

The First Expiation Enforcement Appeal of its Kind Provides Clarity for Councils

KelleyJones Lawyers recently assisted the City of Burnside in relation to a Magistrates Court appeal under section 14(1) of the *Expiation of Offences Act 1996* (the Act). The appeal was lodged by Mr Blanch, the recipient of an expiation notice issued by the City of Burnside.

Section 14 of the Act, which commenced operation on 3 February 2014, provides a right of appeal by an alleged offender against an enforcement determination made by the Fines Enforcement and Recovery Officer under section 13 of the Act.

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The appeal proceedings were the first occasion that the Court:

- entertained a section 14 appeal to which a Council was a party; and
- was required to consider the issues that the appeal raised.

It is, therefore, an important case for Councils. This is because in arriving at its decision, the Court clarified the operation of section 14 of the Act, and examined the interaction between the previous expiation enforcement scheme under the now repealed provisions of the Act (the Old Scheme) and the new expiation enforcement scheme involving the Fines Enforcement and Recovery Officer (the New Scheme).

The Facts

In June 2013, the Council observed a vehicle unlawfully parked in a bike lane and issued Mr Blanch, the registered owner of the vehicle, with an expiation notice (the Notice). Despite an expiation reminder notice having been issued, the expiation fee remained outstanding and the Council progressed the Notice to Court enforcement in accordance with the Old Scheme. Specifically, the Council sent the Registrar a Certificate of Enforcement for these purposes and an Enforcement Order was made.

Mr Blanch lodged an application for review of the Enforcement Order (Form 51 Application) in December 2013 on the grounds that the Notice should not have been given to him in the first instance. The Form 51 Application was heard by the Court on 30 January 2014 and was refused. The effect of this is that the Court confirmed the Enforcement Order under the Old Scheme (i.e. pursuant to the now repealed section 14(4)(a) of the Act).

The New Scheme commenced operation on 3 February 2014. Notwithstanding the Court's decision in respect of the Form 51 Application, on 13 March 2014, Mr Blanch lodged his appeal against the Court's decision under section 14(1) of the Act. Mr Blanch asserted that the Notice should not have been issued to him because he was not driving the vehicle at the time of the offence. The fact that Mr Blanch was not the driver at the time of the offence was not in dispute. Mr Blanch never provided a statutory declaration to the Council stating the name and address of the driver.

The Council's Position

On behalf of the Council we made submissions that the appeal was not competent for the following reasons:

- the Form 51 Application was determined by the Court before 3 February 2014 in accordance with the Old Scheme;
- under the Old Scheme the Court's decision of 30 January 2014 to confirm the Enforcement Order was final and Mr Blanch did not have a right of appeal against it. This is because the provisions of the Act relevant to the Old Scheme provide that a decision by the Court made on review of an enforcement order is not subject to an appeal;
- this is reinforced by regulation 13 of the *Expiation of Offences Regulations 2011* (the Regulations). This provision states that section 14 of the Act that was in force immediately before the New Scheme commenced operation on 3 February 2014, continues to apply in relation to an application made under that section. Put simply, the Old Scheme applies to the Court's decision to confirm the Enforcement Order and the New Scheme does not.
- in any event, the right of appeal under section 14 of the Act lies against an enforcement determination made by the Fines Enforcement and Recovery Officer. In this case, an enforcement determination had not been made in respect of the Notice.

We submitted on the Council's behalf that even if the appeal was competent, it should be dismissed on the merits since the Notice was properly issued to Mr Blanch as the registered owner of the vehicle. That is, in the absence of a statutory declaration having been lodged by Mr Blanch, the Council was entitled to pursue him for the offence which was the subject of the Notice. This submission relied upon the application of section 174A of the *Road Traffic Act 1961*, which operates such that the registered owner of a vehicle involved in the commission of a parking or stopping

offence is liable for the offence even though he/she may not have been driving at the time.

The Outcome

Ultimately, the Court accepted the Council's position that the appeal was not competent and dismissed the appeal.

Further, the Court considered it was appropriate to deal with the Council's submissions regarding the merits of the appeal. In this regard, the Court agreed with the Council that in light of section 174A of the *Road Traffic Act 1961*, even if the appeal was competent, it would not have been successful on its merits. This decision confirms that the fact an owner of a vehicle may not have been driving the vehicle at the time of an offence does not, of itself, constitute a valid reason for a Council not to issue the owner with an expiation notice for the offence. The question as to whether it is appropriate and reasonable to do so will turn upon the circumstances in question.

In arriving at its decision, the Court clarified that the right of appeal under section 14 of the Act is an appeal on the merits and constitutes a distinct process compared to the right of review under the Old Scheme, which is limited to procedural grounds only.

This means that in practice, all appeals lodged under section 14 of the Act require the Court to consider the reasons why an expiation notice was issued and may necessitate examination of the evidence of the relevant offence and consideration of whether or not the offence was trifling for the purposes of the Act. This is another reason why it is critical that Councils ensure all evidence relevant to the issue of an expiation notice and any objections to the notice made by the alleged offender, are documented.

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