

Use and Effect of Infringement Notices

By Tim Beckett

Use of infringement notices

Typically, infringement notices are issued in relation to offences which may be considered to be at the lower end of the scale of seriousness, such as parking offences. The use of infringement notices allows local governments to address minor compliance issues without necessarily triggering the expense and delay of formal court proceedings. However, a local government should not issue an infringement notice unless it has sufficient evidence to prosecute the alleged offender for that same offence, in the event the modified penalty is not paid.

Effect of an infringement notice

The issue of an infringement notice for an alleged offence allows the recipient of the infringement notice to accept responsibility for an offence by paying the prescribed modified penalty for that offence, rather than facing a potential prosecution where a high maximum penalty and court costs may apply. For example, the modified penalty for failing to register a dog is \$200, whereas the maximum penalty for that same offence is \$5,000.

The payment of the modified penalty upon receipt of an infringement notice acts to prevent the local government from prosecuting the recipient for that same offence. For that reason, local governments should not issue infringement notices for serious offences, as the modified penalty may not properly reflect the significance of the offence. For example, under section 218 of the Planning and Development Act 2005 for an offence by a corporation is \$500, whereas the maximum penalty is \$1,000,000. If a local government issues an infringement notice for a planning scheme breach, the corporation can avoid prosecution for that same offence by paying the relatively insignificant sum of \$500, which will prevent proceedings from being commenced for the alleged offence and, in some cases, the period of time preceding the breach.

Similarly, if an infringement notice is issued and the modified penalty is not paid and the allegation is ultimately dealt with by way of a prosecution, the court may look at the modified penalty as a 'starting point' for determining the appropriate sentence. Therefore, even if a person is convicted of a significant offence carrying a maximum penalty of \$200,000, the court may impose the original modified penalty on the basis that the local government appeared to initially accept that the modified penalty reflected the seriousness of the offence.

Where modified penalty is not paid

In cases where a modified penalty is not paid, a local government can either withdraw the infringement notice and commence a prosecution for the alleged offence or, in some cases, refer the infringement notice to the Fines Enforcement Registry (FER) for further enforcement action.

Where a notice recipient refuses to pay a modified penalty, the allegation may be referred to the local government's legal representatives for review, to determine whether an offence has been committed and, if so, whether the local government should proceed with a prosecution in the magistrates court.

Where a prosecution is to be commenced, the infringement notice should first be withdrawn by the local government. The withdrawal of infringement notice should be accompanied by a letter, confirming that the infringement notice has been withdrawn and the charge has been referred to the local government's legal representatives for prosecution.

If an infringement notice is not withdrawn before a prosecution is commenced, an offender may attempt to pay the modified penalty at a later stage in order to establish a defence to the prosecution.

Details of the alleged offence

In most cases, the prosecution notice will reflect the details of the offence contained within the infringement notice. However, in some cases, a review of the evidence will result in a different offence being alleged within the prosecution. For example, in the case of *Rodi v City of Joondalup* [2014] WASC 330, the Supreme Court agreed that, where an infringement notice is not paid, "there is nothing to prevent the local authority from instituting such proceedings as it considers necessary and appropriate".

Therefore, if an infringement notice contains an error in respect of the details of an offence, that error will not prevent a local government from commencing a prosecution in respect of that offence. However, local governments should still take care to ensure that infringement notices are properly issued, as the issue of incorrect infringement notices can cause embarrassment, in addition to an increased administrative burden. Furthermore, the court may consider the effect of an incorrect infringement notice when determining sentence and costs in the event of a conviction.

Fines Enforcement Registry prosecutions

When unpaid infringement notices are referred to FER, it will pursue payment of the infringement notice and, if the infringement notice is not paid within the required time, a notice recipient may face possible drivers' licence suspension. If a notice recipient subsequently requests to have the alleged offence dealt with by a court, FER may then commence a prosecution on behalf of the local government in respect of the offence. Once those proceedings are commenced, the local government will be required to conduct the prosecution.

Unfortunately, a prosecution commenced by FER will be limited to the basic details set out in the infringement notice, which inevitably results in some FER prosecutions being commenced incorrectly. Where possible, where an offence alleged within an infringement notice is going to result in a prosecution, it is preferable for the infringement notice to be withdrawn from FER, to enable a local government to review the evidence and, where appropriate, instruct its lawyers to commence a new prosecution in respect of the alleged offence.

Conclusion

Infringement notices should only be issued in respect of less serious offences, where the modified penalty adequately reflects the seriousness of the offence. Furthermore, infringement notices should not be issued unless there is sufficient



evidence for the allegation to be proved beyond reasonable doubt. When used appropriately, infringement notices will – along with prosecutions – form part of a proper local government enforcement and compliance regime.

If you would like to discuss any of these issues further, please do not hesitate to contact Tim Beckett at tbeckett@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.