

OUR PLAN FOR A FAIR AND EFFECTIVE TOLL ENFORCEMENT SYSTEM FOR VICTORIA

Briefing Paper
April 2017

This briefing paper is the work of a coalition of concerned community organisations who want to see Victoria's toll fines system overhauled.

Contents

| | | |
|----|---|----|
| 1. | OUR PLAN FOR A FAIRER TOLLING SYSTEM | 3 |
| | Principles for a fair and effective toll enforcement system..... | 3 |
| | Dealing with the system’s current backlog..... | 4 |
| 2. | WHY IT IS TIME FOR CHANGE..... | 5 |
| 3. | VICTORIA’S OUTSTANDING TOLL FINE DEBT..... | 6 |
| 4. | HOW PRIVATE DEBT IS HANDLED BY OTHER SYSTEMS..... | 8 |
| | The Victorian Water Sector..... | 8 |
| | Toll enforcement in New South Wales | 10 |
| 5. | IMPACT ON COMMUNITY, INDIVIDUALS, LEGAL ASSISTANCE SERVICES AND THE JUSTICE SYSTEM..... | 11 |
| | Impact on the local community | 11 |
| | Impact on individuals..... | 13 |
| | Impact on legal assistance services | 14 |
| | Impact on our justice system | 15 |
| 6. | SOME FURTHER ISSUES | 17 |
| 7. | CONCLUSION..... | 17 |

1. OUR PLAN FOR A FAIRER TOLLING SYSTEM

Our plan for a fairer toll enforcement system for Victoria follows the release of our briefing paper 'A More Fair and Efficient Toll Fines System for Victoria' released earlier this year. That paper made a detailed case for change and the information provided has been updated in this paper.

The fundamental challenge could be described in the following way:

What if we / How might we: redesign the toll infringements system

For: all road users

So that:

- High levels of compliance are maintained
- There is early intervention so that people in genuine hardship don't get caught in a spiral of fines/debt and ultimately a criminal record or prison
- Pressure is taken off our courts and justice system so that resources can be more effectively deployed to areas such as family violence
- It is consistent with government values and the desire of toll operators to ensure that 'time is better spent' and that transport truly 'strengthens communities'

Principles for a fair and effective toll enforcement system

We believe that a fair and effective toll enforcement system can be achieved in Victoria without undermining high levels of compliance with the tolling system.

Victoria already has a Tolling Industry Ombudsman, but the oversight and fairness this office could offer is severely curtailed by the Ombudsman's limited jurisdiction and powers, and the extremely limited public knowledge of the availability of this service. In our view, a robust, suitably resourced and well-publicised Ombudsman would add significant credibility and oversight to what is currently a highly automated and quickly escalating system.

Based on the system in New South Wales, we recommend a system designed around the following principles:

- Private toll debt should be recovered by toll operators;
- Private toll operators should administer a system that makes it easy for people to do the right thing at the beginning. This must include a range of accessible payment options and concession entitlements similar to public transport and should also be supported by clear and effective public communication about how the toll system works;
- Private operators should do more to identify people who can't pay or who are experiencing hardship early. Private operators should provide a range of tailored options to individuals in hardship to repay or deal with the debt, including comprehensive hardship programs in line with practices in other industries;
- Toll operators should be required to comply with a Code of Practice and should be regulated by a robust Ombudsman to ensure that communication, accessible payment options, early intervention, hardship and other consumer protections are improved and monitored in line with other industries;
- Infringements should remain an option to penalise and deter repeated unpaid use of toll roads, but appropriate safeguards should be imposed to ensure that infringements are used as a last resort and

not used instead of debt collection. This could be achieved by a cap of a maximum of one infringement per quarter per vehicle, or a cap across the toll road network similar to that in New South Wales;

- In addition, infringements should only be used to deter deliberate offending, that is they should be reserved for drivers who have the capacity to pay. Government should take a more active role in assessing whether grounds exist to issue an infringement. We recommend the introduction of ‘toll infringement referral requirements’ such that before issuing an infringement, Victoria Police must be satisfied that certain steps have been taken by the toll operator, including:
 - The toll operator has assessed whether the person is experiencing hardship and, if so, has provided a hardship option in accordance with the Code (that is, only people assessed as not experiencing financial hardship can be issued with a toll infringement);
 - The toll operator has taken all reasonable steps to contact the person;
 - Where the person is unable to be contacted, the toll operator has made other assessments of the person’s likely capacity to pay, including through checking asset registries, the National Hardship Register and the value of the vehicle, and has assessed that the person is likely to have capacity to pay (a threshold test is defined for assets sufficient to meet a definition of having capacity to pay);
 - The toll operator has considered whether the person is likely to be experiencing homelessness or other hardship, based on data available from VicRoads and the customer’s history with the operator; and
 - The person has accrued a minimum number of unpaid trips (we recommend at least 10) before infringement action can be taken.
- The Ombudsman should have a key role in monitoring compliance with these threshold requirements and should have the power to order that infringements are cancelled where it becomes apparent the threshold requirements have not been met;
- The issuing of an infringement should not extinguish the debt owed to the toll operator, meaning toll operators continue to pursue the outstanding toll debt using civil debt recovery. This means there is no way to be ‘better off’ by deliberately not paying your tolls.

In our view, this proposed system would achieve the challenge objectives listed above. High levels of compliance would be maintained through the design of a system that requires drivers to pay the tolls they owe. In addition, the system would be able to distinguish between people who can’t pay and those that won’t, and would impose fair and meaningful penalties against people who won’t pay. Accordingly, failing to pay for toll road usage can remain a criminal offence, but it should be used for the specific purpose of penalising and deterring the most serious recidivist offenders who have the capacity to pay.

Dealing with the system’s current backlog

While these changes would stop the flood of people into the infringements system, a targeted process should also be implemented to deal with the huge backlog and ease the impact on the justice system of the millions of toll infringements already in the system. An amnesty should be introduced that enables individuals that are assessed as experiencing hardship to pay the original toll fees and a reasonable administrative fee to the toll operators in respect of their outstanding toll infringements, in exchange for cancellation of their infringements and the administrative costs owing to the Department of Justice.

A review of people currently on arrangements to pay off toll infringements – whether pursuant to payment arrangements with Civic Compliance or the Infringements Court, or as a result of orders made by the Magistrates’ Court at penalty enforcement warrant hearings – should also be undertaken. People already paying off toll infringements who are assessed as experiencing hardship should be treated consistently with those whose matters are not yet resolved, to ensure the changes do not produce harsh and inequitable consequences.

2. WHY IT IS TIME FOR CHANGE

It is time to change Victoria’s toll fines system. The current system is placing unsustainable pressure on Victoria’s Magistrates’ Courts, support services, communities and families. The system delivers a disproportionate blow to people who for a variety of legitimate reasons are unable to pay the toll at a particular time, but who want to do the right thing.

The burden of fines on Victorian Magistrates’ Courts was noted by the recent Royal commission into Family Violence. It suggested that consideration be given to changing the jurisdiction of infringement cases, to relieve some of the pressure on the courts so their time and resources can be better spent on the far more serious issue of family violence.

It is important to note that half of the impact on the Infringements Court and criminal justice system caused by infringements that result from the use of privately owned toll roads.¹ Victoria is the only place that criminalises private debt in this way; the scale and approach to enforcement is at odds with other Australian jurisdictions. And while the government is implementing considerable reforms to Victoria’s fines system, these do not address the toll fines system.

In 2014 the Sentencing Advisory Council recommended that a working group should be established to “identify and implement potential solutions to the increasing burden of tolling infringement offences on the criminal justice system in Victoria” (recommendation 47).² This recommendation has not been implemented and the burden on the system has continued to grow.

This briefing paper has been prepared by a number of community legal centres and Victoria Legal Aid who see first-hand the enormous harm the current system is causing to individuals, communities and the justice system. It represents the consolidated views of many in the legal assistance sector who deal with tolling infringement matters, based on the sometimes limited available information.

The West Gate Tunnel Project legislation and concession deed amendments present a rare opportunity for government, Citylink and EastLink to acknowledge and address the unintended and damaging impacts of the toll enforcement system. This paper presents what we know about the impacts of the system, how it compares to other debt enforcement systems, and our proposals for reform. We believe that our proposed model strikes an appropriate balance between the responsibilities of the private toll road operators and the State in terms of enforcement of unpaid tolls, and achieves a fair and effective toll enforcement system that does not jeopardise high levels of compliance with the tolling system.

¹ In 2014-15, 1.7 million enforcement orders were made for all fines, tolling matters make up 49 per cent of all enforcement orders; see the 2014-15 Annual Report on the Infringements System, available at: http://assets.justice.vic.gov.au/justice/resources/e9d3c72c-3ab2-427c-a036-7e7405c26796/2014_15_report_infringements_sys.pdf

² Sentencing Advisory Council, “Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria”, 30 May 2014, available at: <https://www.sentencingcouncil.vic.gov.au/publications/imposition-and-enforcement-court-fines-and-infringement-penalties-victoria>.

3. VICTORIA'S OUTSTANDING TOLL FINE DEBT

On 30 June 2015, Victoria's outstanding infringement warrant debt totalled \$1,686,597,696 – a 9.5% increase on the previous year's total.³ Warrants for toll fines made up \$686,924,234 of this figure or around 40% of the total debt.⁴ Outstanding toll warrant debt is rising exponentially, and increased 15% from 2013-14, and 80% since 2012.⁵ In 2015-16, an average of 58,148 Citylink infringements and 43,281 East Link infringements were issued to motorists each month.⁶ We estimate that the expansion of tolling to the West Gate Tunnel will result in a further 7,000 infringements per month, significantly exacerbating the problems the system is already facing.⁷

The outstanding infringement warrant debt is inflated on account of Victoria's toll fine system which adds between \$155 to \$342 to almost every single unpaid toll fee of between \$0.41 and \$8.90, an increase of between 3,800% and 83,400%. Every single day of unpaid toll road usage attracts a separate toll fine and therefore a driver can be fined thousands of dollars for one week's use of a toll road.

In practice, toll fines are enforced as a group and drivers commonly receive large numbers of these warrants at once (e.g. 50 warrants = \$17,130, comprising as little as \$110 in toll fees and \$17,020 in enforcement costs). Figure 1 below illustrates the 'toll fine journey', showing the significant costs added to single toll fees throughout the process.

Figure 1 – Toll Fine Journey

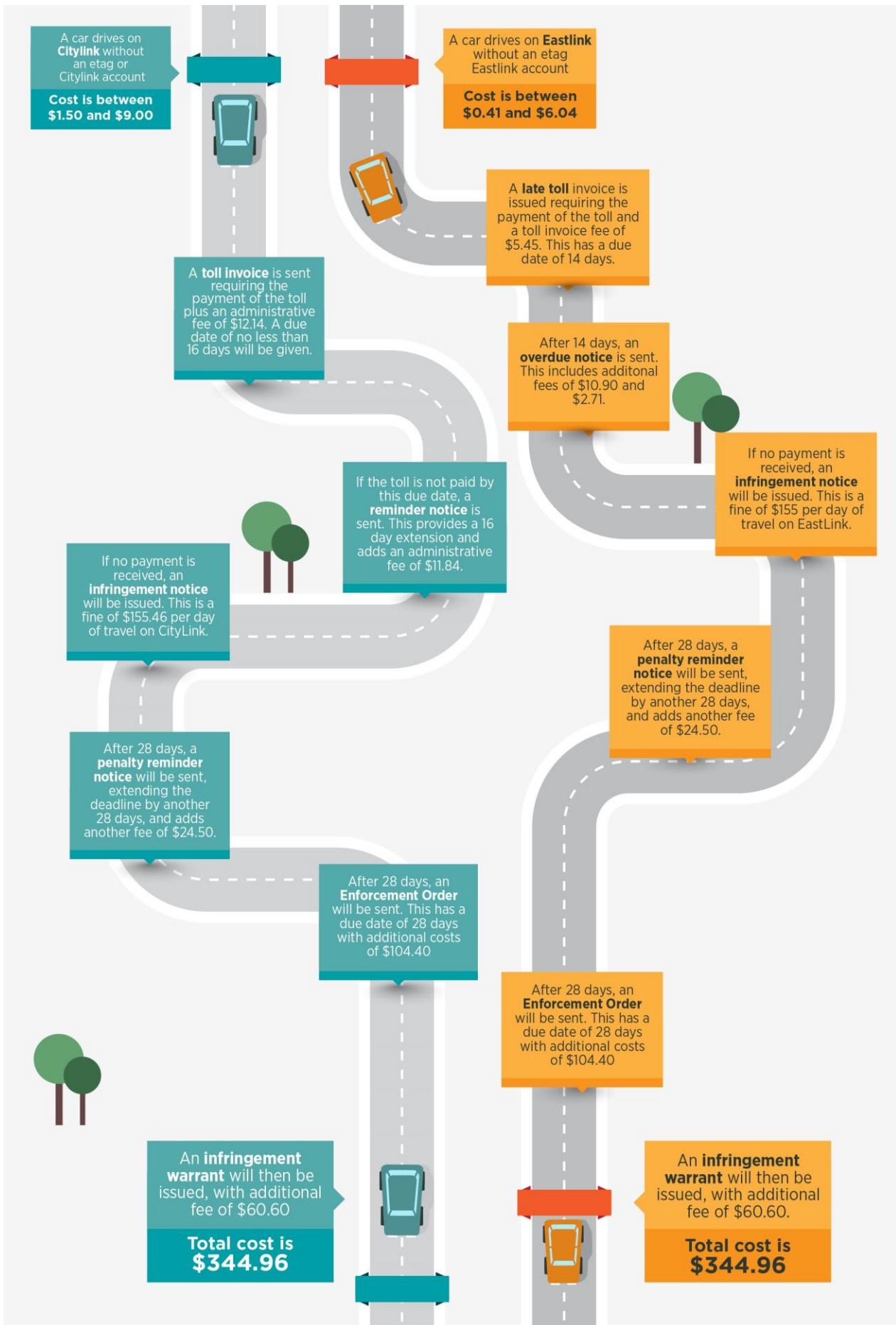
³ Department of Justice and Regulation, "Sheriff's LGA figures released today" Media Release, 23 December 2015.

⁴ Millar, R and Schneiders, B. <http://www.theage.com.au/victoria/toll-road-fines-ballooning-debt-turning-motorists-into-criminals-20160107-gm17wy.html>, published 7 January 2016.

⁵ Ibid.

⁶ Department of Justice and Regulation figures.

⁷ Based on projections in the 'Western Distributor & Monash Freeway Upgrade: Key Findings from the Business Case', December 2015, p6, available at http://economicdevelopment.vic.gov.au/_data/assets/pdf_file/0003/1237341/Key-findings-from-the-business-case.pdf.



The Victorian Ombudsman's recent investigation into public transport fare evasion enforcement specifically cited the complete lack of available data on the cost of the fines enforcement system.⁸ The report shows that the impact of fines on Victoria's justice system and the amounts recovered by government is not well-known or understood.

Case Study 1 – Geoff: a courier from Melbourne's North

Geoff is 62 years old and works hard as a courier. He is married with two adult children. Geoff has worked as a sub-contractor for courier companies for many years. These companies impose very strict delivery times; being only a few minutes late can cost Geoff his contract. Without travelling on Citylink, Geoff would never make his deliveries on time.

In late 2010, Geoff's wife was hospitalised with a life threatening illness. While Geoff was caring for his wife, he started falling behind on the bills and missed a few payments. As the bills piled up, Geoff made sure to keep on top of his utilities and other essentials but any bill that could wait was put on the bottom of the pile.

In only a few months, Geoff had accumulated over a hundred toll infringements as he travelled along Citylink for work. Over the next few years Geoff tried to start making payments but, because he was unable to work as much as before, he always fell behind. As Geoff tried to get back on his feet, the warrants started arriving. What had been around \$6,000 in toll invoice fees was now \$150,000 in fines. Geoff tried putting the fines on payment plans and payment orders but there were so many that he was paying \$700 per week just to stop warrants being issued.

Geoff's work has since dried up and he missed more payments. Because he does not have 'special circumstances' he has no option but to continue on payment plans. His applications for revocation based on exceptional circumstances have all been refused.

To date, Geoff has paid over \$97,000 in fines. Paying the cost of the tolls 50 times over with no end in sight, his health is suffering and he does not know how much longer he will be able to continue making payments. If Geoff stops making payments, he is afraid that he will lose his house or be sent to prison for 8 months. Geoff was recently hospitalised as a result of stress-related health conditions.

As a rough rule of thumb, legal assistance resources involved in enforcing toll fines would involve:

- Driver engagement with legal services:
 - single advice (45 minutes)
 - open case file to request medical or other reports, continued contact, making applications preparing for court (6 - 20 hours)
 - representation in court (2-6 hours)
 - follow up work arising out of court (1-5 hours)
- Medical or other support services' time to prepare reports (1-5 hours)

4. HOW PRIVATE DEBT IS HANDLED BY OTHER SYSTEMS

The Victorian Water Sector

Water is an essential service used by all Victorians. Water businesses charge a fee for the supply of water to ratepayers, much like toll companies charge a fee for use of toll roads.

⁸ Glass, D. "Investigation into public transport fare evasion enforcement", May 2016, page 56, available at: <https://www.ombudsman.vic.gov.au/Investigations/Recent-Investigations/Investigation-into-public-transport-fare-evasion-e>.

Unlike the criminal enforcement of toll fines, ratepayers who cannot pay for use of water will incur a debt that water businesses enforce through the ordinary civil debt enforcement process. As noted above, each use of a toll road attracts individual enforcement fees and costs. In contrast, interest and any late fees are added to water debt quarterly. As outlined in Case Study 2 below, this represents a substantial difference in the total outstanding debt.

Ratepayers can also access hardship programs run by water businesses, government relief grants and receive referrals to support services. Hardship programs are encouraged and mandated through codes of practice, the Energy and Water Ombudsman of Victoria and good industry practice over a long period of time. Ratepayers are further protected by:

- section 12 of the *Judgment Debt Recovery Act 1984* meaning a debt cannot be enforced against a person receiving government income where their assets do not exceed \$7,350; and
- the *Limitation of Actions Act 1958* preventing enforcement of a debt older than 6 years or judgment older than 15 years.

Despite the similarities between toll roads and water, considerable differences emerge in how toll road and water companies deals with unpaid fees.

| Toll Roads | Water |
|---|--|
| Short-term payment plan may be offered to those who contact toll road company within 90 days of toll road use | Extensive hardship programs available including: <ul style="list-style-type: none"> • Debt waiver • Debt reduction • Payment matching • More time to pay • Assessment of water efficiency |
| No government relief available | Government relief grants available |
| Outstanding toll fees referred to Victoria Police after 90 days and become infringements | Referrals provided to support services including: <ul style="list-style-type: none"> • Social workers • Family violence support workers • Financial counsellors • Housing agencies • Gambling support workers |
| No community engagement programs | Community engagement programs undertaken |
| Enforcement of infringement through Infringements Court, Sheriff and Magistrates' Court | Enforcement of debt through civil processes – debt collection and Magistrates' Court (civil) proceeding |
| Potential imprisonment | Protection of <i>Judgment Debt Recovery Act 1984</i> and <i>Limitation of Actions Act 1958</i> |

Case Study 2 – Kate: a mother of two from Tarneit

Kate, a mother of two toddlers, has never received a fine before. She has recently undergone a stressful situation, with her son needing ongoing medical attention at the Royal Children's Hospital in Melbourne.

Kate had some idea that she was driving on a toll road to reach the hospital, but throughout the stress of her son's illness, she thought she would work things out at a later date.

During this period, Kate had no time to open her mail or deal with outstanding financial issues, as she was trying to hold down her part-time job while caring for her sick son and other child. After a number of months, Kate's son's health improved and she was able to start getting her affairs back in order. She needed to deal with outstanding debts on her car finance and utilities, as she was fearful of their repossession or disconnection respectively. Kate finally made an appointment with a community legal centre to deal with the fines, and after the 4-week wait for an appointment, she saw a lawyer.

Kate had only opened a few of the numerous envelopes received; on seeing the lawyer, Kate discovered that she had 45 outstanding enforcement orders and warrants in her name, totalling more than \$10,000. To Kate, \$10,000 might as well have been \$1 million, there was no way she could pay, and the amount was too high for her to enter a payment plan.

If Kate's toll debt was a phone bill, the penalty/enforcement fees would have been added monthly. Therefore, Kate would have paid around five amounts of penalty/enforcement fees for use over the five month period, and be facing a manageable debt less than \$1,000 with hardship options. Victoria's toll fines system adds between \$155 to \$342 in enforcement costs to every day's use of the road – similar to adding \$155 to \$342 to a day of water usage – and resulting in a hugely inflated debt. Kate also faces the added consequences of imprisonment, seizure and sale of her car and cancellation of her licence and registration.

Toll enforcement in New South Wales

In New South Wales, where Transurban also manages the majority of toll roads, non-payment of tolls is recovered through the civil debt system. Road operators engage debt collectors to recover the unpaid tolls, plus a reasonable administrative fee. However, important consumer protections including hardship arrangements and debt collection Codes of Practice safeguard drivers from inappropriate debt collection action and ensure debt collection is proportionate to a person's financial circumstances and capacity to make repayments.

To deter repeated and deliberate non-payment, a separate and additional option is available. An infringement can be issued for the offence of non-payment of tolls. However, the use and impact of this penalty is targeted and safeguards are in place. In New South Wales, a single fine is used to penalise a course of offences, in contrast to Victoria where each day of unpaid travel results in a separate fine being issued. There is also a limit to the number of infringements toll operators can ask to be issued each month. This limit is currently 300 per month per road asset. This introduces a human element into the decision-making process and means toll operators have to actively choose which drivers warrant the intervention of the infringements system. By contrast, in Victoria an average of 58,148 infringements were issued for unpaid Citylink trips per month in 2015-16⁹. As in Victoria, strong deterrent sanctions including licence cancellation remain available for those drivers who persistently refuse to address their fines.

In New South Wales, this means toll debts reflect the actual fees owed to the operator. Large debts range from \$1,000 to \$3,000, which are realistic amounts capable of being paid off in most cases. This has the effect of incentivising future compliance. By contrast, international and domestic research has found that disproportionate and automated systems of punishment characterised by a lack of procedural fairness –

⁹ Department of Justice and Regulation figures.

such as Victoria’s toll fines system – tend to decrease respect for the system, leading to a decline in voluntary rates of compliance with the system.¹⁰

This combination of factors means tolls in New South Wales do not have the disproportionate effect that they have in Victoria. The cap on infringements and the requirement for human intervention to identify who should be fined is a significant strength. This could be made even stronger if mechanisms were introduced to ensure infringements are reserved for those drivers who have the capacity to pay but refuse to do so.

It is also important to note that New South Wales made changes to its fines enforcement system following recognition that a large number of prisoners were incarcerated due to fines and a critical incident involving serious injury to a prisoner serving a sentence for unpaid fines.

5. IMPACT ON COMMUNITY, INDIVIDUALS, LEGAL ASSISTANCE SERVICES AND THE JUSTICE SYSTEM

Impact on the local community

The 11 Local Government Areas recording the highest outstanding infringement warrant debt in the 2014-15 financial year were all outer suburbs of Melbourne:¹¹

Figure 2 – list and map of local government areas recording highest infringement warrant debt 2014-15¹²

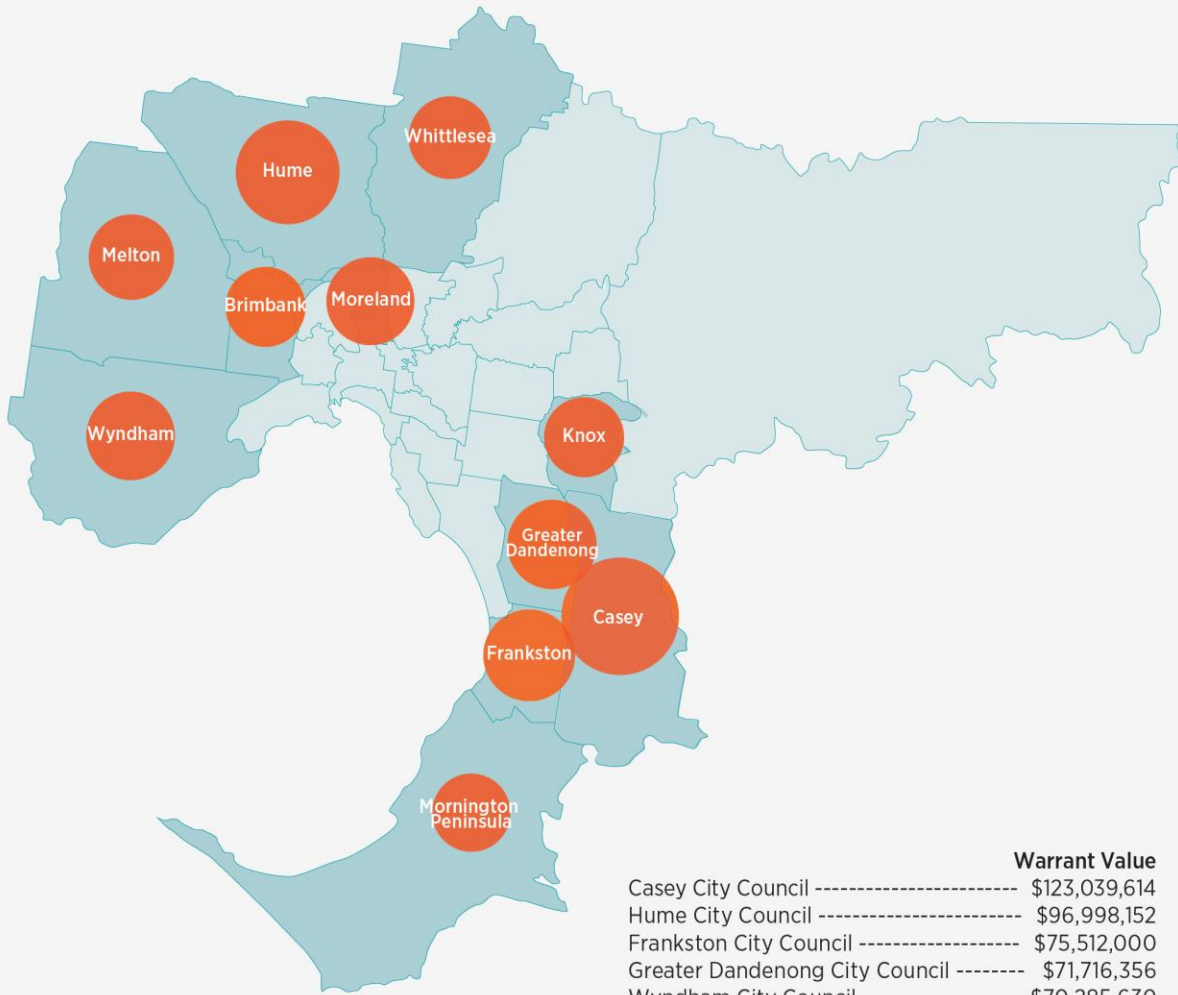
| Local Government Area | Total warrant value |
|--|---------------------|
| 1. Casey City Council | \$123,039,614 |
| 2. Hume City Council | \$96,998,152 |
| 3. Frankston City Council | \$75,512,000 |
| 4. Greater Dandenong City Council | \$71,716,356 |
| 5. Wyndham City Council | \$70,285,630 |
| 6. Moreland City Council | \$69,245,087 |
| 7. Melton City Council | \$65,157,948 |
| 8. Whittlesea City Council | \$ 61,645,669 |
| 9. Knox City Council | \$57,851,348 |
| 10. Brimbank City Council | \$57,641,317 |
| 11. Mornington Peninsula Shire Council | \$55,653,933 |

¹⁰ See, for example, ‘Why People Obey the Law; Closing the gap between regulation and the community’, Kristina Murphy, ‘Procedural justice and its role in promoting voluntary compliance’ in Peter Drahos (ed) *Regulatory Theory* (2017, ANU Press) at 43; Kristina Murphy, ‘Procedural Justice and the Australian Taxation Office: A study of scheme investors’ *Centre for Tax System Integrity Working Paper No 35* (October 2002). See generally, the voluminous work of the Centre for Tax System Integrity (a joint research centre established by the Australian National University and the Australian Taxation Office) at <http://www.ctsi.org.au/index.html>.

¹¹ Ibid above at 3.

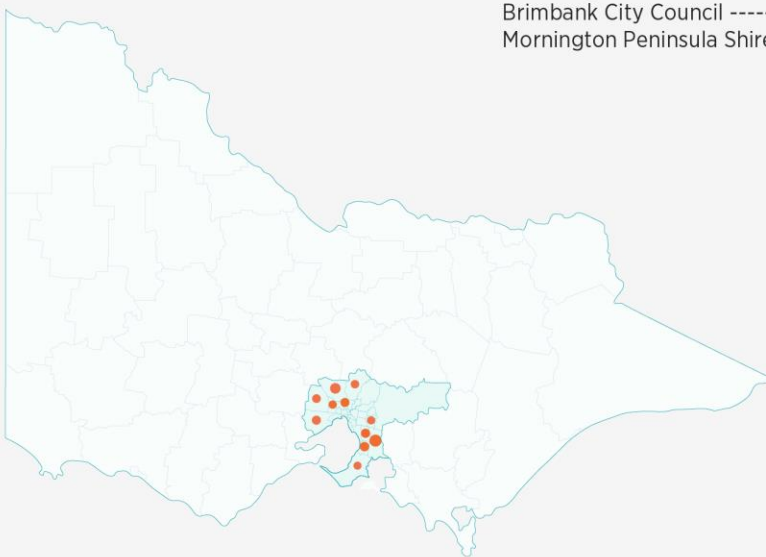
¹² Ibid.

Melbourne Metro



| | Warrant Value |
|---|----------------------|
| Casey City Council ----- | \$123,039,614 |
| Hume City Council ----- | \$96,998,152 |
| Frankston City Council ----- | \$75,512,000 |
| Greater Dandenong City Council ----- | \$71,716,356 |
| Wyndham City Council ----- | \$70,285,630 |
| Moreland City Council ----- | \$69,245,087 |
| Melton City Council ----- | \$65,157,948 |
| Whittlesea City Council ----- | \$61,645,669 |
| Knox City Council ----- | \$57,851,348 |
| Brimbank City Council ----- | \$57,641,317 |
| Mornington Peninsula Shire Council ---- | \$55,653,933 |

Regional Victoria



More than 99% of toll road users pay for their use of the toll road: at the time of use, soon after or in response to toll invoice. \$700 million in outstanding toll fine warrants is therefore owed by a very small proportion of toll road users, mostly living in Melbourne's outer suburbs which experience the highest rates of socio-economic disadvantage in the metropolitan area.¹³ This represents millions of dollars being dragged from outer urban areas without equivalent reinvestment. Pressure is also added to community support services in outer urban areas, and money drawn from local councils and local business owners.

Case Study 3 – Hadeel: a migrant from East Africa working for government

Hadeel migrated from east Africa to Australia with her parents, siblings and two young children. Hadeel worked in a low-paid administrative role in a government agency in the city and took public transport to work. Her income was used to support her entire family. The family had use of a vehicle registered in Hadeel's name but which Hadeel used only rarely. All adult family members shared use of the vehicle and drove it frequently while Hadeel was at work and on weekends.

Hadeel's parents spoke very little English and did not understand Victoria's tolling system – they thought that since there was no toll booth, they had missed the toll road. They frequently visited family in the outer eastern suburbs, using Citylink to get from the outer western suburbs. Over a period of four years, 138 infringements were incurred by her family members, totalling more than \$19,000 for toll road use. All the infringements were issued to Hadeel as the registered owner of the vehicle.

Hadeel did not become aware of the infringements until the Sheriff clamped the wheels of the vehicle while Hadeel – then heavily pregnant – was at the supermarket with her children. By this time, with the addition of enforcement costs, the toll matters totalled more than \$41,000.

Hadeel was unaware of the infringements because the correspondence was sent to previous addresses as the family moved multiple times and Hadeel was unaware of the requirement to update her address with VicRoads. By this late stage in the process, Hadeel could not nominate the drivers who incurred the infringements due to the strict time limit for this process.

Hadeel was assisted by a community legal centre to apply for revocation of the infringements on the basis that she was not the driver. This took more than 18 months to resolve, with Hadeel attending the Melbourne Magistrates' Court on five separate occasions. The toll matters were ultimately revoked but as a result Hadeel ended up with 138 findings of guilt on her criminal record. She was sentenced to a good behaviour bond in addition to the mandatory order that she pay the road operator a \$40 administrative fee in respect of each toll offence, which totalled \$5,520.

Hadeel was required to disclose these criminal matters to her employer which led to her losing her job, plunging the family further into financial hardship.

Impact on individuals

People with large toll fine debts represent a broader cross-section of the community than traditional community legal centre or legal aid clients, as outlined in the six hypothetical case studies throughout this paper. Many are the working poor with competing expenses, or people suffering a temporary crisis such as family violence or family breakdown. A toll fee or fine doesn't need to be paid immediately, and large debts often accumulate due to drivers having more pressing issues to deal with or expenses with immediate consequences such as energy bills, petrol or rent. A significant number of drivers who don't pay for use of the toll road also experience special circumstances such as a mental health condition or homelessness. In

¹³ See SEIFA Disadvantage ranked by Local Government Area at <http://profile.id.com.au/g21-region/seifa-disadvantage>.

this context, it is easier to understand how paying the toll invoices may be easily forgotten or ‘put aside.’ Other ‘offenders’ may not have been the driver but are deemed responsible by law.

Case Study 4 – Daphne: a pensioner grandmother

Daphne is a pensioner in her ‘60s. A couple of months after Daphne’s husband passed away, she offered to drive her grandson to school, to help her daughter who was starting a new job.

Daphne’s husband used to take care of the money and things like e-Tags. As she drove her grandson to school via Eastlink during the next few weeks, Daphne heard the e-Tag beeping and didn’t give it another thought. When the notices arrived saying she owed money, she thought they were a mistake. She meant to call and tell them so, but things were getting on top of her and she didn’t follow it up. She put aside all the mail she received and when nothing further happened, she figured the mistake had been fixed.

When Daphne was stopped in a roadblock operation by the Sheriff and told she owed almost \$5,000, she started crying. Her grandson was in the car with her, so she tried to pull herself together, but the Sheriff’s officers said they were wheel-clamping her car unless she could pay the fines on the spot. Seeing how distressed Daphne was, the officers instead issued a 7-day notice, meaning that if she didn’t pay the full amount in seven days, the Sheriff could wheel clamp or seize her car, or arrest and bail her to appear in court.

Daphne’s pension was less than \$800 a fortnight, she had very little savings and no credit card. In total, she had 15 fines totalling almost \$5,000 due to enforcement costs. Daphne couldn’t believe it when she worked out that had her e-Tag account been up-to-date, those 15 trips would have cost less than \$100. Instead Daphne will need to attend court to resolve her outstanding toll fines.

Many of these people engage with legal assistance services once their lives are back on track, yet this is often late in the process, such as when the Sheriff is involved. Data obtained under freedom of information shows that of 1.21 million toll fines issued in 2015-16, 72% remained unpaid and progressed to enforcement. For those appearing in court with toll fines, Magistrates regularly discharge a substantial part (up to two-thirds) of the total debt. The remaining third is often still very large, meaning respondents enter into instalment orders to slowly pay off the debt, often over a period of many years. An instalment order requires stability and regularity yet often it is the absence of stability and regularity that leads to the toll fines being incurred and accumulating. When a person defaults on an instalment order, a warrant is automatically issued to immediately imprison the person. For those living week-to-week or struggling with health or housing difficulties, the chances of defaulting on this order are very high.

Impact on legal assistance services

Legal assistance services operate with very limited resources. A substantial and growing proportion of these resources are spent dealing with infringements – applying for withdrawal or cancellation of fines for vulnerable clients and representation in court for infringement matters.

From 2011-12 to 2014-15, the number of infringement advices provided by community legal centres rose by 65.83%.¹⁴ From 2011-12 to 2014-15, the number of active infringements cases undertaken by community legal centres rose by 48.62%.¹⁵ Last financial year, Victoria Legal Aid provided nearly 14,000 services in infringements, to more than 4,500 distinct clients. In that period, clients with infringement problems made up more than 5% of Victoria Legal Aid’s total client base. In 2015-16, although the total number of

¹⁴ National Community Legal Centre Information System data.

¹⁵ Ibid.

infringements issued decreased by 4.6% from 2014-15, the number of enforcement orders made increased by 6.5%.¹⁶ The increase in the proportion of infringements that are going unpaid signals a greater impact on legal assistance agencies, other support services and individuals.

The more time spent by community and legal aid lawyers dealing with infringements cases results in other vulnerable clients facing eviction, experiencing family violence or being pursued by debt collectors missing out on vital legal assistance.

Case Study 5 – Samira: A young woman from Melbourne’s West who has struggled with homelessness

Samira was excited to get engaged at age 21, but her very traditional parents didn’t approve and told her to move out. She worked casually in data entry jobs and couldn’t get a private rental despite many applications, so was couch surfing with friends. She married and wanted to find a place to live with her husband, but he couldn’t find work and their housing applications continued to be refused. She fell pregnant, and had to leave her job late in the pregnancy. Their housing remained unstable for four years, so they couch surfed and slept in the car. The need to find housing caused Samira to become distressed, distracted, frantic and anxious. Samira’s main focus was trying to care for her baby.

Over a four year period, Samira incurred 18 parking and toll fines while sleeping in her car, attending appointments with housing agencies, looking for rental properties, residing temporarily with parents or friends who had restricted parking, and visiting the Women’s Hospital or Medicare. The fines, with costs added on, totalled \$10,400. She entered into five different payment plans for the fines, but couldn’t maintain them. Once she finally got on her feet, and into stable housing, she contacted Victoria Legal Aid to try to sort out the fines, which were at warrant stage. She had enrolled in a Diploma of Health Science, and was working towards dentistry. She was on Austudy and her husband still couldn’t find work, so she couldn’t pay the fines off.

Victoria Legal Aid applied for revocation on the basis of special circumstances given her homelessness. Her application was supported by letters from the housing and homelessness services she had been in contact with. The Court requires a strong link between the special circumstances and the fines, known as ‘the nexus’.

The Infringements Court revoked the enforcement orders on the parking fines, and Samira is waiting to hear whether those will be referred to the Special Circumstances List or whether the agencies will decide not to proceed. However, the Infringements Court was not satisfied about the nexus between her homelessness and the toll offences, and did not revoke them. She is required to pay seven toll fines totalling just under \$3,000. The Infringements Court advised it would refuse any further application to pay these off by instalments because of her previous history of defaulting. Unless she can pay them off in full, she is at risk of almost three weeks in jail.

Impact on our justice system

As a proportion of all infringements, infringements arising from use of privately owned toll roads cause half of the impact on the Infringements Court and criminal justice system.¹⁷ The government is implementing considerable reforms to Victoria’s fines system but there are no changes planned to the toll fines system.

¹⁶ Infringements Management Enforcement Service, Annual Report on the Infringements System 2015-16, November 2016, available at http://assets.justice.vic.gov.au/justice/resources/a38140da-2a86-4ad8-a5b5-8f57477eb5f4/2015-16_report-infringements-sys.doc

¹⁷ In 2014-15, 1.7 million enforcement orders were made for all fines, tolling matters make up 49 per cent of all enforcement orders; see the 2014-15 Annual Report on the Infringements System http://assets.justice.vic.gov.au/justice/resources/e9d3c72c-3ab2-427c-a036-7e7405c26796/2014_15_report_infringements_sys.pdf

This is despite the Sentencing Advisory Council recommending in 2014 the need to establish a working group “to assist it in considering solutions to the increasing burden on the criminal justice system of existing toll road infringement offences and the potential associated costs of enforcement as a result of the future development of toll roads” (recommendation 47).¹⁸

The toll road operators are implementing changes to timeframes and customer interactions at the beginning of the system but while these are positive and necessary they alone will not overcome the problems this paper describes.

Victoria’s Royal Commission into Family Violence heard that the “Magistrates’ Court is confronting unprecedented demand pressures and that demand has increased faster than the system’s response”¹⁹. The Commissioners noted the specific burden fines place on the capacity of the Courts to hear family violence matters and recommended that consideration be given to changing the jurisdiction of infringement cases to relieve this pressure²⁰. The Victorian government has committed to implementing all the Royal Commission recommendations.

The removal of fines matters from the courts, particularly fines that do not involve risks to public safety such as toll offences, is urgently needed. Reforming the toll enforcement system to ensure that private debt is collected by the private companies to whom it is owed would ‘turn off the tap’ of people being funnelled into the Courts, freeing up Magistrates’ precious time and delivering on Recommendation 62.

Case Study 6 – Pete: the plumber

Pete is a proud father of four, who is happily married and works as a plumber. A couple of years ago, things went badly wrong for him. He and his wife struggled to cope when their fourth child came along. Their marriage suffered and Pete moved out of the family home. As the family’s sole breadwinner, Pete continued to pay the mortgage and support his wife and children, but he also had to pay rent for a place of his own.

Pete was struggling to cope emotionally and financially. He was working long hours and had a long commute from the southern Mornington Peninsula to Ringwood each day – more than two and a half hours – unless he used Eastlink which cut the travel time down by half an hour. Pete used Eastlink over the next nine months without an e-Tag – around 200 trips. When the mail started piling up, he just couldn’t deal with it and eventually stopped opening the envelopes.

A couple of years on, things are better for Pete who has reconciled with his wife and moved back in with his family – but now he is facing over \$60,000 for those toll fines and he can’t pay it. Pete says he was an “idiot” and he wants to pay what’s reasonable. The amount he should have paid in toll fees is around \$1,100. He could handle that – plus a modest processing fee. But he can’t pay the \$60,000 he now owes.

¹⁸ Sentencing Advisory Council, “Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria”, 30 May 2014, page 303 page available at: <https://www.sentencingcouncil.vic.gov.au/publications/imposition-and-enforcement-court-fines-and-infringement-penalties-victoria>.

¹⁹ State of Victoria, Royal Commission into Family Violence: Summary and Recommendations, Parl Paper No 132 (2014–16), Vol III, p148.

²⁰ Ibid. Recommendation 62 requires that: “The Victorian Government enact legislation and take other steps as necessary to support the capacity of the Magistrates’ Court of Victoria... to grant family violence intervention orders speedily and with due regard to the interests of justice and the safety of affected family members... The Victorian Government consider [within two years] transferring some of the jurisdiction of the Magistrates’ Court of Victoria to another forum— for example, fines and traffic infringements.”

Pete's local community legal centre is helping Pete to sort things out – but he is having trouble sleeping at night, knowing he will have to attend Court, the Sheriff could cancel his licence or seize his car, and if that happens, Pete will lose his job. It is even possible that Pete could lose his home.

Another person in Pete's shoes – but who doesn't own assets – could be facing arrest and even imprisonment. It would take 395 days or 13 months imprisonment to 'pay off' \$60,000 fines – at a cost to the State of almost \$120,000. Therefore, the State would not recover the \$60,000 and instead would pay \$120,000 = a total loss of \$180,000. (Fines paid off 1 penalty unit a day \$151.67; Prison costs \$297.34 per day).²¹

6. SOME FURTHER ISSUES

The current toll fines system raises a number of important questions:

- How much public funding is being spent on enforcing tolling infringement debts, including the costs of increased demand on courts, Sheriff's officers, police, prisons and legal assistance services? What is the financial impact and burden of toll fines on courts, prison, other justice system infrastructure and community support services? How much capacity could be freed up in the legal assistance sectors and courts system to deal with family violence matters if changes were made?
- Why are communities in Melbourne's outer suburbs recording the highest outstanding infringement warrant debts for toll fines and what is the impact of the toll and fine enforcement system on these communities? What is the relationship between a community's toll fines, reliance on toll roads, and socio-economic disadvantage?
- How much revenue do toll fines generate for the Victorian Government, and how much of the existing amount is realistically able to be recovered?
- What was the policy rationale for criminalising civil debt in this way? Given what we now know about the harmful impacts of the policy, is it legitimate for the approach to continue?

7. CONCLUSION

The current system is the result of commercial negotiations and policy decisions whose consequences were not foreseen. In light of substantial research showing that disproportionate, automated systems which do not afford individuals respect and procedural fairness lead to decline in system integrity and rates of compliance,²² it is probable that the current punitive system is not responsible for achieving the compliance objectives it was designed to achieve. At the same time, the current system is destroying the lives of vulnerable individuals and disadvantaged communities, while it also imposes unsustainable pressure on the Courts and the justice system.

The West Gate Tunnel negotiations present an important opportunity to review the effectiveness and cost to the State of the current regime used to enforce unpaid tolls. A fair and effective system is within reach – a system which recognises the commercial realities for the toll operators, strikes the right balance between the respective responsibilities of the toll operators and the State in enforcing unpaid tolls, embeds strong protections for Victorians, and maintains high levels of compliance.

²¹ Corrections statistics.

²² Above n10.