SUBMISSIONS OF THE LAND AND PROPERTY MANAGEMENT AUTHORITY ("LPMA")

Question 1.1

Should there be a stand-alone statute dealing with penalty notices?

Question 1.2

Should the term "penalty notice" be changed to infringement notice?

There are compelling arguments identified in the Consultation Paper to model a "stand alone" statute for the better administration of penalty notices. The issue of proper delineation of Ministerial responsibility is an issue which certainly requires attention.

The Consultation Paper has illustrated that there is confusion in the terminology presently existing in the *Fines Act 1996*, and a new Act (possibly called an 'Infringements Act" as is the case in Victoria) would assist in providing greater clarity, lessen the confusion and provide easier access to the law on penalty notices. One of the suggestions which is supported is that the term "penalty notice" be changed to "infringement notice". This will also provide a consistency across states relating to terms. Further development of this proposal is supported.

Question 2.1

Should principles be formally adopted for the purpose of assessing which offences may be enforced by penalty notice?

As the Consultation paper has identified, presently there is a fragmented approach in the way separate agencies develop legislative proposals for new infringement notices. Whilst the Office of Parliamentary Counsel has developed a manual, inconsistencies in the development of proposals exist. This is largely due to the fact that determination of whether an offence is suitable to be dealt with by way of penalty notice and the amount is largely determined by the Minister and the agency responsible for administering the Act under which that offence is created.

While some agencies have developed policy manuals to guide them, (for example, Crown Lands Division within LPMA has within its *Crown Lands Office Practice Guidelines* some direction as to the issue of penalty notices) a specific legislative process providing guidance is desirable. It is agreed that the proposal for a set of principles and guidelines for new offences be endorsed as it will provide an integrated and co-ordinated policy framework across all agencies.

Question 2.2

Should there be a central body in NSW to verse and monitor the penalty notice system regime as a whole? If so, should it be:

(1) the Attorney General and the Department of Justice and the Attorney General; or
(2) a stand-alone body; or
(3) a Parliamentary Committee?

It is considered attractive that a central body be established specifically overseeing the penalty notice regime. Establishing such a body with ongoing responsibility for monitoring the use and continual improvement of penalty notices is desirable. It is considered that any body should have within it representation from the Police Minister, the Attorney General and Parliamentary Counsel as each would have key roles to play in the system.

Question 2.4

Should there be a provision for annual reporting to Parliament on the number of infringement notices issued and any other relevant data? If so, who should be responsible for this?

As it appears that the State Debt Recovery Office is the authority which receives all infringement notices and holds all records, it may be that this is the appropriate entity to provide annual reports to Parliament.

Question 3.1

(1) Should penalty notices be used only for offences where it is easy and practical for issuing officers to apply the law and assess whether the offence has been committed?

(2) If so, should the principle mean that penalty notices should only apply to strict and absolute liability offences, or should they also apply to offences that contain a fault element and/or defences?

It is considered appropriate that penalty notices be used for offences where it is easy and practical for issuing officers to apply the law and assess whether an offence has been omitted. An issuing officer has to be satisfied that all the elements of an offence have been addressed before a penalty notice is issued. Practical training courses for issuing officers would assist them in determining whether an offence has in fact been committed.

Penalty notice offences may contain fault elements or other elements such as defences however, these should be clear-cut and easily ascertainable by the issuing officer. For example, a number of penalty notice offences under the provisions of the *Crown Lands Act 1989* provide a defence of being lawfully authorised to do an act or occupy the land. The issuing officer simply assesses the available evidence of authorisation (for example office tenure or correspondence records) and acts accordingly. However, under section 10 of the *Biofuels Act 2007*, which permits a person to raise in defence factors which are not clear cut, it may be considered more appropriate to refer the matter to a court for determination.

Question 3.2

If penalty notices apply more broadly to offences with a fault element and/or defences, what additional conditions should apply? Should the conditions include any of those found in the *Victorian Attorney General's Guidelines to the Infringement Act 2006*, for example:

(1) specially trained enforcement officers;
(2) a requirement for operational guidelines; and

(3) a requirement to consider warnings or cautions?

See comments at Question 3.1 above. Proper training is essential and would assist in the practical problems faced by issuing officers.

Question 3.3

Should penalty notices be used when an offence includes an element that requires judgment about community standards, for example "offensiveness?

It may be argued that matters requiring determination of community standards should be left outside the responsibility of issuing officers and should be left to the jurisdiction of the court.

Question 3.4

Should the concept of "minor offence" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "minor offence" be defined?

It is agreed that the penalty notice regime should only apply to those offences which can be considered in context "minor" in nature, that is, ones in which, at first instance, payment of a fine is an appropriate measure.

Question 3.5

Are there any circumstances under which an offence involving a victim of violence could be a penalty notice offence?

It is considered that an offence involving a victim of violence should be dealt with by a court, not a penalty notice. The effect on the victim can be properly assessed by the court in determining the correct sentence for the defendant and additionally, to address the concept of restorative justice to the victim. Additionally, the certainty of a court ruling will assist in determination of compensation entitlements under the *Victims Support and Rehabilitation Act 1996.*

Question 3.6

Should the concept of "low penalty" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "low penalty" be defined?

It is considered appropriate that the concept of "low penalty" be adopted as a basis for classifying what should be an appropriate monetary sum for a penalty, however, flexibility needs to be retained. The concept of an upper monetary cap on all penalty notices expressed as a percentage of the fine which is able to be imposed by a court in relation to an offence is supported.

Question 3.7

Should offences with imprisonment as a possible court imposed penalty be considered for treatment as a penalty notice offences? If so, under what circumstances?

It is considered appropriate in some limited circumstances that offences of this nature be considered for treatment as penalty notice offences. The Victorian Guidelines referred to in the Consultation Paper provide instances where this may be considered.

Question 3.8

Should 'high volume offence" be among the criteria for determining whether an offence may be treated as a penalty notice offence? If so, how should "high volume offence" be defined?

It is submitted that whilst the volume of offences is an element to be considered, it should not be used as one of the primary factors in determining whether an offence should be treated as a penalty notice offence. Whilst historically the element of high volume offences was an important criterion for the creation of penalty notices as it assisted in diverting less serious offences from the courts and thereby reducing the burden on the court system, it is submitted that it is also appropriate to apply the penalty notice regime to 'low volume' offences.

Under the *Crown Lands Act 1989,* the number of penalty notices issued would be regarded as 'low- volume'. Under the *Biofuels Act 2007*, whilst no penalty notices have as yet been issued, it is still an option that may be appropriate in certain instances. For example offences under section 13 are often dealt with informally by way of caution however, if a caution was ignored, then it would be deemed appropriate to issue a penalty notice. Under section 10, , it is sometimes determined more appropriate to refer a matter directly to a court for that assessment because the penalty allowed under the penalty notice is inadequate or because of other issues raised in a defence. However, the option of issuing a penalty notice should remain.

A more compelling and relevant element to consider in determining which offences should be dealt with by way of penalty notice is the nature of the offence and accordingly, the penalty notice system may still be considered the better and more effective method from both an agency and from a court perspective. The additional comments of the Commission in the Consultation Paper on this issue are also of importance "... use of penalty notices in comparatively low volume offences may be necessary to deter the offending effectively, and may give offenders an option to deal with the matter without going to court".

Question 3.10

Is it appropriate to issue multiple penalty notices in relation to conduct that amounts to a continuing offence? If not, how should the penalty notice amount be determined for continuing offences?

There may be circumstances where the issue of multiple penalty notices is appropriate. A practical example is the mooring of boats to jetties for continuing days without payment of fees. An authorised officer should be entitled to issue a separate penalty notice for each day (and for the same amount) the boat continues to be illegally moored as there is a loss of revenue for each of those days. Another example relates to the continued presence of unauthorised structures on Crown Lands. The ability to issue multiple penalty notices can act to remove the commercial advantage derived from continual breach. If the defendant is of the view that the multiple penalty notices are exorbitant, it is open to the offender to elect to have these matters heard in court.

Question 4.1

Should principles be established to guide the setting of penalty notice amounts and their adjustment over time?

As identified in the Consultation Paper, setting of penalty notice amounts is very much agency based without any systematic guiding principles which has resulted in disparities in amounts imposed for similar offences by different agencies. It is agreed that there is a need for a concerted attempt to coordinate all penalty notice amounts, the setting of criteria for maximum amounts and establishing principles for the setting of those amounts (for example that they are at a level that would still deter offending yet at the same time be lower than the penalty a court would impose).

Obviously, the primary policy consideration in determining the amount should be the seriousness and nature of the offence.

Question 4.2

Should a maximum be set for penalty notice amounts? If so:

(1) What should the maximum be?

(2) Should the maximum be exceeded in some cases? If so:

(a) On what grounds (eg the need to deter offending)?

(b) Should the public interest be among the grounds? If so, how should it be defined or characterised?

(3) Should the maximum be different for individual and corporations?

The maximum should not be an amount which is too high as it may encourage people to actually go to court and thereby increase the burden on the court system.

In determining amounts, it is also important to consider the element of deterrence and publicity. Issuing a penalty notice is less a deterrent than having an offender attend an open court which is accessible by members of the public. Where proceedings result in a finding of guilt, a formal conviction is usually recorded against the offender. This conviction may carry further adverse consequences to an offender, for example, having to report the conviction to an employer.

With regard to differing maximum amounts to be applied to individuals and companies, it is recommended that there be a continuation of higher penalties for corporations.

There are obvious policy reasons why the maximum amount should be different for corporations. These include the fact that a higher penalty will reflect the additional responsibility required by a corporation to be a good role model, that the offence was committed in the course of commerce and therefore seen as a more serious offence and, that a corporation is in a better financial position to pay. Indeed, under Section 176 of the *Crown Lands Act 1989,* action can additionally also be take action against a director of the corporation or a person concerned in the management of the corporation if that director or person knowingly authorised or permitted the contravention.

Question 4.3

Should there be a principle that the penalty notice amount be set at a level that would deter offending, but be considerably lower that the penalty a court would impose?

Whilst there is logic in application of this principle, it is difficult to assess what penalty a court may impose. In some instances, the court may impose a penalty less than that set out in a penalty notice. The guidelines need to take into account the savings in time for the court and the savings to the defendant, for example not to have to take a day off work to attend court.

Question 4.4

(1) Should there be a principle that a penalty notice amount should not exceed a certain percentage of the maximum fine for the offence? If so, what should be the percentage?

(2) Should a principle allow the fixing of penalty notice amounts beyond the recommended percentage in special cases? If so what should the grounds be?

(3) Should there be an upper percentage limit in those special cases? If so, what should this percentage be?

It is agreed that there should be a principle that a penalty notice should not exceed a certain percentage of the maximum fine. It is noted that presently under the *Crown Lands Act 1989* and the *Biofuels Act,* the penalty notice amounts are set at 10% of the maximum fine imposed by a court.

It is agreed that the amount should not go beyond a recommended percentage, (for example they should not exceed 25%). If the penalty notice is not adequate for the offence, then the matter should be taken to court.

Question 4.5

Should there be a principle that a penalty notice amount should be lower than the average of any fines previously imposed by the courts for the same or a similar offence, if such information is available?

It will be difficult to get an average of any fines imposed by courts as the defendant will have the opportunity to address the court as to penalty. No such opportunity exists for a penalty notice, as the amount is fixed.

Question 4.6

Should there be a principle that in setting penalty notice amounts consideration should be given to the proportionality of the amount to the nature and seriousness of the offence, including the harms sought to be prevented?

It is highly recommended this principle be adopted. The primary policy consideration in determining the amount should be the seriousness and nature of the offence. An issue of present relevance is water licensing. Under the water licensing regime, pumps installed are metered, however, there have been incidences of illegal portable pumps being used by individuals for irrigation of crops which are unmetered and are outside the scheme. The potential value of the crops exceed the present fine, so in effect, there is no incentive to stop offending.

Question 4.7

Should there be a principle that in setting a penalty notice amount, consideration should be given to whether the amount is consistent with the amounts for other comparable penalty notice offences?

This principle is valid. The challenge will be to find comparable offences across statutes, each of which may have a different focus.

Question 4.8

Should there be a principle that for offences that can be committed by both natural and corporate persons, higher penalty notice amounts should apply to corporations? If so, what should be the guidelines for setting such amounts?

Yes – see comments made at question 4.2 above.

Question 5.1

Taking into account the recent reforms, is there sufficient guidance on;

(1) when to issue penalty notices; and
(2) the alternatives available?

The guidelines regarding circumstances when to issue official caution are helpful however, there is a need that issuing officers, be made aware and have continual practical training as required.

Question 5.2

(1) Should government agencies (including statutory authorities) responsible for enforcing penalty notice offences be able to engage the services of private organisations to issue penalty notices? If so, what should be the requirements?

(2) Is there any evidence of problems with the use of contractors for the purpose if enforcing penalty notice offences?

It is submitted that government agencies be able to engage the services of private organisations or private persons to issue penalty notices. Under section 32(1A) of the *Sydney Harbour Foreshore Authority Act 1998*, a "ranger" includes a person engaged by the Sydney Harbour Foreshore Authority to provide services to that Authority.

When, due to factors such as a lack of resources, cost–effectiveness and/or it is administratively deemed more appropriate to engage the services of private persons to perform those functions and, additionally those functions are performed subject to the control and direction of the relevant agency, (indeed this is legislatively provided for in section 32(1A) of the *Sydney Harbour Foreshore Authority Act 1998*), the agency should have the option to engage those services.

Under the *Crown Lands Act 1989*, only authorised officers can issue penalty notices. Authorised officers include police officers and anyone appointed by the Minister. The Minister for Lands would not engage a private organisation but, in the past has appointed rangers from several councils to issue penalty notices. Under the *Crown Lands (General Reserves) By-law 2006,* rangers appointed by reserve trusts are authorised officers empowered to issue penalty notices. Certain safeguards (including adequate training) have been put in place as to the appointment of these rangers so that there have been few problems in this regard. One of the safeguards is evidence of having been trained in the requirement of the penalty notice scheme.

As identified in the Consultation Paper, "the engagement of private organisations for purposes of policing public security is not unusual. A government agency that requires more personnel to enhance the laws it administers may find it cost-effective to outsource this service rather than create new positions within its structure".

Question 5.3

(1) Should a limit be placed on the number or value of penalty notices that can be issued in respect of one incident or on the one occasion of offending behaviour?

(2) If so, should this be prescribed in legislation, wither in the *Fines Act* or in the parent statute under which the offence is created, or should it be framed as a guideline and ultimately left to the discretion of the issuing officer?

See comments at question 3.10 above. The issuing officer should have the discretion as to whether multiple penalty notices should issue for the one incident. If the offender is of the view that the issuing officer was too harsh, the matter can be referred to the court for hearing. Submissions can also be made in respect of the fines.

Question 5.4

Should the power to withdraw a penalty notice only be available in limited circumstances on specific policy grounds? What should those grounds be?

There should be circumstances where a penalty notice should be withdrawn, however, this should only apply in limited circumstances. It may be difficult to ascertain what those limited circumstances may be and accordingly may be ultimately up to the discretion of the issuing officer dependent on the circumstances. Guidelines would assist in the proper use of that discretion.

Question 5.5

Are current procedural provisions relating to how a penalty notice is to be served on an alleged offender, contained in each relevant parent statute, adequate?

If the original notice is handed to the offender, that satisfies the legislative requirement. If the original notice is posted, it is deemed to be served on the fourth working day after posting as per section 76 of the *Interpretation Act 1987* (unless evidence to the contrary is given). It would be of assistance if service of penalty notices is consistent across all agencies.

Question 5.6

Is it feasible to require the State Debt Recovery Office or the issuing agency to confirm service of the penalty notice or subsequent correspondence?

Whilst this certainly would be desirable, given the volume of the notices issued, this would be seen as impractical.

Question 5.7

(1) Should the *Fines Act* prescribe a period of time within which a penalty notice is to be served after the commission of the alleged offence? If so, what should the time limit be?

(2) If the penalty notice is served after this time has elapsed, should the Act provide that the penalty notice is invalid?

If the public authority is aware of the offence from the commission of the offence, then it is submitted that a period (for example a six month period) should be a reasonable time for service. Problems arise when an offence is committed and the public authority is not aware of the offence for several months later, a practical example being dumping offences. Accordingly, there is an argument that the relevant legislation provide that the relevant period of time commence when the public authority becomes aware of the offence.

If the *Fines Act 1996* is to be the central legislative provision for penalty notices, a time limit is recommended to be embodied within the Act and additional provision may be that a penalty notice is unenforceable if served after the time limit has elapsed.

Question 5.8

If it is appropriate to prescribe a time limit in legislation, should agencies be required to formulate guidelines governing the time period in which a penalty notice should be served?

Agencies may be of the view that the time limit prescribed in the *Fines Act* is inadequate and accordingly agencies should have the ability to specify an alternate time period in their legislation. Provision should therefore be in the *Fines Act* to allow for this possibility.

Question 5.13

Should information about penalty notice history be provided to courts for the purpose of determining sentence for any offence?

It is reasonable that the court be provided (as it should already be) with penalty notice history to assist the court in sentencing. Without such an approach, the court would have to regard the offender as a first time offender which may not be the case.

Question 6.1

(1) Should penalty Notices be issued to children and young people? If so, at what age should penalty notices apply and why?

(2) Are there offences where penalty notices should be issued notwithstanding the recipient is a child well below the cut off age?

Consideration should be given to penalty notices being able to be served on 16 to 18 year olds for certain offences, including driving offences, alcohol related offences and graffiti offences. In so doing, regard should be given to the maximum penalty regime applicable to juveniles convicted in Children's courts. A process might be considered for example which enables a minor to receive a reduction in penalty after supplying adequate proof of age.

Question 6.2

Are there practical alternatives to penalty notices for children and young people?

Alternatives are desirable, for example, the concept of visible unpaid work for young people who cannot afford to pay a fine.

Question 6.3

Should parents be made liable for the penalty notice amounts incurred by chidren and young people?

It is desirable that parents/guardians be made aware of the fine and the child or young person be made to either pay the fine or undertake the unpaid work. This would be a good result in graffiti offences.

Question 6.4

Should enforcement officers be required to consider whether a caution should be given instead of a penalty notice when the offender is below the age of 18 years?

It is submitted that an enforcement officer should always consider a caution before a penalty notice is issued as is envisaged by section 19A of the *Fines Act 1996*. Whether a penalty notice issues will depend on the actual age, the offence in question and other issues set out in the Guidelines.

Question 6.5

Should police officers dealing with children who have committed, or are alleged to have committed, penalty notice offences be given the option of issuing a caution or warning, or referring the matter to a specialist youth offender under *Young Offenders Act 1997* to determine whether a youth justice conference should be held?

(1) Should some of the diversionary options under *Young Offenders Act 1997* apply and, if so, which ones?

(2) For which penalty notice offences should diversionary options apply?

For offences occurring on Crown land, the Police should be given discretion as to how to deal with the offence taking into regard levels of options available to ensure the offence does not re-occur. For example, in graffiti offences, the first option may be pay an amount of money to repaint the wall. If the money is not paid by a certain date, this could be reported and the next option would be adopted such as being required to attend a work detail to repaint the wall. Failure to attend the site or failure to perform the work, could then lead to another level of enforcement.

Question 6.7

Should a child or young person be given the right to apply for an internal review of a penalty amount on the grounds of his or her inability to pay?

See response to question 6.1.

Question 6.9

Should driver licence sanctions be used generally in relation to offenders below the age of 18 years?

Driver licence sanctions can only be used if the offender has a driver's licence. Many young offenders would drive whilst unlicensed so it may be argued that using this method of enforcement would be of little benefit in those circumstances.

Question 6.10

Should driver licence and registration sanctions be applied to young people under the age of 18 years for non-traffic offfences?

As noted above, the effectiveness of using driver licence and registration sanctions is limited to young people who have a licence or registration. It is recommended that other methods of enforcement should be considered.

Question 6.11

Should a young person in receipt of penalty notices for both traffic and non-traffic offences be issued with separate enforcement notices in relation to each offence?

If there is a traffic offence and a non traffic offence, separate enforcement notices should be issued. It would be uncommon that more than one offence is entered onto a penalty notice.

Question 6.12

Should a conditional "good behaviour" period shorter than 5 years apply to children and young people following a fine or penalty notice debt being written off?

It may be useful to give children and young people the benefit of a shorter good behaviour period as they are at an age when they are maturing and gaining a sense of responsibility.

Question 7.1

Should penalty notices be issued at all to people with mental illness or cognitive impairment? If not, how should such people be identified?

This question opens many challenges. It may depend on the degree of the mental illness or cognitive impairment. One may assume however that if a person is diagnosed with either of these illnesses, they are constraints and limitations on their ability to function in society generally. Accordingly, a penalty notice may be of limited effect to stop re-offending.

Question 7.4

Should fines and penalty notice debts of correction centre inmates with a cognitive impairment or mental illness be written off? If so, what procedure should apply, and should a conditional good behaviour period apply following the person's release from a correctional centre?

Consideration should be given in instances where a person is an inmate of a correction centre, that all penalty notice debts be called up and the fines worked off. This method will assist an offender on being released from custody to not having to then face a debt which may lead to further offences being committed to repay the debts.

Question 7.8

(1) **Should a concession rate apply to penalty rates issued to people on low incomes? If so, how should "low income" be defined?**

(2) **Should a person in receipt of certain Centre-link benefits automatically qualify for a concessional penalty amount? If so which benefits?**

The issuing officer should not be given the added responsibility to enquire as to the income of the offender. The Guidelines make provision for the low income offenders to make submissions and time to pay can be granted. It is queried whether there is a need to make the system too complicated by introducing such a provision.

Question 7.12

Should participation in discrimination awareness and disability awareness training be required for all law enforcement officers authorised to issue penalty notices? How else could awareness be raised?

Discrimination awareness and disability awareness should be required for all issuing officers. As part of the OH&S training for all staff, the law enforcement officers should be made aware of any advances and ideas in this area.

Question 7.15

Should the requirement to withdraw a penalty notice following an internal review where a person has been found to have an intellectual disability, a mental illness, a cognitive impairment, or is homeless, be extended to apply specifically to;

(1) Persons with a serious substance addiction?

(2) In "exceptional circumstances" more generally?

Consideration should be given to postponing enforcement of penalty notices against persons with a serious substance addiction if that person is taking action to address that addiction, withdrawal of the penalty notice could occur after the successful completion of an addiction program. It is desirable to have an exceptional circumstances provision in any legislation.