



KERNAGHAN & HALL

Reference Number: NSWLRC1

25 September 2010

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001
AUSTRALIA

Dear Sir or Madam,

RE: SUBMISSION REGARDING PENALTY/INFRINGMENT/SUSPENSION NOTICES

I write to proffer a comment regarding some problems to do with penalty notices and police discretionary powers consequent upon such notices.

I write consequent to recent experience concerning the consequences on individuals who are served with a penalty notice or infringement notice. Recently, I have had occasion to observe prejudice to a client arising out of conduct by a NSW Police Officer in exercise of certain regulatory authority under the road transport legislation and related regulations. I make no criticism of the officer concerned; my intention in writing is to bring to your attention a potential problem that might benefit from reform.

The essential problem is one of interface between the legislatively proscribed origination of process and the real-world application of that originating process. Specifically there appears to be a gap between what the legislation dictates is commencement of process (by service of penalty notices for example) and what happens in reality (administrative processing by the officer to the computer system that informs the State Debt Recovery Office and the Roads and Traffic Authorities).

Without prompt and correct processing of penalty notices by the issuing officer, that penalty notice is in no way operative. That is, the act of serving upon an individual is necessary but not sufficient. Without proper processing, I am advised that it becomes impossible for an individual to either pay a relevant fine or, perhaps more importantly, elect to defend the claim against them in a court.

In the context of NSW road law, the consequence of a failure by an issuing officer to properly process documentation can be considerable to an individual. That is so when the circumstances of a given case are combined with a discretionary act by the officer to suspend a driver's license using his or her power to do so

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under legislation.

Section 205 of the *Road Transport (General) Act 2005* provides that if a person is charged by a police officer with an offence of a particular type the same or another police officer may, at any time within 48 hours after the person has been charged, give the person a suspension notice.

A suspension notice will have the effect of suspending the driver's license of the person concerned.

The section defines a suspension notice as "a notice, in a form approved by the Authority and inter alia;

(b) if the person is served with a penalty notice for an offence referred to in subsection (1A) or (1B)- informing the person that any driver license held by the person is suspended from a date specified in the notice, or (if the notice so specifies) immediately on receipt of the notice, until whichever of the following happens first:

(i) a period of 6 months (in the case of an offence referred to in subsection (1A) (a)) or 3 months (in the case of an offence referred to in subsection (1A) (b) or (1B)) elapses after the date on which the offence is alleged to have been committed,

(ii) if the person elects to have the matter determined by a court in accordance with Part 3 of the Fines Act 1996 -the matter is heard and determined by a court or a decision is made not to take or continue proceedings against the person,

(iii) a decision is made not to enforce the penalty notice, and

(c) informing the person of the right of appeal under section 242, and

(d) requiring the person:

(i) to surrender any such license, by a date specified in the notice, to a police officer, or

(ii) if the notice so specifies-to surrender any such license in the person's possession immediately to the police officer who gave the person the notice.

As noted above, I have had recent experience where a police officer having issued a penalty notice for an offence of driving 45 kilometers per hour above the posted speed limit has been thereby empowered to issue a suspension notice. The suspension notice impacts upon the Accused person by suspending his license for a period of six months.

Such a situation does not take into account the possibility that a person involved in such a situation may wish to elect to have his or her matter dealt with in court. In the present case, my client sought at an early time and on repeated occasions to elect to have the substantive penalty notice offence defended before a court. However he was repeatedly denied the opportunity to do so as the issuing police officer had reportedly failed to register the penalty notice on the electronic system.

As a result of that act or omission, the State Debt Recovery Office and the Roads and Traffic Authority (as they have informed me and as I am instructed by my client) were unable neither to process any infringement notice nor to permit my client the opportunity to bring the matter before a court for judicial adjudication.

In the meantime, the suspension notice has moved beyond any judicial review – by virtue of the operation of the legislation governing appeals about such notices. Such appeals must be lodged within 28 days of the issuance of the notice. If that is not, then there is no way for the court to intervene to resolve the sort of situation where an officer has failed to bring the matter in any proper form such that an accused person can activate his entitlement to have a matter heard before the court.

My client sought to litigate the matter before the court, having no other way to bring the state of affairs to the court's attention. The matter was dismissed for want of prosecution, notwithstanding that the learned Magistrate noted the unacceptable state of affairs. My client remains awaiting processing by the State Debt Recovery Office going on for three months after the offence.

Such a situation is open to abuse by an officer who seeks to exact punishment of an individual in the absence of a court process. The limitation of a period in which to lodge an appeal against a suspension order and an absence of any procedure for leave to extend the time in which to lodge an appeal against a suspension order, potentially leaves individuals in the situation where they are subject to a six month period of disqualification of their license with no recourse to a court process and not based on anything other than the opinion of the police officer (or another) that a relevant offence has been committed.

I submit that consideration be given to:

- i. Amendment of the regulations to require that officers who issue a penalty notice or an infringement notice must file all relevant documentation with the relevant authority within an acceptable time period;
- ii. Amendment of the regulations to provide that the 28 day time period in which to appeal the issue of a suspension notice commence from the date of filing of the appropriate notice, or in the alternative;
- iii. Amendment of the regulations to provide a court with discretion to grant leave to appeal outside of the 28 days where it would be in the interests of justice to do so.

Further, to cure the problem of officers failing to file appropriate documentation and by that conduct denying an accused person access to a court election, I submit consideration be given to:

- i. Amendment of the regulations to provide a mechanism for individuals upon whom a penalty notice or infringement notice is issued to activate court process for themselves by filing the court election before a court registry, irrespective of the requirements of the computer systems of the State Debt Recovery Office and the Roads and Traffic Authority.

I am available for further discussion should you require it.

Yours faithfully,

Aaron Kernaghan

Partner

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