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9 May 2019

Department of Justice  
Office of the Secretary  
GPO Box 825  
HOBART TAS 7001

Dear Sir/Madam

**Submission – Magistrates Court (Criminal and General Division) Bill 2019 – Part 13 – Costs**

**Introduction and Summary**

We act for Councils throughout the State in prosecutions for breaches of legislation that Councils are responsible for enforcing, namely:

- i. *Building Act 2016;*
- ii. *Building Regulations 2016;*
- iii. *Food Act 2003;*
- iv. *Dog Control Act 2000;*
- v. *Environmental Management Pollution Control Act 1994;*
- vi. *Land Use Planning and Approvals Act 1993;*
- vii. *Local Government Act 1993;*
- viii. *Local Government (Building & Miscellaneous Provisions) Act 1993;*
- ix. *Local Government (Highways) Act 1982;*
- x. *Road Rules 2009.*

In Tasmania, Local Governments do not have prosecutorial departments. Because of this, when court proceedings are required to be brought against an individual or entity for not complying with, for example the *Building Act 2016*, it is usual that Councils engage external lawyers to act and appear on their behalf.

The need to engage external lawyers is the consequence of a reality – Council Officers responsible for the regulation of the above statutes in most instances do not have the qualifications or the experience required to commence and act in legal proceedings that require the criminal standard of proof be met. Further, Councils are to be distinguished from other public authorities, such as the Police or Office of

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the Director of Public Prosecutions, where the officers are legally trained and experienced.

Firmly holding this reality in mind, a Council properly discharging its obligations to enforce the above statutes, is required to engage external solicitors.

Naturally, this comes at a cost to the Council and ultimately, the ratepayers of its municipality. Depending on the offence, complexity, and length of the required litigation, the cost can be substantial.

If a Council is not able to recover its legal costs after a successful prosecution, it is likely that Council would be discouraged from commencing legal proceedings.

It follows that regulation and compliance would be greatly threatened if the ultimate enforcement through the court system only occurred sporadically or occasionally.

#### **Costs recovery under the *Justices Act 1959***

Presently, following a successful prosecution in the Magistrates Court, a Council may make an application that the defendant pay the Council's costs, or a proportion of the costs, of the complaint (the litigation).

This application is made pursuant to s.77(1) of the *Justices Act 1959*, which provides:

*"Where justices make a conviction or order in favour of the complainant they may, in their discretion, order that the defendant shall pay to the complainant the whole or a specified proportion of his costs of and incidental to the complaint."*

Save for exceptional circumstances, if such an application is made by the Council following a successful prosecution, a Magistrate will grant the order that the defendant pay the Council's cost, or part thereof.

Section 77 or a like provision is critically important to Council prosecutions. Although some of the abovementioned statutes provide a Council may recover its costs of a prosecution, or part of its costs, in certain circumstances,<sup>1</sup> other statutes do not.<sup>2</sup> The statutes that do not include a provision allowing the recovery of costs, rely on s.77 to make an application for costs.

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<sup>1</sup> *Environmental Management and Pollution Control Act 1994*, s.65; *Food Act 2003*, s.115; *Land Use Planning and Approvals Act 1993*, ss.63(5), 65E(2); *Local Government Act 1993*, s.204(1).

<sup>2</sup> *Building Act 2016*; *Building Regulations 2016*; *Dog Control Act 2000*; *Local Government (Building & Miscellaneous Provisions) Act 1993*; *Local Government (Highways) Act 1982*, s.97(8); *Road Rules 2009*.

**Costs recovery under the *Magistrates Court (Criminal and General Division) Bill 2019***

We have reviewed the *Magistrates Court (Criminal and General Division) Bill 2019 (the Bill)* and note that Part 13 – Costs does not include a similar provision to s.77 of the *Justices Act 1959*, or any provision that would allow a Council to seek an order for costs following a successful prosecution.

If the Bill were to be passed into law in its current form, Councils seeking to enforce, for example, building compliance or public parking compliance would be significantly disadvantaged. This is highlighted in the below example.

*Example*

An owner of a property constructs a retaining wall on their property without a permit. The Council seeks that the owner remove the illegal retaining wall. The owner refuses to do so.

Pursuant to s.41(c) of the *Building Act 2016*, the Council is to ensure proceedings are commenced against the owner as they have failed to comply with the *Building Act 2016*.

Accordingly, the Council seeks advice from external solicitors, who advise that the Council may appropriately issue a complaint to the owner. The Council instructs the solicitors to issue the complaint. A complaint and summons are filed.

The owner of the property evades being served with the summons and a process server is required to serve the summons on the owner.

The owner is eventually served and attends court. The owner, as entitled to, seeks an adjournment without plea.

The Council's solicitors then prepare disclosure and all materials that are relevant to the prosecution and serve it on the owner.

At the next court appearance, the owner attends and states they would like to seek legal advice after receiving the Council's disclosure. The complaint is then adjourned again.

At the third court appearance, the owner attends and states that they have not sought legal advice and pleads not guilty to the charge. The complaint is then set down for hearing.

The complaint is then heard on the fourth court appearance. The owner does not adduce any evidence. The Magistrate finds the owner guilty of the charge and that they had no conceivable defence. The Magistrate makes an order pursuant to s.251 that the owner demolish the illegal retaining wall.

In the above example, depending on the length of the hearing, the Council's costs of the prosecution (including the process server's fee for serving the summons) could be between \$6,000.00 and \$10,000.00.

This also excludes the additional cost to Council in the time spent by its officers first attempting to achieve compliance without court intervention and the time spent instructing its solicitors.

Without s.77 or a like provision, a Council, and in effect the ratepayers, are left without compensation for a significant outlay that has, in this example, been brought about by belligerent and inexcusable non-compliance.

With the existence of budgetary constraints if Councils are prevented from recovering their costs of legal proceedings it is conceivable that Councils will be discouraged from commencing legal proceedings for offences against the statutes that do not provide for the recovery of prosecution costs.

**Conclusion**

We strongly submit the Department should consider an amendment to the Bill to include a provision similar to s.77 of the *Justices Act 1959*.

We welcome a discussion with Department as to how this can be achieved or alternatively, how the example provided above can be remedied if the Bill remains as drafted.

Yours faithfully  
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