

VICTORIAN ombudsman

Investigation into the Department
of Transport and Planning's
implementation of the zero and
low emission vehicle charge

September 2023



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The Victorian Ombudsman pays respect to First Nations custodians of Country throughout Victoria. This respect is extended to their Elders past, present and emerging. We acknowledge their sovereignty was never ceded.

Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973* (Vic), I present to Parliament my report on the *Investigation into the Department of Transport and Planning's implementation of the zero and low emission vehicle charge*.



Deborah Glass OBE

Ombudsman

27 September 2023

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To protect the privacy of complainants, the names used in this report are pseudonyms.

Foreword

This report is about the application of the State Government's road-user charge for electric and plug-in hybrid electric vehicles (zero and low emission vehicles, or 'ZLEVs'). Owners of fuel-powered vehicles contribute to the maintenance of roads through the Commonwealth fuel excise. To ensure that owners of ZLEVs pay their 'fair share', they are charged for each kilometre they travel on public roads, including outside Victoria.

The charge is imposed by the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* – Victorian legislation, the validity of which is being challenged in the High Court.

So why would the Ombudsman put out a report on legislation that may be struck down?

This investigation does not touch on the validity of the legislation, plainly a matter for the High Court. Nor do we consider whether it is good public policy to impose a charge on electric vehicles when the Government has adopted a 'roadmap to net-zero emissions and a climate resilient Victoria by 2050'.

But thousands of people have been affected by the charge since it came into effect in 2021, many of them unfairly. And while this report focuses on the actions of the Department of Transport and Planning, there are broader lessons for the public sector about the dangers of making policy on the run (or not making it at all), and the importance of exercising discretion.

Imagine buying an electric vehicle, and then being charged for more kilometres than you have driven, because 'this average calculation is bound by legislation'.

Or travelling thousands of kilometres on fuel in your plug-in hybrid vehicle in remote parts of Australia with no charging stations and being charged hundreds of dollars for road use, despite having already paid the Commonwealth fuel excise on all those kilometres.

Imagine finding your car has been deregistered, even though you paid your rego, because you failed to provide an odometer reading while you were overseas. And, adding insult to injury, imagine then receiving a 'penalty' charge for making a late declaration of the reading.

Furthermore, that 'penalty' is calculated based on the 'average distance' travelled, which may be far more than you actually used your vehicle. As the Robodebt inquiry showed us, there are dangers in making assumptions and using average calculations to charge people. Assumptions have been made about how people will use their electric vehicles, which plainly disadvantage people with older vehicles or those who have less access to charging stations.

And imagine, lastly, that when you complained, you received an unhelpful template response. You were told the Department had no choice, no waivers were possible, its hands were tied by the legislation – although this very same legislation provided the Department with a very broad discretion to waive charges. A discretion it repeatedly chose not to use.

The Department told us it had not developed a policy for exercising discretion as the legislation was new – even though by the time we asked, it was already two years old, and the Government was happy enough to collect money under it.

This approach is unreasonable and wrong. We found an unreasonable lack of policy guidance to those administering the legislation, inflexible handling of complaints, and an unwillingness to exercise discretion. It is also wrong to charge penalties not provided for in legislation, and the money collected under this 'penalty' should be repaid.

While the Department has resolved some complaints and refunded some monies during this investigation, it has not yet acknowledged that other decisions were unfair, and that it could exercise its discretion in these cases. The Department appears to be using the High Court challenge to the legislation as a smokescreen for inaction.

Whether or not its validity is successfully challenged, this legislation is being administered unfairly. This needs to change.

Deborah Glass

Ombudsman

Background

A new distance-based charge

1. Zero and low emission vehicles ('ZLEV') include electric vehicles that can be charged from power outlets and vehicles powered by hydrogen fuel cells. There are currently around 19,200 ZLEVs registered in Victoria.
2. On 18 March 2021, the Treasurer of Victoria, the Hon Tim Pallas MP, proposed to Parliament a new road-user charge for ZLEVs.
3. The proposed charge was to be calculated based on the number of kilometres a ZLEV travelled. It was described as a way to balance Victoria's 'transition to a low-carbon future' with the need to pay for the upkeep of Victorian roads.
4. The Victorian Government's rationale for introducing the charge was that ZLEV owners pay little or nothing towards the maintenance of Victorian roads. Owners of traditional fuel-powered vehicles pay for public road upkeep through the Commonwealth fuel excise which is included in the purchase price of every litre of fuel.
5. VicRoads explains on its website:

The new road-user charge requires ZLEV registered operators to make a fair contribution to funding Victorian roads. The Victorian Government will use this revenue to invest in the accelerated adoption of zero and low emission vehicles, including new electric-vehicle-charging infrastructure and reforms to enable electric-vehicle-ready new buildings.
6. In July 2021, the new road-user charge for ZLEVs was introduced in Victoria under the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ('ZLEV Act'). This legislation was the first of its kind in Australia.
7. The ZLEV Act was prepared by the Department of Treasury and Finance; but it is administered by the Department of Transport and Planning and VicRoads.
8. In this report we refer to the Department of Transport and Planning, its predecessor the Department of Transport and VicRoads as 'the Department'.
9. The ZLEV Act confers the power to make certain decisions under the Act on the Secretary of the Department. The Department provided the investigation with a delegation document dated 14 July 2022 which allows the Secretary's power to be exercised by staff within the Department. This report refers to the Department as a decision-maker on that basis.

Victorian Government's ZLEV approach

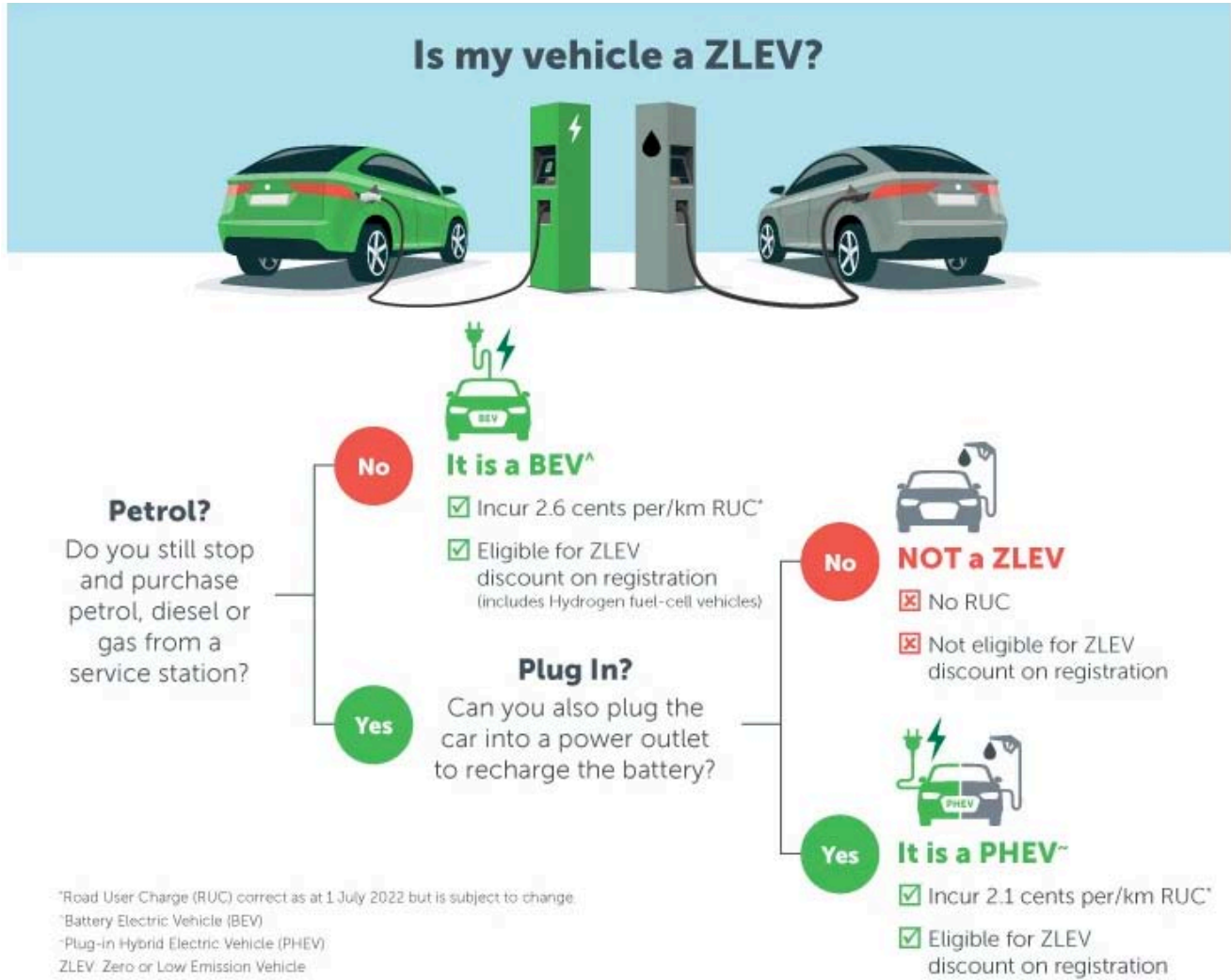
10. In May 2021, the Victorian Government launched its *Climate Change Strategy* ('the Strategy') and *Zero Emissions Vehicle Roadmap* as a 'roadmap to net-zero emissions and a climate resilient Victoria by 2050'. This included targets to reduce greenhouse gas emissions by 28 to 33 per cent by 2025 and by 45 to 50 per cent by 2030 (from 2005 levels).

11. The Strategy recognises Victoria's transport sector currently accounts for 25 per cent of Victoria's carbon emissions. To achieve a 'fully decarbonised road transport sector' by 2045, the Victorian Government has set a target for 50 per cent of all new light vehicles sales to be ZLEVs by 2030.
12. In May 2021, the former Department of Environment, Land, Water and Planning unveiled the *Zero Emissions Vehicle Roadmap* and outlined its intention to 'ensure Victoria is a leader in the adoption of [zero emissions vehicles] in Australia'.
13. The *Zero Emissions Vehicle Roadmap* stated that an associated \$100 million package would help to meet sustainable targets by delivering:
 - \$46 million for Australia's first public [zero emissions vehicle] subsidy program - supporting the purchase of more than 20,000 [zero emissions vehicles]
 - \$20 million for a [zero emissions vehicle] public transport bus trial
 - \$10 million to replace 400 vehicles in the Victorian Government Fleet (VicFleet) with 400 [zero emissions vehicles]
 - \$5 million to establish a Commercial Sector Zero Emissions Vehicle Innovation Fund
 - \$19 million to accelerate the rollout of [electric vehicle] charging infrastructure.
14. The *Zero Emissions Vehicle Roadmap* stated that this package 'has been made possible by a zero and low-emissions road user charge'.

Types of low emission vehicles

15. There are three main types of ZLEVs under the ZLEV Act. These are grouped into two categories - battery electric vehicles ('BEVs') and Plug-in Hybrid Electric Vehicles ('PHEVs').
16. BEVs include vehicles that use only electric power from a battery and vehicles that use a hydrogen fuel cell.
17. PHEVs have two independent engines: a PHEV can operate as an entirely electric vehicle or an entirely fuel-propelled vehicle. PHEVs can travel varied distances using electric power, from around 40 to 80 km per charge.
18. Hybrid vehicles, on the other hand, have a fuel motor that is simultaneously assisted by an electric motor. These vehicles do not need to be charged using an external source because the vehicle generates its own electricity to store in the battery. Hybrid vehicles are not considered to be ZLEVs and owners are not charged under the ZLEV Act.
19. The Department told the investigation that in Victoria, registration data as at March 2023 showed that PHEVs comprised 26 per cent of the total 19,216 registered ZLEVs. At the same date, there were 6,460,892 registered vehicles in Victoria.

Figure 1: ZLEV types and charges



Source: VicRoads, June 2023

How the ZLEV distance-based charge is applied

20. The ZLEV charge is described by the Department as being ‘about 2 cents/km less’ than the Commonwealth fuel excise, in recognition of the environmental benefits of ZLEVs.
21. From 1 July 2023, indexation applied to the ZLEV charge under section 9 of the ZLEV Act, increasing the rate payable. Owners of BEVs are now required to pay 2.8 cents per kilometre (up from 2.6 cents), while PHEV owners are required to pay 2.3 cents per kilometre (up from 2.1 cents).
22. The Department has stated the lower charge for PHEVs acknowledges that driving them will also sometimes consume fuel, and therefore PHEV owners will sometimes pay both the distance-based charge and the Commonwealth fuel excise.
23. The ZLEV Act, although Victorian legislation, applies to kilometres travelled by a ZLEV vehicle registered in Victoria on any public road in Victoria and on any highway (as defined by common law) in any state or territory of the country.
24. To calculate the ZLEV charge, the Department requires ZLEV owners to provide a photo of their vehicle’s odometer showing the kilometres travelled, at the start and end of each registration period. The Department sends ZLEV owners a notice requiring them to declare their odometer reading within 14 days.
25. From the evidence received by the investigation, it appears that if a driver fails to provide the photo requested in the notice, the Department:
 - may suspend or cancel the ZLEV’s registration
 - almost always issues an automatic pro-rata invoice based on an estimated 13,500 km of travel per year.

Reception of the ZLEV Act

26. The ZLEV Act has attracted some community criticism. The criticism is mainly about the ZLEV charge’s potential to discourage the uptake of electric vehicles, to slow emissions cuts, and to disproportionately impact drivers travelling in regional areas.
27. University of Queensland academic Dr Jake Whitehead conducted research in November 2020, and concluded the introduction of the charge was ‘completely incongruent’ with the Victorian Government’s target of net zero emissions by 2050.
28. The Victorian Government, however, has created some incentives for ZLEV owners, including the package announced under the *Zero Emissions Vehicle Roadmap*. Additionally, all types of ZLEVs are eligible for a registration discount of up to \$100 per year.
29. Purchasers of new ZLEVs were also eligible for a \$3,000 rebate under a 2021 scheme; however, the scheme was wound up in 2023, a year earlier than planned.

30. On 22 April 2021, an open letter to *The Age* newspaper was penned by a coalition of 25 car manufacturers, rideshare companies, environmental and industry groups and infrastructure companies. The letter declared the ZLEV charge the ‘worst electric vehicle policy in the world’. The letter criticised the Victorian Government’s policy for hindering and disincentivising electric vehicle uptake, stating it ‘makes things much harder for Victorian families who want to buy and drive electric’.
31. Significantly, there has been a recent challenge in the High Court about the validity of the ZLEV Act and its charges (*Vanderstock & Anor v the State of Victoria*, Case No. M61/2021).
32. This investigation has no bearing on the proceedings and makes no comment on the validity of the ZLEV Act.
33. In *Vanderstock*, the plaintiffs’ case is that the road-user charge imposed by section 7(1) of the ZLEV Act is invalid because it is a tax on the ‘consumption of goods’ which is a ‘duty of excise’. Constitutionally, a duty of excise lies solely within the Australian Government’s remit.
34. Victoria’s case is that the ZLEV charge is not a tax ‘on goods’ but rather a tax on ‘the activity of driving’. Even if it were a tax ‘on goods’ it is not a tax on the ‘production, manufacture, sale or distribution of goods’, but a tax on the use or consumption of goods. Such a tax is not a duty of excise for the purposes of section 90 of the Constitution. Therefore, the State contends, this charge can be legally levied under Victorian legislation.
35. The ZLEV Act is the first piece of legislation in Australia to tax ZLEV usage. The outcome of this case may determine whether the Australian Government or state and territory governments are able to collect tax revenue from ZLEV use. At the date of publication of this report, the case has not been decided by the Court.

What we investigated

36. The Ombudsman has received more than 30 complaints about application of the ZLEV Act. These complaints concern two main issues:
- whether the charge was unreasonably applied by the Department, considering how owners used their vehicles
 - whether additional charges imposed by the Department after submitting a late odometer declaration were reasonable.
37. On 20 October 2022, under the *Ombudsman Act 1973* (Vic), the Ombudsman notified the Department and the relevant Minister of her intention to investigate the Department’s approach to the exercise of discretion under the ZLEV Act.

Procedural fairness

38. This report includes adverse comments about the Department. In accordance with section 25A(2) of the Ombudsman Act, the investigation provided the Department with a reasonable opportunity to respond to the material in this report, through means of a draft report. This report fairly sets out the Department’s response.

39. In accordance with section 25A(3) of the Ombudsman Act, any other bodies or persons who are or may be identifiable from the information in this report are not the subject of any adverse comment or opinion. If they are named or identified in this report, the Ombudsman is satisfied that:

- it is necessary or desirable to do so in the public interest
- identifying those persons will not cause unreasonable damage to those persons' reputation, safety, or wellbeing.

Refusing to consider waiving the ZLEV charge

Those that use the road network more, pay more. This is the key underlying principle of the distance-based charge.

- Department of Transport and Planning

40. The ZLEV Act includes mechanisms for ZLEV owners to:
 - object to an invoice for the ZLEV charge (for example, if a vehicle has not travelled the distance indicated on the invoice)
 - request a waiver of some or all of a ZLEV charge
 - request a waiver of the requirement to lodge a declaration of their odometer reading.
41. Section 27 of the ZLEV Act confers a discretion on the Secretary to waive all or part of a ZLEV charge. Discretions are included in legislation to provide a flexible approach to an otherwise standard process.
42. Section 27 says:

The Secretary may waive the whole or any part of an amount of the ZLEV charge otherwise payable by the registered operator of a ZLEV -

 - (a) in the circumstances prescribed by the regulations; or
 - (b) in any other circumstances the Secretary considers appropriate.
43. The only circumstances currently prescribed for the purposes of section 27(a) are detailed in the *Zero and Low Emission Vehicle Distance-based Charge Regulations 2021*. These provide for waiving the first charge payable by a vehicle dealership, up to 1,500 km travelled by the ZLEV.
44. Section 27(b) effectively gives the Secretary the power to waive the charge in any circumstances they consider appropriate, in addition to separate powers under the Act to extend time for lodgement of declarations, refund overpayments or issue revised invoices.
45. The investigation examined the Department's internal briefings, legal advice and documents that set out the Department's position on the appropriate circumstances for waiving a ZLEV charge.
46. The investigation considered a draft internal brief prepared by the Department for the Secretary's review dated 14 November 2022. This brief remains in draft and has yet to be provided to the Secretary. This draft brief appears to generally favour a broad exercise of discretion by the Secretary under section 27(b):

In the absence of direct or indirect guidance on circumstances where the provision of a waiver should be considered or justified then it is reasonable to conclude that parliament intended that [the Secretary] should have the flexibility to determine to provide or not provide a waiver as [they] see fit.
47. This report includes case studies showing the Department's response to complaints made about the ZLEV Act. The Department has said it is open to resolving complaints on a case by case basis. The investigation's review of these complaints suggest the Department has been reluctant to use the section 27(b) discretion.

Double charging PHEVs

48. The Department estimates there are currently almost 5,000 PHEVs registered in Victoria and that this number is growing.
49. PHEVs typically have a range of only 40 to 80 km when operating solely on electric power, before they need recharging. This range depends on the size and age of the installed battery and other operating conditions such as acceleration and air-conditioning. PHEVs can be powered by battery alone during short trips or by a combination of battery and fuel during longer trips.
50. The ZLEV charge is a flat rate per kilometre based on the type of ZLEV, not on the type of power being used. As PHEVs can be run using fuel only, some PHEV owners believe the ZLEV charge inaccurately reflects the distance travelled on electric power. This is because the ZLEV Act does not differentiate whether a PHEV is using electric power or fuel.
51. The result is that PHEV owners are effectively charged twice for their fuel-propelled travel – once through the Commonwealth fuel excise when they purchase fuel and once through the ZLEV charge applied to every kilometre travelled.
52. By applying a flat rate to all PHEVs, it appears there is an assumption that PHEVs will predominantly use electric power. This assumption is the reason why PHEVs are charged half a cent less than other ZLEVs: it is intended to compensate for their dual fuel usage.
53. For example, the Department's draft brief dated 14 November 2022 discussing the Secretary's discretion to waive charges under the ZLEV Act assumes PHEV owners mostly undertake short, battery-powered trips:

Average fuel consumption for PHEVs is based on assumptions regarding the length of trips undertaken by the average user, with the assumption being that the majority of kilometres undertaken each year are short and use electric power only. These assumptions (the same used by manufacturers) produce average PHEV fuel consumption figures of around 1.5 litres to 4 litres per hundred kilometres (L/100km) travelled.
54. In reality, charging the flat distance-based rate on all PHEV owners without taking into account the type of power used has an unequal impact. The assumptions about how most people use their PHEVs ignore factors such as how and where the vehicle is used, its age and condition, the availability of power charging stations and driving conditions.
55. The Department's position is:

... if PHEV registered operators are using their vehicles to travel long distance, by operation of the Act, they will be required to pay a higher ZLEV charge. The impact of this charge when accounted for together with fuel excise paid on fuel used by PHEV registered operators will vary for each operator and is a matter for buyers to consider before purchasing a vehicle.
56. Buyers who purchased PHEVs before the legislation was enacted, or were not aware of the legislation when buying, would not have considered the impact of the charge.

57. PHEV manufacturers' estimates are based on new vehicles in peak working order. Any battery's capacity and efficiency deteriorates with use and over time. Replacement batteries are expensive; and unless a person can afford to replace the vehicle's battery, their PHEV will eventually rely more heavily on fuel.

58. The Department's draft brief discussing the Secretary's discretion acknowledged that basing the charge on averages disadvantages some drivers:

Nonetheless, some PHEV owners, those travelling significantly more than average and taking a large proportion of longer trips, are experiencing fuel consumption of up to 5.7L/100km. This equates to paying approximately 2.5 cents per kilometre in fuel excise. Meaning that such PHEV owners are paying a total of 4.6 cents per kilometre on average (i.e. fuel excise plus the ZLEV distance based charge).

59. The Ombudsman has received 12 complaints from PHEV owners concerned about the double charge. The Department has received many more.



Case study 1: Department refuses to waive charges

Emma drove her partner William's PHEV around Australia, on a journey of about 22,000 km. With no electric charging facilities available during most of her trip, Emma reported using petrol for about 95 per cent of the journey. Emma kept receipts for all her fuel purchases and tracked her route using GPS.

At the end of William's PHEV registration period, he received an invoice under the ZLEV Act. William calculated the invoice included a charge of \$377.44 for Emma's journey, even though the vehicle was only using its fuel engine.

In March 2022, William asked the Department to waive \$377.44 of the ZLEV charge as Emma had already paid for road use for those kilometres through the fuel excise. He made this request specifically noting section 27(b) of the ZLEV Act.

In his letter to the Department, William wrote:

I have no objection to [the ZLEV charge] as I benefit from using electricity to charge the car and drive many of its kilometres in normal circumstances using electric power. Due the lack of suitable charging stations and the fact that [my partner] camped whenever possible, the vast majority of her travelling was under Petrol ...

Therefore I ask that my 2021/22 ZLEV charge be reduced by \$377.44 ...

I ask this as otherwise I would be paying tax twice - once as fuel excise on the fuel and once as a notional Plug in Hybrid at 2 cents per kms.

I have examined the [ZLEV Act] and the only place I can find the authority to waive the ZLEV charge in my case is under [section] 27 (b) where the Secretary may waive the ZLEV charge **"in any other circumstances the Secretary considers appropriate."** [William's emphasis]

I hope you agree that the circumstances justify the claimed reduction in the ZLEV charge.

William provided his car's GPS data and fuel receipts to show his request was appropriate under the general discretion available to the Department.

On 3 May 2022, a Customer Resolutions Officer from the Department responded to William:

Whilst I acknowledge the circumstances outlined in your letter, unfortunately there are no exemptions applicable for use of a Victorian registered ZLEV vehicle interstate or limited availability of charging stations in remote locations.

In recognition that the registered operator of Plug-in Hybrid Electric Vehicles also pay fuel excise when using regular petrol, these operators are charged a lower per kilometre ZLEV rate than electric and other zero-emission vehicles.

VicRoads is not the authority responsible, as taxes are set by the Victorian Government. Concerns relating to the ZLEV charge should be referred to your local member of Parliament.

I wish you the best with this matter. If you have further concerns, please contact the Department of Treasury and Finance who may be able to assist further.

This response did not address William's request for waiver, and wrongly confined itself to the argument that no exemptions in the Act were applicable. William had stated that his request was not based on an exemption, but rather a discretionary waiver.

Further, it is unclear why the Department directed William to the Department of Treasury and Finance, noting they are not decision-makers under the ZLEV Act.

William complained to the Ombudsman.

The Department explained to the Ombudsman that the ZLEV charge applied to vehicles regardless of what fuel was used:

As the policy objective behind the Act was to provide for road user charging for PHEV's, it is considered that [William's] use of the vehicle as a petrol-powered vehicle is not considered to be a reason for a waiver to apply. Should a waiver be granted on the basis that a PHEV was driven as a petrol-powered vehicle, the waiver could well be requested by many other PHEV operators, negating an objective of the legislation.

While the Act does not explicitly differentiate between fuel and electric power, William believed it was unfair for the Department to refuse to use its discretion to waive the ZLEV charge.

The investigation was not persuaded by the Department's argument that waiving William's charge would lead to more requests for waivers on similar grounds.

The breadth of the section 27(b) discretion suggests each ZLEV owner is able to make an application to the Secretary for a waiver, and each case should be considered on its own merits and particular circumstances.

By using such a 'blanket' approach, the Department is restricting its own discretion: this can lead to unfair outcomes.

60. While the ZLEV Act was created to ensure users pay for the maintenance of Victorian roads, by buying fuel for the journey Emma had already contributed through paying the Commonwealth fuel excise at the fuel pump.
61. The Department told the investigation a waiver of the ZLEV charge was not appropriate for PHEVs because the proportion fuel and electric power used cannot be determined.
62. However, this is not always true - in some cases a PHEV's fuel usage can be determined. Some complainants, like William, provided the Department with fuel receipts and GPS data to demonstrate their use of fuel.
63. Also, the Department received a complaint from another PHEV owner about a \$401 ZLEV charge for a six-month period. She submitted a photo of her vehicle's odometer which separates the distances travelled on petrol and electric power.
64. The photograph shows the vehicle travelled a total of 22,646 km, of which only 7,919 km used solely electric power. This meant 65 per cent of the kilometres attracted the fuel excise as well as the ZLEV charge.

Figure 2: Odometer with separate readings for petrol and electric kilometres travelled



Source: Complainant's photograph provided to the Department

65. Another complaint to the Department outlined how the double charge made it more expensive for the owner to drive a PHEV, even considering the registration discount. This owner was considering trading in their PHEV for a standard fuel-powered vehicle.
66. In another example, a PHEV owner from the Mallee region of Victoria explained he needed to travel long distances for medical treatment and did so entirely on fuel. He did not believe it was reasonable for a double charge to apply.
67. The Department explained to the investigation that the lower charge for PHEVs compared with other ZLEVs was generally fair recognition that a PHEV may in some circumstances use fuel.
68. The Department responded to the Ombudsman's draft report:
- ... as provided in sections 7 and 8 of the ZLEV Act, the ZLEV charge is payable based on road usage of specified roads on a per-kilometre basis, regardless of whether the separate use of fuel and electric power can be determined ... The Department considers that it is inappropriate to use the discretionary power to effectively create a new category of exemption not contemplated in the Act.
69. The investigation does not agree that a 'new category of exemption' would effectively be created. Rather, that the section 27(b) discretion is an opportunity for the Department to consider, on a case by case basis, the fairness of the charge in the particular circumstances of each case. Why would such a discretion be inserted in the Act otherwise?
70. The way some owners use their vehicles does not always match the assumptions in the legislation, and the Department could overcome the unfair impact of these assumptions by using its discretion.

Travel on remote and private roads

71. The ZLEV Act contains some exemptions to the ZLEV charge. For example, the ZLEV Act applies to travel outside the state, but section 7 of the Act provides that the ZLEV charge applies only on 'specified roads'.
72. The Department's view is that 'the definition of a specified road is broad and covers all roads, including interstate ... except private roads such as driveways or roads on farms'.
73. Notwithstanding this, it appears open to the Department to consider the fairness of collecting ZLEV charges for travel that does not contribute to the degradation of Victorian roads, as funding Victorian roads is one of the purposes of the ZLEV charge.
74. In a complaint received by the Department, a Victorian resident relocated to the Northern Territory for seven months. The complainant reported using only the petrol engine of their PHEV for travel around north Queensland, the Northern Territory and northern Western Australia.
75. The complainant requested the ZLEV charge be reconsidered due to the lack of charging stations. The complainant also noted that the vehicle's reported maximum electric range was around 18 kilometres, which was less than when the vehicle was new.
76. The Department, however, did not waive the ZLEV charge, saying:
- There are very specific conditions in which travel in a ZLEV will be exempt from the road-user charge. Kilometres travelled interstate are not exempt from the ZLEV road-user charge.

77. This response again applies a uniform approach, only considering exemptions and not the Department's discretion under section 27(b) of the ZLEV Act.
78. In this instance it would have been appropriate for the Department to consider exercising the discretion based on the fairness of the ZLEV charge in this situation.
79. The complainant raised a number of considerations: the purchase of fuel, the remoteness of travel, the lack of available charging stations and the apparent limit of the electric range of their vehicle.
80. The Department's response was that the ZLEV Act provides for travel on interstate roads, and it was implementing the Act as passed by Parliament. The investigation considers that significant travel outside Victoria may result in unfair charges if the Act is applied indiscriminately.
81. The investigation found just one instance where an invoice was amended for a ZLEV charge based on the roads travelled by a ZLEV owner. This was not a case where the Department exercised its discretion, but a case where the travel was exempt from the ZLEV charge.
82. The request for an exemption was approved on the grounds the vehicle was used on private property, including distances travelled on a suburban Melbourne home's driveway.
83. The complainant had submitted logbooks and GPS data to show the vehicle's use on private land. However, the matter was not resolved for over a year. In October 2022, the complaint was escalated and reviewed by a Principal Practice Advisor at the Department.
84. Three days after the complaint was escalated, the Department approved the exemption in full. Based on the data provided by the complainant, \$150 was exempt from the charge. The Department responded:
- Whilst examination of your records was somewhat onerous, they were very helpful in assisting a determination of travel on non-specified roads and a deduction from the chargeable travel distance ... It should be noted that all exempt distances you have claimed have been allowed.
85. While the task of examining records may have been 'onerous', this is a burden the Department must bear to properly consider and do justice to an application.
86. Compiling the records to support an application like this would likely be 'onerous' for all ZLEV owners. But not all ZLEV owners would have the means or ability to collate the types of information that resulted in this successful exemption.
87. In response to the Ombudsman's draft report, the Department noted it does publish information on exemptions on the VicRoads website. The advice reads:
- No ZLEV registered operators will be granted concessions or exemptions, however there is one circumstance for which vehicle usage would be exempt: Use on private roads – distances travelled by ZLEVs on private roads or agricultural lands.
88. The exemption granted for travel on private roads appears to acknowledge that travel on private roads does not contribute to the degradation of Victorian public roads. It seems inconsistent to acknowledge an exemption for private roads, but not consider waiving charges associated with significant travel outside Victoria, as this too does not contribute to the degradation of Victorian public roads.

No policy or guidance

89. In 2022, in response to William’s case, where his partner Emma drove 22,000 km around Australia on fuel power, the investigation asked the Department to provide reasons for its refusal of his application for a section 27(b) waiver of charges. We also asked the Department to provide the policy used to consider his request for a waiver.
90. The Department responded in November 2022 stating it did not have a policy or guidance material to help decide applications for a waiver under the ZLEV Act.
91. The Department told the investigation:
- Given this is a relatively new Scheme and a new piece of legislation, the Department does not currently have any policies, guidelines or business rules in place for how the Secretary ought to exercise his discretion for the purposes of this provision.
92. At the time of writing, the Department had received over 180 complaints about the ZLEV Act. Many of the complainants described the unreasonableness of the ZLEV charge’s application to their circumstances.
93. The investigation’s review of documents showed the Department commonly categorised complaints about how ZLEVs were charged as complaints about ‘policy’.
94. The Department categorised two-thirds of ZLEV complaints as being about policy or process. These complainants were effectively told their dissatisfaction was noted but that their complaint would go no further within the Department.
95. The Ombudsman’s *Complaints: Good Practice Guide for Public Sector Agencies* encourages agencies to treat complaints as ‘free feedback’. The Guide also discusses the importance of supporting and enabling staff to deal with complaints without the need for escalation.

Figure 3: Complaints about ZLEVs, by category

Complaint category	Number of complaints	Percentage of all complaints
Fee complaint	6	3%
Incorrect/conflicting advice	4	2%
Policy unsatisfactory	81	43%
Process unsatisfactory	45	24%
Other (13 categories)	52	28%
Total	188	100%

Source: Department of Transport and Planning

96. It appears the Department missed an opportunity to view these complaints as an indication that a guiding policy for staff was needed.
97. Despite the range of complaints the Department received from ZLEV owners and the Act allowing for a broad exercise of a waiver of charges, decision-making occurred – and appears to still occur – in a vacuum. There is no policy or guidance to assist delegated decision-makers.
98. In response to the Ombudsman’s draft report, the Department said it:
- is open to developing policies or improving our business rules on the application of the ZLEV scheme consistently with the purposes of the Act ... The Department notes that there are competing views regarding the application of section 27 of the Act and remains committed to considering alternative positions.
99. A general guiding policy (which does not restrict the Secretary’s discretion) should have been developed prior to the ZLEV Act coming into operation. This would have assisted staff in responding to waiver requests and may well have ensured fairer application of the discretion. The lack of a guiding policy quite possibly contributed to the Department’s closed responses to requests for a waiver.
100. Without clear policy and guidance material, on the basis of the evidence before the investigation, Department staff often provided unclear, unfair and unhelpful responses to complaints about the ZLEV charge.

Responding unhelpfully to complaints

101. The Department had received more than 180 complaints about the ZLEV Act at the time of the investigation. It said it could not apply a waiver in all these cases because many complainants were disputing the operation of the ZLEV Act generally and were not specifically requesting a waiver of their ZLEV charges.
102. When responding to complaints about the ZLEV Act, the Department did not make people aware of the availability of the section 27(b) waiver, or how to request one.
103. In response to the draft report, the Department said:
- [the Department] does not consider it appropriate nor helpful to inform customers about the discretion under [section] 27 of the Act in circumstances where their complaints made clear that they were taking issue with the scheme itself or were seeking to reduce their ZLEV charge for reasons that were contrary to the legislation (such as for interstate travel or use of a PHEV).
104. The Ombudsman’s *Complaints: Good Practice Guide for Public Sector Agencies* discusses the importance of enabling complaints and making complainants aware of their options for resolving the issue at hand.
105. Unhelpful responses and responses lacking in transparency, such as in the instances observed in this report, do little to invite or encourage complaints and generate public trust.

106. Figure 4 is an example of the unhelpful responses the Department provided to complainants who raised issues with the application of the ZLEV Act. Rather than assisting complainants to access avenues for review or informing them about the discretion under the ZLEV Act that may resolve their complaint, the Department often provided 'template' responses.

Figure 4: Example response, January 2023



Response to a complaint about a ZLEV charge

I refer to your inquiry [...] regarding the State Government's electric vehicle charge, Zero and Low Emission Vehicles (ZLEV) for your vehicle registration [...]

The Victorian Government introduced the distance-based road user charge from 1 July 2021. This is to ensure all motorists pay their fair share towards the costs of building and maintaining Victoria's road network. The charge is designed to ensure ZLEV owners pay a fraction of the motor vehicle-related taxes and charges that traditional internal combustion vehicle owners pay.

In recognition that the registered operators of Plug-in Hybrid Electric Vehicles also pay fuel excise when using regular petrol, these operators are charged a lower per kilometre ZLEV rate than electric and other zero-emission vehicles.

While I understand your frustration, the ZLEV charge is imposed by, and collected under, the Zero and Low Emission Vehicle Distance-based Charge Act 2021. The State's current position is that this is a valid law, and the Department of Transport must continue to administer the ZLEV charge in accordance with the Act unless and until a determination by the courts would require it to act otherwise.

There are very specific conditions in which travel in a ZLEV will be exempt from the road-user charge. Kilometres travelled interstate travel are not exempt from the ZLEV road-user charge.

I acknowledge this may not be the response you were hoping for, however trust it clarifies VicRoads position on the matter.

Thank you for taking the time to provide your feedback.

Source: VicRoads

107. Another tenet of good complaint handling is advising complainants of the internal and external review options available to them, including senior officers within an agency, the Ombudsman or Victorian Civil and Administrative Tribunal ('VCAT').
108. Referring a complainant to external review options is only appropriate when internal avenues have been genuinely exhausted. Without apparently considering the discretions available to it, the Department did not appear to have fully utilised its internal options in considering complaints.
109. One complainant told the Ombudsman he was a health professional whose work spanned an area of regional Victoria. He provided the investigation a copy of his complaint to the Department which explained he travelled about 300 km each week in his PHEV on fuel.
110. When the Department responded with an explanation of the exemption for ZLEV use on private roads but did not address his specific circumstances, he told the Ombudsman he would apply to VCAT to seek a determination on the appropriateness of the charge.
111. A VCAT appeal involves an application fee and time. Complainants should not have to apply to VCAT to resolve their concerns when the Department can resolve the complaint itself through a merits-based review of the circumstances under the discretion available to it in section 27(b) of the ZLEV Act.
112. The Department has also sometimes described itself as 'only a collection agency' and advised complainants to raise their concerns with the Department of Treasury and Finance (which was initially responsible for development of the legislation). Further, it has said it is not the responsible authority as taxes are set by the Victorian Government and the Department only acts as an agent.
113. While the Department does not set the ZLEV charge, the ZLEV Act does give power to the Secretary to issue, revise and cancel invoices, as well as to grant various waivers under the Act. The Department could use these mechanisms to endeavour in the first instance to resolve complaints.
114. In one case, the Department received a complaint from a person seeking clarification on how to submit information about their vehicle predominantly running on fuel. The Department responded:
- As you know the ZLEV charge is imposed by, and collected under, the *Zero and Low Emission Vehicle Distance-based Charge Act 2021*. While VicRoads acts as the administrator of the ZLEV scheme, it is my understanding the legislation was passed by the Department of Treasury and Finance.
- I would suggest contacting the Department [of Treasury and Finance] to raise the above questions, if you haven't already done so. I know this isn't giving you the answers you are seeking and I am sorry I can't help further however these matters are not ones that VicRoads can assist with.
115. This is misleading and fails to recognise that the Secretary of the Department has the authority to consider requests for a charge waiver. The fact that the Department of Treasury and Finance may have ushered the legislation through the parliamentary process is irrelevant.
116. The Department appears unwilling to make any significant decisions about the application of the ZLEV Act, despite being the responsible agency. This has resulted in some ZLEV owners having to pay unfair charges simply to stay on the road.

The Department's view on discretion

117. In response to the Ombudsman's draft report, the Department has said it:
- affirms its commitment to continuous improvement, [its] willingness to engage productively with the Ombudsman on the appropriate exercise of the discretion, and [its] view that any exercise of the discretion requires a case by case consideration of each individual complaint.
118. However, its broader view is that the ZLEV Act applies a charge to both interstate travel and to PHEVs regardless of whether separate use of fuel and electric power can be determined. In its response to the Ombudsman's draft report, the Department said:
- ... as provided in sections 7 and 8 of the [ZLEV] Act, the ZLEV charge is payable based on road usage of specified roads on a per-kilometre basis, regardless of whether the separate use of fuel and electric power can be determined ... [The] Department is bound to apply the [ZLEV] Act as passed by Parliament and does not consider that individual buyer decisions when purchasing vehicles is a reasonable basis for exercise of the discretion under s27(b) of the Act.
119. The Department also said it believes that 'any exercise of the Secretary's discretion under section 27(b) of the Act must be consistent with the Act's purpose and objects'.
120. The investigation is not suggesting that all applications for a waiver under section 27(b) ought to be granted. Rather, as with any scheme that relies on assumptions, there will be some circumstances where the application of the charge will be unreasonable. Examples of this may be where PHEVs travel in remote areas where there is limited opportunity to charge their vehicle, or where there is significant travel by a ZLEV outside of Victoria.
121. In fact, the purpose of a discretion, which in the case of the ZLEV Act is broadly worded, is to allow for flexibility in applying an otherwise standard process.
122. In practice, the investigation saw the Department responding inflexibly to complaints and not considering using its discretion to resolve the issues raised. This, in effect, inappropriately restricts the Secretary's discretion in section 27(b).
123. It is a principle of administrative law that a decision-maker cannot limit themselves in the exercise of a discretion by effectively binding themselves to a fixed approach. Each request for a waiver should be viewed on its merits.
124. In response to the Ombudsman launching this investigation, the Department acknowledged it 'may be' appropriate to develop guidelines around exercising discretion. However, the Department informed the investigation that it does not intend to make any changes to implementing the ZLEV Act until the Court's decision on the ZLEV Act's validity.
125. The Department's draft brief considered granting waivers in circumstances where a PHEV owner had travelled, or had forecast to travel, more than 25,000 km per year and had signed a declaration that they were suffering financial hardship.
126. This recognises that a PHEV travelling such distances may result in disproportionate charging under the Act.

127. The draft brief estimated that about 7 per cent of PHEV owners would drive more than 25,000 km per year. In the same document it stated:

The cost of providing a waiver to all PHEV owners travelling more than 25,000 km per annum is estimated to be between \$20,000 and \$40,000 per annum.

128. Despite acknowledging the assumptions can create unfair charges for some PHEV owners and the unfair costs involved, the Department has not used its discretion to address this.

129. Internally, on 14 April 2023 the Department noted:

It is well understood by the Department that there is work to do in strengthening the legislation, in particular the discretionary powers and delegation of the Secretary's powers. This work will continue pending the results of the High Court case which is currently reserved for judgment.

Penalising ZLEV owners

Registered ZLEV operators have 14 days from the date of request to provide their odometer reading before the penalty process commences.

- Department of Transport and Planning

130. To calculate the ZLEV charge, the Department requires ZLEV owners to declare their vehicle's odometer reading under sections 10 and 11 of the ZLEV Act. A declaration must, generally, be made in the 14 days following the start and end of any registration period. The Secretary may, by written notice, require a ZLEV owner to lodge a declaration on or before the day specified on the notice (which must be at least 14 days after the notice is issued).
131. The Department requests declarations be made by submitting a photograph of the ZLEV's odometer.
132. If a ZLEV owner has not lodged a declaration by the required date, VicRoads may send a Notice of Intention to Suspend which advises owners the vehicle's registration may be suspended. If the declaration is still not provided, VicRoads may suspend or cancel the vehicle's registration under sections 29 and 35.
133. Under section 13 of the Act, the Secretary has the discretion to extend the time available to a ZLEV owner to lodge their declaration. There are no constraints on this discretion.
134. Similarly, the Secretary may waive the requirement to lodge a declaration under section 14 of the ZLEV Act, which also specifies some circumstances for granting a waiver:
 - (1) The Secretary, by written notice, may waive the requirement for the registered operator of a ZLEV to lodge a declaration in respect of the ZLEV if the Secretary considers it appropriate to do so in all the circumstances.
 - (2) Without limiting the circumstances in which the Secretary may waive the requirement to lodge a declaration, the Secretary may do so -
 - a. if the declaration would otherwise be required to be lodged within 42 days after the day on which the initial declaration in respect of the ZLEV was required to be lodged; or
 - b. if the registered operator satisfies the Secretary that the registered operator is temporarily unable to access the ZLEV to obtain information required to make the declaration.
135. Where a ZLEV owner fails to make a declaration or does not provide sufficient information for the charge to be determined, the Secretary can estimate the charge payable under section 17 of the ZLEV Act.

136. A ZLEV owner can object to an invoice under section 40 of the ZLEV Act:
- (1) The registered operator of a ZLEV may lodge an objection to an invoice issued to the registered operator on any of the following grounds—
 - a. the ZLEV did not travel the distances subject to the ZLEV charge for which the invoice was issued;
 - b. the amount of the ZLEV charge stated in the invoice has been incorrectly calculated;
 - c. the amount of interest stated in the invoice has been applied or calculated incorrectly;
 - d. the ZLEV is not subject to the ZLEV charge.
 - (2) An objection must –
 - a. be lodged with the Secretary in writing; and
 - b. state fully and in detail the grounds for the objection.
137. Under section 43, a ZLEV owner may also object to the decision to suspend or cancel a registration. Section 50 says the Secretary must consider objections.
138. At the time of reporting, the Ombudsman had received 13 complaints from people about how the Department responded to late declarations or estimated the ZLEV charge.
139. Complainants raised concerns about the perceived heavy-handedness of the Department’s approach to issuing suspensions and cancellations under the ZLEV Act, especially in situations where a person was unable to access their vehicle. Complainants also raised concerns about the Department imposing a ‘penalty’ charge for late declarations.

Cancelling registrations

140. Between the legislation coming into force in July 2021 and 1 March 2023, media reports estimated that 243 vehicle registrations had been cancelled under the ZLEV Act.
141. Some complaints to the Ombudsman involved ZLEV owners who were overseas or interstate at the time odometer declarations needed to be made.
142. In these complaints, the ZLEV owners had paid their standard registration fee (this can be done from anywhere for any type of vehicle). However, these owners were not physically able to photograph their car’s odometer for the purposes of submitting their declaration for the ZLEV charge.
143. In one complaint to the Ombudsman, the Department had cancelled the vehicle’s registration, even though the registration charge had been paid. The ZLEV owner was then required to pay for:
 - the ZLEV charge (based on estimated kilometres)
 - the vehicle’s registration fee again
 - a roadworthy certificate to re-register their vehicle.
144. This created a significant financial penalty for the complainant. Both the Ombudsman and the Department received several similar complaints.
145. Compounding the apparent unfairness of this situation is the fact some complainants were unaware there was a risk of their registration being suspended or cancelled. People who could not access their hard copy mail and had not registered for digital correspondence, would never have received a notice asking for an odometer reading, nor a notice of pending suspension.



Case study 2: Department states it has no choice but to suspend registration

ZLEV owner Claire was overseas when her ZLEV declaration became due. On her return, she found her ZLEV had been deregistered.

Claire acknowledged she had issues with her email account and that she was absent from her physical mailing address, but was frustrated at the Department's inflexibility given she was unable to provide her odometer reading. She told the Ombudsman:

I have not been able to drive the car between October 19 and November 10th 2022. I have paid \$901.00 to [re-register] the car on November 10th, 2022 even though the car registration had been paid in full in June 2022. I have been forced to pay two registrations ...

Claire explained her situation to the Department. Responding to Claire, the Department advised that its hands were tied by the ZLEV Act:

While I understand your circumstances, it is a person's responsibility to ensure their details are up to date, not just for the ZLEV scheme but also for other licensing and registration services.

To assist with this, details can be updated securely through a myVicRoads account. This will ensure you don't miss important mail and put yourself at risk of driving illegally

...

if a person fails to provide an odometer reading, and takes no action following the reminders, legislation calls for the registration to be suspended. VicRoads has no delegation to deviate from this.

Claire's option to object was not explained in the Department's response and the Department appears to have closed her complaint.

146. The ZLEV Act allows VicRoads to suspend (or cancel) a vehicle's registration where the ZLEV charge has not been paid. However, it is wrong to imply there is no option available to the Department other than to suspend a person's vehicle registration. Sections 29 and 35 provide that the Secretary 'may' suspend or cancel a registration, not that it must occur.
147. Further, the ZLEV Act contains other discretions to enable a flexible approach. Section 14(2)(b) specifically sets out that if a person satisfies the Secretary that they were unable to access their vehicle at the time a declaration is required, the requirement to make a declaration may be waived.

148. In response to the draft report, the Department said:

We agree with the Ombudsman that registration suspension is not mandatory for failure to declare an odometer reading. However, the power to suspend registration must be exercised in a consistent and predictable manner in order to establish an effective regulatory scheme. It would be unworkable for the Department to seek to explore all personal circumstances that led to individual non-compliance with the law prior to applying a consequence required for the effective implementation of the scheme.

149. This is not, however, at the heart of the issue. This complainant outlined her specific circumstances which the Department appears to have overlooked. The Department did not let Claire know that she could apply for a waiver of the requirement to declare her odometer reading based on her absence from her vehicle.

Charging extra kilometres as a 'penalty'

150. If an odometer declaration becomes overdue, in addition to potentially cancelling a ZLEV's registration, the Department has imposed what it describes as a 'penalty' charge on the ZLEV owner for each day the declaration is late.
151. This late 'penalty' charge is based on the estimated kilometres an average ZLEV would have travelled for each day the odometer declaration is overdue. The Department has determined the 'average distance' a ZLEV travels per year to be 13,500 km, or about 37 km a day.
152. The Department provided an example to the investigation: If a ZLEV owner does not make a declaration until 179 days after it is due, a charge for an extra 6,620 km will be added to their invoice.
153. In response to the draft report, the Department said that if a ZLEV owner provides a late declaration, 'the Secretary will refund the registered operator for any overpayment and amend the invoice issued for that period'.
154. The Department acknowledged that this is required by sections 20 and 28 of the Act, but in practice this is not what we have seen. The Department has instead added this estimated charge on top of the actual kilometres travelled, in the complaints the Ombudsman received.
155. ZLEV owners are thus required to pay for more kilometres than the vehicle has travelled, apparently as a penalty for declaring their odometer reading late.
156. The Department informed the investigation it is able to apply late declaration financial penalties based on section 17 of the ZLEV Act, which allows the Department to draw on 'any information available to it' to estimate a ZLEV charge. Section 17 states:
- (1) The Secretary may determine the amount of the ZLEV charge payable by the registered operator of a ZLEV from any information available to the Secretary, or by way of estimate, if—
 - (a) the registered operator fails to lodge a declaration by the required day for lodgement; or
 - (b) the Secretary reasonably believes that a declaration is false or misleading; or
 - (c) the Secretary has insufficient information to determine the exact amount of the ZLEV charge.
157. Neither section 17 nor any other provision in the ZLEV Act appears to explicitly allow the Department to impose a penalty on ZLEV owners for late declarations.
158. In five complaints made to the Ombudsman, the Department initially refused to amend invoices that included a penalty, even where the estimated kilometres were shown to be inaccurate.



Case study 3: Department provides irrelevant responses to a complaint

Collin lodged an objection to an invoice which charged him for over 800 km more than his ZLEV had travelled.

The additional kilometres were attributed by the Department on a pro-rata basis for the 23 days his initial declaration was overdue.

Collin explained he had been interstate and unable to photograph the vehicle's odometer.

Despite several emails, the Department did not initially acknowledge the discretions that may apply to his situation, given he said he was unable to access his vehicle.

Instead, Collin lodged a formal objection to the charge under section 40 of the Act, claiming his vehicle did not travel the distance outlined on the invoice.

The Department said:

The additional kilometres charged are for a late declaration.

As mentioned in the below, you were required to declare your odometer reading on 08/02/22 but failed to do so until 03/03/22.

If you are objecting to the requirement of being part of the ZLEV Initiative, you can seek an external review to the Victorian Civil and Administrative Tribunal ...

Alternatively, you can seek an external review from the Victorian Ombudsman, Local Member of Parliament or Department of Treasury and Finance.

The ZLEV Act 2021 is always in effect, until VicRoads has been advised by one of above Governing Bodies.

The investigation notes that none of the institutions or individuals mentioned in the Department's response could determine that the ZLEV Act is not 'in effect'. The investigation also suggests it is unlikely Collin would have understood what relevance 'objecting to being a part of the ZLEV initiative' had to his complaint. The Department did not consider the substance of Collin's objection, and its response was evasive.

Dissatisfied with the Department's response, Collin again requested his objection be considered on the basis that his vehicle did not travel the distance estimated by the Department, in line with the wording of section 40 of the ZLEV Act.

The subsequent response from the Department seemed to acknowledge Collin's concerns with its initial response to his complaint. However, it proceeded to ask for further information to substantiate Collin's claim that he was interstate when the initial odometer declaration was required:

The additional kilometres charged are for a late declaration.

Collin told us he did not understand why evidence of his travel was relevant, as his objection was not based on his interstate absence. He provided the Department with evidence, but reiterated his objection was based on the fact his vehicle had not travelled the invoiced distance, not on the fact he was interstate.

Following the Ombudsman's involvement, the Department provided Collin with a refund.

159. Internally, the Department did acknowledge that action which was not punitive was possible under the Act where a person was late in declaring their odometer reading. It discussed two possible paths forward using the Secretary's discretionary powers:
- It could extend the time available for lodgement (under section 12).
 - It could request the odometer reading be provided to the Department outside of the formal declaration process. The Department could then use this information to issue the correct charge as an 'estimate' (under section 17).
160. While the Department may have been willing to consider its discretion in relation to Collin's absence from Victoria, its continued insistence that the 'penalty' be paid appears to conflict with the ability to object in section 40.
161. The investigation noted one ZLEV owner complained to the Department after being refused the opportunity to make a late declaration. The person said their vehicle had the capacity to display the odometer as it would have read on that date, and they wrote to the Department to submit this information. It is unclear whether this complaint was resolved.
162. In another approach to the Ombudsman, a complainant, Carlos explained he was three days late to declare his new ZLEV's initial odometer reading in 2022.
163. An additional 163 km were added to the invoice he received a year later, creating a charge for more kilometres than his vehicle had travelled.
164. Carlos wrote to the Department in April 2023. While Carlos's complaint was being investigated by the Department, he told the Ombudsman his registration was suspended.
165. Carlos told us that after about two weeks, he decided to pay for the invoice, even though it included additional kilometres, to remove the suspension on his ZLEV registration.
166. In an exchange with the Department further clarifying his complaint, Carlos explained that despite being late, the total chargeable distance referred to in his invoice exceeded the ZLEV's current odometer reading, meaning the car could never have travelled the distance assumed by the averaged penalty.
167. The Department responded with the following:
- Hi [Carlos],
- I understand your logic, however this average calculation is bound by legislation.
- Kind regards ...
168. This advice is incorrect. Not only is the Department not 'bound' by the ZLEV Act in this instance, but there is also no provision allowing the Department to impose a penalty.
169. ZLEV owners are entitled to make objections to invoices they receive. Section 40 of the ZLEV Act specifically allows a person to dispute a ZLEV charge if the vehicle did not in fact travel the distance the invoice indicates.

Figure 5: Excerpt from ZLEV invoice

Declaration of Odometer Reading for Vehicle [REDACTED] and Notice of Invoice

Dear [REDACTED]

Thank you for declaring your odometer reading for vehicle [REDACTED]. If your road-user charge is less than \$10 there will be no invoice raised and no payment due.

Please find a summary of your declaration below:

Declaration summary:

Start of period

21/04/2022
Date of declaration

25/04/2022
Declared odometer reading

87km

End of period

21/04/2023
Date of declaration

28/04/2023
Declared odometer reading

15111km

Exempt distance

0km
Additional kilometres*

163km

* Additional kilometres are calculated based on average use per day and applied to days between start of period and declaration date.

Total chargeable distance

15187km

Based on the above road use, the below invoice is now payable:

Source: VicRoads notice to complainant

170. In June 2021, the Department developed a process map, showing the decision-making steps for dealing with objections to invoices where the kilometres charged are more than the actual distance travelled. The map can be found in Appendix 2 of this report.
171. Although the process map includes the possibility of reissuing an invoice for a revised amount under section 20, the above examples show the Department was refusing to remove penalty charges from invoices.
172. Happily, after receiving the Ombudsman's draft report, the Department informed the investigation it was liaising further with Carlos to resolve his complaint.
173. We contacted Carlos who confirmed his complaint was resolved and his invoice had been reissued for the correct amount.
174. In contrast to the prior advice it had provided to this complainant, the Department told the Ombudsman:
- The additional km ZLEV charge can be removed and subsequently updated on the customers ZLEV invoice ... on the grounds of substantial evidence provided by the ZLEV operator to support the reason for the late declaration.
175. In response to the draft report, the Department addressed its use of the term 'penalty'. The Department said it 'concede[s] this language may require revision'.
176. The Department has demonstrated it is capable of flexibility around ZLEV odometer declarations. It was contacted by the Australian Fleet and Lease Association in early 2022 amid concerns the ZLEV Act's odometer declaration requirements would create a considerable compliance and administrative burden on fleet operators.
177. The Department decided to charge a fleet vehicle a flat fee of 13,500 km per year and then undertake a final 'true up' when the vehicle ceased to be registered to a fleet operator (such as when it is sold or if it is written off).
178. A final 'true up' means any discrepancy between the assumed and actual travel would be reconciled. If the vehicle had travelled more than 13,500 km per year, a charge would be issued; if less, a refund would be issued.
179. This is similar to what residential gas customers usually experience when it is difficult for a meter reader to access the gas meter at their property. An estimate is made and a 'true up' occurs when the gas meter is next read.
180. This capacity to alter declaration requirements for big industrial groups shows the Department is able to think creatively about its use of the discretions available to it under the legislation.
181. It is not clear why the Department was willing to be flexible in this way for industrial groups but not apparently for individuals.
182. It is, however, encouraging to see the Department's apparent shift in its application of a 'penalty' charge after its review of the investigation's draft report.

Responding poorly to complaints

183. The investigation identified several complaints received by the Department objecting to the additional kilometres charged which were met with similar responses to Collin in case study 3.
184. In one approach to the Ombudsman, complainant Agata said the Department had asked her to declare her odometer reading before she took possession of her new vehicle from the dealership.
185. As the vehicle was still with the dealer, Agata could not comply. She took a photo and declared the odometer as soon as she collected the vehicle. Despite this, she was charged an extra 602 km for the 'late' declaration.
186. Agata had described the situation in her complaint to the Department, requesting the additional charge be removed as the circumstances were outside of her control.
187. Agata received a response from the Department which simply said:
- I can confirm that the extra charge is due to a late declaration.
- To avoid this in the future, please ensure you are declaring your odometer reading on time.
188. When Agata again raised that she was not in possession of the vehicle to comply with the Department's request, the Department's response was confusing:
- Thank you for your email.
- An additional start of period use was applied to your invoice which was calculated based on your average daily use. This charge is calculated on the basis of when the declaration is requested in the portal, to when it is completed. This is automated.
- If you are objecting to the requirement of being part of the ZLEV Initiative, you can seek an external review to the Victorian Civil and Administrative Tribunal ...
- Alternatively, you can seek an external review from the Victorian Ombudsman, Local Member of Parliament or Department of Treasury and Finance.
- The ZLEV Act 2021 is always in effect, until VicRoads has been advised by one of above Governing Bodies.
189. After Agata complained to the Ombudsman, we met with the Department to attempt to resolve the complaint.
190. We explained the response appeared to ignore Agata's entitlement to have her objection considered based on the fact that her ZLEV invoice was inaccurate.
191. The Department agreed to waive the penalty charge. It also agreed to make its requirements and processes when transferring ZLEV ownership clearer on its website, to assist dealerships and purchasers to manage their obligations.

Conclusions

192. The Victorian Government's rationale for introducing a charge on ZLEVs under the ZLEV Act was that ZLEV owners paid less towards the maintenance of Victorian roads and should pay their fair share. Traditional fuel-powered vehicles pay for the upkeep of public roads through the Commonwealth fuel excise which is included in the purchase price of every litre of fuel.
193. There has been a recent challenge in the High Court about the validity of the ZLEV Act and its charges (*Vanderstock & Anor v the State of Victoria*, Case No. M61/2021).
194. The ZLEV Act charges ZLEV owners for each kilometre their vehicle travels on public roads, including public roads outside of Victoria. Owners of BEVs pay 2.8 cents per kilometre, while PHEV owners pay 2.3 cents.
195. PHEVs can use both electric power and fuel. The lower charge for PHEVs acknowledges that they will sometimes pay both the distance-based ZLEV charge and the Commonwealth fuel excise while travelling on fuel.
196. All types of ZLEVs are also eligible for a registration discount of up to \$100 per year.
197. However, some ZLEV owners complained to both the Ombudsman and the Department that the application of the ZLEV Act to their vehicle and their particular circumstances was unfair.
198. The ZLEV Act assumes PHEV owners will mainly use electric power and applies the charge to PHEVs on that basis. In reality, PHEVs cannot undertake long trips using only electric power. Where PHEV owners travel long distances using fuel, they are double charged.
199. Section 27(b) of the ZLEV Act provides the Secretary with a broad discretion to waive ZLEV charges 'in any other circumstances the Secretary considers appropriate'. However, it appears that the Department is reluctant to exercise the Secretary's discretion to address unfair charges.
200. One example in this report showed a complainant seeking a waiver for \$377 of their ZLEV charge as most of their travel was fuel powered. By already paying the fuel excise for the travel, they were concerned they were being double charged. They raised relevant circumstances such as the remoteness of their travel around Australia and the lack of available charging stations, but no waiver was granted.
201. The Department said that if it approved a waiver in this case, it may encourage other drivers to ask for similar waivers. The Department also stated that granting a waiver in this case under section 27(b) of the ZLEV Act would not align with the intention of the legislation. Noting the breadth of discretion in the waiver, the investigation does not agree with this reasoning.
202. The Department said it is committed to continuous improvement and is willing to engage productively with the Ombudsman on the appropriate exercise of its discretion. It also affirmed its view that any exercise of the discretion requires a case by case consideration of each complaint.
203. It would be appropriate for the Department to consider the fairness of ZLEV charges in the particular circumstances of each case. For example, where a ZLEV owner pays the Commonwealth fuel excise, does not contribute to the deterioration of Victorian roads or lacks available charging opportunities, the Secretary can waive the ZLEV charge and should at least consider doing so.

204. There are other examples showing that rather than actively considering the discretions available to it, the Department often wrongly confined itself to considering exemptions – specific conditions in which a ZLEV was exempt from the charge, such as travel on private roads.
205. If the Department’s view is that the charges outlined in the Act are always payable, and it will continue to collect the charge in all circumstances, then section 27(b) would appear to have no purpose.
206. In addition to failing to consider its discretion, the Department created in effect, a ‘penalty’ process that is not based on the provisions of the ZLEV Act. The ‘penalty’ for late declarations of a ZLEV’s odometer readings results in charges to ZLEV owners of more kilometres than they have in fact travelled.
207. This approach is difficult to reconcile with the ZLEV Act given that the Act specifically provides ZLEV owners with an avenue to object to charges for more kilometres than their vehicle has travelled.
208. While the Department has said it ‘will refund ... any overpayment and amend the invoice issued’, where late declarations are made, in practice the Department was refusing to amend invoices that include this penalty, even where complainants had shown the invoice to be inaccurate.
209. The Department has also taken an inflexible approach to suspending and cancelling ZLEV’s registrations. In one complaint, a ZLEV owner was unable to access her vehicle when her odometer declaration was due, as she was overseas at the time. In response to her complaint, the Department said the legislation required them to suspend her registration and it had no delegation to deviate from this.
210. It is wrong to imply the Department had no option other than suspending the vehicle’s registration. Suspension is discretionary under sections 29 and 35 of the ZLEV Act.
211. In documents provided to the investigation, the Department acknowledged that approaches that were not punitive were possible under the Act to address late declarations. Section 14(2)(b) of the ZLEV Act specifically sets out that if a person satisfies the Secretary that they were unable to access their vehicle at the time a declaration is required, the requirement to make a declaration may be waived.
212. The investigation found the Department failed to develop adequate policies to guide staff on the implementation of the legislation and its processes are unclear. The Department told the investigation that no policy existed because the legislation was ‘relatively new’ - even though it had been in force for around two years.
213. It is unreasonable that the Department failed to create even a basic policy or guidance around the reviewability of charges. This should have occurred before or at the time the ZLEV Act came into operation.
214. The lack of basic guidance created the risk of Department staff making unfair and inconsistent decisions. It has also contributed to confusing and evasive responses to complaints about charges under the ZLEV Act.

Opinions

215. The Department has not been helpful in dealing with complaints from the public. The report shows examples of where the Department failed to explain the options available to complainants. It often decided not to inform complainants about the availability of the Secretary's discretion and did not assist people to access the discretion. Instead, the Department referred complainants to other organisations which are not able to resolve the issues, such as the Department of Treasury and Finance.
216. As a public organisation, the Department has a responsibility to foster a receptive culture towards complaints from the public. Apart from anything else, this ultimately helps organisations to improve their service. It appears ZLEV complainants are still not being advised of the discretions available, or how to seek a review of their charges.
217. The Department has said that it does not intend to make any changes to how it implements the ZLEV Act until the High Court comes to its decision in *Vanderstock*. While the Court's decision will impact the validity of the charge, this has, to some degree, resulted in a gridlock in the Department's administration of the ZLEV Act.
218. The investigation remains of the view that there are avenues available in the legislation as it currently stands to address the complaints covered by this investigation and the Department needs to make use of them.

In light of the above and the complaints considered by the investigation, the Ombudsman has formed the following opinions:

1. The Department acted in a manner that was unreasonable within the meaning of section 23(1)(b) of the Ombudsman Act in:
 - a. the Department's failure to develop policy guidance to assist its decision-making under the ZLEV Act
 - b. the Department's handling of complaints, including failing to inform complainants about the availability of the Secretary's discretion under section 27(b) to waive the whole or part of a ZLEV charge or the objection process under section 40 of the ZLEV Act
 - c. the Department's apparent unwillingness to exercise its powers under section 14, to waive the requirement to provide an odometer declaration, section 27(b), to waive the whole or part of a ZLEV charge, and section 50, to allow an objection to an invoice.
2. The Department acted in a manner that was wrong within the meaning of section 23(1)(g) of the Ombudsman Act insofar as it used section 17 of the ZLEV Act to impose a 'penalty'.

Recommendations

Pursuant to section 23(2) of the *Ombudsman Act 1973* (Vic), it is recommended that the Department of Transport and Planning:

Recommendation 1

Review the handling of each complaint received about the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) and ensure that the specific circumstances of the complaint are properly considered and the substance of the complaint is addressed.

Department's response:

Accepted.

Ombudsman's comment:

This recommendation recognises the Department's willingness to resolve individual complaints as stated to the investigation.

Recommendation 2

Cease using section 17 of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) to impose a 'penalty' by charging for more kilometres than were travelled.

Department's response:

We accept this recommendation, but we do not agree that this practise is occurring.

Recommendation 3

Establish a process to remedy the use of section 17 of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) to impose a 'penalty', by:

- a. identifying all instances of ZLEV owners being charged for more kilometres than they travelled
- b. refunding all monies collected through this 'penalty'.

Department's response:

We accept this recommendation, but we do not agree that this practise is occurring.

Ombudsman's comment:

The investigation saw multiple instances of the Department refusing to provide a refund when requested, until the Ombudsman became involved.

Recommendation 4

Subject to the High Court's decision in *Vanderstock*, develop and publish processes for zero and low emission vehicle owners to:

- a. dispute inaccurate ZLEV charges (section 40)
- b. request a waiver of the requirement to declare their odometer reading (section 14)
- c. request a discretionary waiver (section 27(b)).

Department's response:

Accepted.

Appendix 1: The investigation

Authority to investigate

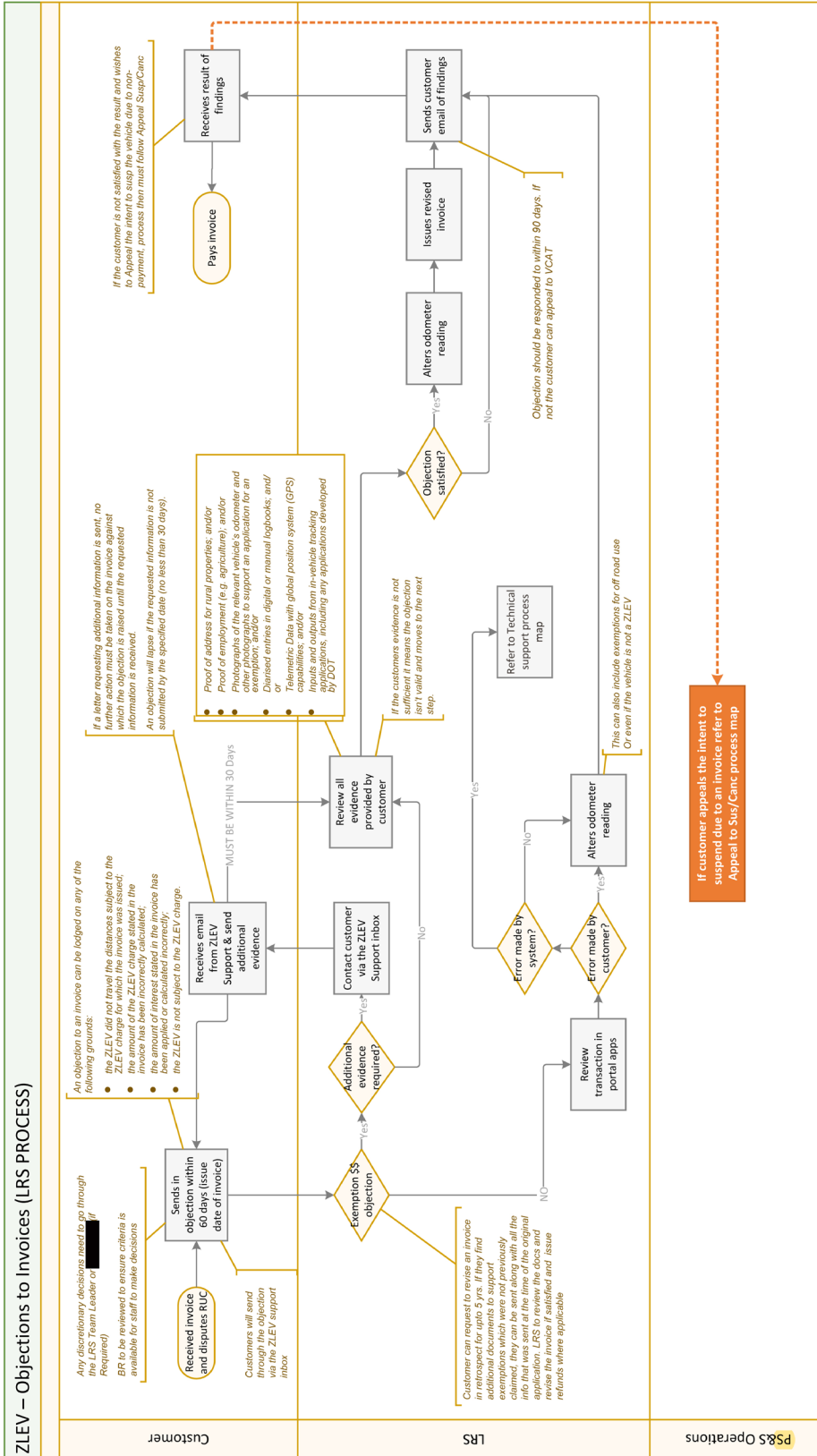
219. The Ombudsman's jurisdiction to investigate any administrative action taken by or in an authority is derived from section 13 of the *Ombudsman Act 1973* (Vic).
220. Under section 2 of the Ombudsman Act, a Department is included within the definition of 'authority' for the purposes of section 13.
221. This investigation was conducted under section 16A of the Ombudsman Act, which provides that the Ombudsman may conduct an own motion investigation into any administrative action taken by or in an authority.

How we investigated

222. The investigation involved:
- analysing the complaints received by the Ombudsman's office since the implementation of the ZLEV Act
 - analysing the ZLEV Act and other relevant legislation
 - reviewing the *Vanderstock* matter currently before the High Court
 - engaging informally to try and resolve complaints in the first instance and then considering the systemic issues raised by these complaints
 - issuing a summons for the complaints received by the Department about the ZLEV Act and internal documents relating to the implementation of the ZLEV Act
 - analysing the complaints received by the Department
 - analysing the internal documents created by the Department about the implementation of the ZLEV Act
 - meeting with the Department to discuss the investigation process and individual complaints.

Appendix 2: Departmental process map

Figure 6: Process map for objections to invoices



Source: Department of Transport and Planning

Victorian Ombudsman's Parliamentary Reports tabled since April 2014

2023

Joint investigation with IBAC
Operation Watts Progress report
September 2023

Misconduct in public organisations: A casebook
August 2023

WorkSafe 3: Investigation into Victorian
self-insurers' claims management and WorkSafe
oversight
June 2023

Complaint handling casebook: Resolving issues
informally
May 2023

Councils and complaints: Glen Eira City Council's
approach to contractor work
April 2023

Good Practice Guide: Complaint handling in a
crisis
February 2023

2022

Ombudsman's recommendations - fourth
report
September 2022

Investigation into a former youth worker's
unauthorised access to private information
about children
September 2022

Investigation of a matter referred from the
Legislative Council on 9 February 2022 Part 1
July 2022

Joint investigation with IBAC
Operation Watts, a joint investigation into
allegations of serious corrupt conduct involving
Victorian public officers, including Members of
Parliament
July 2022

Investigation into complaint handling in the
Victorian social housing sector
July 2022

Report on investigations into the use of force
at the Metropolitan Remand Centre and the
Melbourne Assessment Prison
June 2022

Investigation into Environment Protection
Authority decisions on West Gate Tunnel
Project spoil disposal
May 2022

2021

Investigation into decision-making under the
Victorian Border Crossing Permit Directions
December 2021

Investigation into allegations of collusion with
property developers at Kingston City Council
October 2021

The Ombudsman for Human Rights: A Casebook
August 2021

Councils and complaints - A good practice
guide 2nd edition
July 2021

Investigation into good practice when
conducting prison disciplinary hearing
July 2021

Investigation into Melton City Council's
engagement of IT company, MK Datanet Pty Ltd
June 2021

Investigation into how local councils respond
to ratepayers in financial hardship
May 2021

Investigation into the Department of Jobs,
Precincts and Regions' administration of the
Business Support Fund
April 2021

Outsourcing of parking fine internal reviews – a follow-up report

March 2021

Investigation of protected disclosure complaints regarding the former Principal of a Victorian public school

February 2021

2020

Investigation into the detention and treatment of public housing residents arising from a COVID-19 ‘hard lockdown’ in July 2020

December 2020

Investigation into complaints about assaults of five children living in Child Protection residential care units.

October 2020

Investigation into corporate credit card misuse at Warrnambool City Council

October 2020

Investigation into review of parking fines by the City of Melbourne.

September 2020

Investigation into the planning and delivery of the Western Highway duplication project

July 2020

Ombudsman’s recommendations – third report

June 2020

Investigations into allegations of nepotism in government schools

May 2020

Investigation of alleged improper conduct by Executive Officers at Ballarat City Council

May 2020

Investigation into three councils’ outsourcing of parking fine internal reviews

February 2020

2019

Investigation of matters referred from the Legislative Assembly on 8 August 2018

December 2019

WorkSafe 2: Follow-up investigation into the management of complex workers compensation claims

December 2019

Investigation into improper conduct by a Council employee at the Mildura Cemetery Trust

November 2019

Revisiting councils and complaints

October 2019

OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people

September 2019

Investigation into Wellington Shire Council’s handling of Ninety Mile Beach subdivisions

August 2019

Investigation into State Trustees

June 2019

Investigation of a complaint about Ambulance Victoria

May 2019

Fines Victoria complaints

April 2019

VicRoads complaints

February 2019

Victorian Ombudsman's Parliamentary Reports tabled since April 2014

2018

Investigation into the imprisonment of a woman found unfit to stand trial

October 2018

Investigation into allegations of improper conduct by officers at Goulburn Murray Water

October 2018

Investigation of three protected disclosure complaints regarding Bendigo South East College

September 2018

Investigation of allegations referred by Parliament's Legal and Social Issues Committee, arising from its inquiry into youth justice centres in Victoria

September 2018

Complaints to the Ombudsman: resolving them early

July 2018

Ombudsman's recommendations – second report

July 2018

Investigation into child sex offender Robert Whitehead's involvement with Puffing Billy and other railway bodies

June 2018

Investigation into the administration of the Fairness Fund for taxi and hire car licence holders

June 2018

Investigation into Maribyrnong City Council's internal review practices for disability parking infringements

April 2018

Investigation into Wodonga City Council's overcharging of a waste management levy

April 2018

Investigation of a matter referred from the Legislative Council on 25 November 2015

March 2018

2017

Investigation into the financial support provided to kinship carers

December 2017

Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre

November 2017

Investigation into the management of maintenance claims against public housing tenants

October 2017

Investigation into the management and protection of disability group home residents by the Department of Health and Human Services and Autism Plus

September 2017

Enquiry into the provision of alcohol and drug rehabilitation services following contact with the criminal justice system

September 2017

Investigation into Victorian government school expulsions

August 2017

Report into allegations of conflict of interest of an officer at the Metropolitan Fire and Emergency Services Board

June 2017

Apologies

April 2017

Investigation into allegations of improper conduct by officers at the Mount Buller and Mount Stirling Resort Management Board

March 2017

Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville

February 2017

Investigation into the Registry of Births, Deaths and Marriages' handling of a complaint

January 2017

2016

Investigation into the transparency of local government decision making

December 2016

Ombudsman enquiries: Resolving complaints informally

October 2016

Investigation into the management of complex workers compensation claims and WorkSafe oversight

September 2016

Report on recommendations

June 2016

Investigation into Casey City Council's Special Charge Scheme for Market Lane

June 2016

Investigation into the misuse of council resources

June 2016

Investigation into public transport fare evasion enforcement

May 2016

2015

Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting

December 2015

Investigation of a protected disclosure complaint regarding allegations of improper conduct by councillors associated with political donations

November 2015

Investigation into the rehabilitation and reintegration of prisoners in Victoria

September 2015

Conflict of interest by an Executive Officer in the Department of Education and Training

September 2015

Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight

June 2015

Investigation into allegations of improper conduct by officers of VicRoads

June 2015

Investigation into Department of Health oversight of Mentone Gardens, a Supported Residential Service

April 2015

Councils and complaints – A report on current practice and issues

February 2015

Investigation into an incident of alleged excessive force used by authorised officers

February 2015

2014

Investigation following concerns raised by Community Visitors about a mental health facility

October 2014

Investigation into allegations of improper conduct in the Office of Living Victoria

August 2014

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