt, with the most recent given the highest priority.

Attachment C: Garnishee Order Issue Check Summary Report Example

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

Daily GO Issue Check

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

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

DPR GO Exclusions Check:

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

DPR GO Inclusions Check:

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

3 Questions for Counsel – Revenue NSW's use of automation technologies in administrative decision-making

The NSW Ombudsman sought legal advice from Counsel (instructed by the Crown Solicitor's Office) on the following matters:

1. Was the process by which Garnishee Orders (GO) were issued:
    a. in and around early 2016 using the Original Version of the GO system
    b. from August 2016 following the First Modification to the GO system
    c. from September 2018 following the Second Modification to the GO system
    d. since March 2019 using the Current Version of the GO system

    a lawfully permissible process for the making of such orders by the Commissioner[8] in accordance with section 73(1) of the *Fines Act*? If the answer to any of these is "no", why not?

2. To the extent that the following questions are not answered in 1 above, please also answer:
    a. What action must the Commissioner take before exercising his or her discretion under s 73(1) of the *Fines Act* to issue a Garnishee Order?
    b. What action must the Commissioner take to satisfy himself or herself, for the purposes of Fines Act s 71, that '*civil enforcement action is preferable*' to enforcement under Fines Act Part 4 Division 3?
    c. In satisfying himself or herself of the matter referred to in s 71 and/or in exercising discretion under s 73(1), what consideration or reliance may be given to the outputs of the GO system? In particular, if the Commissioner may consider or rely upon the outputs of the GO system then:
        - must he or she nevertheless personally and actively consider those outputs in respect of each particular proposed order and subsequently authorise a particular order to be issued? If "yes" what "active consideration" is required?

        or

        - may he or she personally and actively consider those outputs in respect of a 'batch' of proposed orders and subsequently authorise that batch of orders to be issued? If "yes" what "active consideration" is required?

        or

        - may he or she, in effect, pre-authorise the making of an order that is, in future, subject to certain outputs of the GO system (without any further active consideration or authorisation by him or her)?
    d. Are there matters that must be considered by the Commissioner when deciding whether or not to issue a Garnishee Order (***mandatory considerations***)? Were any of those mandatory considerations not being considered under:
        - the Original Version of the GO system,
        - the Current Version of the GO system.
    e. Are there any matters that may not be considered by the Commissioner (***irrelevant considerations***) that were taken into account when a determination was made whether or not to issue an order under:
        - the Original Version of the GO system,
        - the Current Version of the GO system.

f. Are any of the answers to the questions in 2 affected by the fact that a Garnishee Order under s 73 operates as an order made by the Local Court under Part 8 of the *Civil Procedure Act 2005*.

g. Does the fact that a Garnishee Order under s 73 operate as an order made by the Local Court under Part 8 of the Civil Procedure Act 2005 mean that that order may be appealed against or set aside by a Court in the same manner as enforcement action taken under Civil Procedure Act Part 8?

h. Do any Constitutional issues arise in respect of the interaction or potential interaction between the *Fines Act 1996* s 73 (as it has been applied at any time using the GO system) and relevant Commonwealth legislation, including the *Social Security (Administration) Act 1999* s 62, the *Bankruptcy Act 1966* or *Income Tax Assessment Act 1936* (Cth)*, Income Tax Assessment Act 1997* (Cth) or the *Taxation Administration Act 1953* (Cth)?

3. If the answer to 1(d) above is "no":

a. Are there any modifications that could be made to the GO system that would mean that the process of issuing Garnishee Orders using that system would then be a lawfully permissible process for the making of such orders by the Commissioner in accordance with section 73(1) of the *Fines Act*? If the answer is "yes", what would those modifications be?

b. Alternatively, could legislative amendments be made to the *Fines Act* to authorise the use of the Current Version of the GO system such that the process by which Garnishee Orders are issued using that system would be a lawfully permissible process for making such orders in accordance with section 73(1) of the *Fines Act* (as amended)? If the answer is "yes", what amendments would be required?[9]

4 Legal Opinion of James Emmett SC and Myles Pulsford

The document beginning over the page is the joint opinion of James Emmett SC and Myles Pulsford, instructed by the Crown Solicitor's Office, 29 October 2020.

1 NSW Ombudsman, 'Annual Report 2016-16' (Report, October 2016) 62 < https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0005/38498/NSW-Ombudsman_Annual-Report_2015-16-plus-errata.pdf>.

2 Indexed in line with CPI.

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

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

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

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

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

8 Reference to "Commissioner" includes reference to a person duly delegated to perform the functions of the Commissioner.

9 See possible eg s 6A *Social Security Administration Act 1999* (Cth); s 6 of the *Fines Enforcement and Debt Recovery Act 2017* (SA).

Legality of automated decision-making procedures

for the making of garnishee orders

Joint Opinion

1. Our instructing solicitors act for the NSW Ombudsman.

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

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

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

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

3. In summary:

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

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

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

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

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

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

Background

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

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

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

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

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

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

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

Step 2: The FES validates the referred details.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Relevant legislation

Fines Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Civil Procedure Act

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

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

Pre-condition to the exercise of the power

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

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

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

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

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

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

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

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

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

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

Nature of power

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

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

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

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

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

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

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

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

Repository of the power

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

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

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

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

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

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

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

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

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

<u>Considerations relevant to the discretion</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

Policy

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

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

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

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

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

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

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

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

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

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

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

Amenability to challenge

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

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

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

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

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

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

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

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

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

Constitutional limits

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

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

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

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

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

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

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

Social Security (Administration) Act

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

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

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

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

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

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

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

Bankruptcy Act

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

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

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

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

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

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

Second question: Validity of the Commissioner's processes

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

Original Version of the process

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

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

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

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

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

Process following the First and Second Modification

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

Current Version of the process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Third Question: Modification and/or statutory amendment

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

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

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

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

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

90. We advise accordingly.

James Emmett SC **Myles Pulsford**

29 October 2020