

MACEDONE LEGAL

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Our Ref:
Your Ref:

6 December 2010

New South Wales Law Reform Commission
Level 13, Swire House
10 Spring Street
SYDNEY

Attention of: Mr Ani Luzung
[REDACTED]

Dear Commissioner,

**RE: CONSULTATION PAPER 10 – PENALTY NOTICES
SUBMISSION ON BEHALF OF SUTHERLAND SHIRE COUNCIL**

We act on behalf of Sutherland Shire Council ("the Council"), who have instructed us to make this submission in the current Law Reform Commission inquiry into the Penalty Notice system in New South Wales.

Summary of Proposed Reform

The Council proposes a reform to the legislative and procedural framework governing Penalty Notice Offences so as to provide greater scope to Prosecuting Authorities (such as local councils) to "settle" penalty notice matters by consent of the party who has received that Penalty Notice¹.

In particular, there is a perceived need to amend legislation and procedures in matters in which defendants elect to have Penalty Notice matters heard and determined by a Local Court. In those circumstances, simple fines and infringements are elevated to the status of Local Court summary prosecutions, and the scope of the parties to deal with the matter (by consent or otherwise) becomes constrained by the requirements of the *Criminal Procedure Act 1986*, and other relevant legislation.

The Council seeks a reform so that in instances where a defendant elects to have a matter dealt with by a Local Court, there would still be an avenue open to that defendant and the Council to "settle" matter by the defendant's consent to pay the statutory prescribed fine amount plus an appropriate costs component, with the reciprocal withdrawal of the Local Court action by the Council.

¹ For convenience, the term "Defendant" will be used in this submission to describe a person or party who has received a Penalty Notice.



Liability
limited
by a scheme
approved
under
Professional
Standards
Legislation

It is submitted that such a reform would reduce case loads for Local Courts in dealing with Penalty Notice offences, and provide a mutually convenient and proper method of disposing of these matters whilst preserving the Council's (or other prosecution authority's) right to receive penalty/fine payments from defendants in circumstances where the breach or infringement giving rise to the original penalty is not in dispute.

The scope and purpose of the proposed reform is set out below. It is anticipated that any such reform may involve amendments to various statutes, including the *Fines Act 1996*, the *Criminal Procedure Act 1986* and the *Crimes (Sentencing Procedure) Act 1989*.

The Present Position – an Overview

Where a Penalty Notice is issued, the defendant is entitled to elect to have the matter dealt with by a Local Court. It is not the purpose of this submission to seek the abrogating of that right.

Experience indicates, however, that many defendants make that election- either in haste, or without taking advice or not in full appreciation or understanding of the processes that will follow- only to subsequently come to the view that they are willing to or prepared to pay the original prescribed fine/infringement after all.

The Council reports that it is not uncommon for defendants who have made a Local Court election in a penalty notice matter to subsequently contact either the Council or the State Debt Recovery Office, offering to pay the fine and have the matter thus concluded.

These requests or inquiries may occur at any time, including after the Court Attendance Notice has been served on the defendant, up to and including approaches made to Council lawyers or Prosecutors on the day the matter is listed in Court.

In those circumstances, the Council would be agreeable to receiving the fine amount from the defendant, plus a costs amount that reflects the Council's expense in filing and serving the Court Attendance Notice and/or the cost of providing a Prosecutor for the Court action.

The Council submits that this approach provides the utilitarian benefits that would flow should such an arrangement be lawful and possible. It would enable a large number of minor matters to be removed from Local Court lists, saving considerable time and effort on the part of both the prosecuting authorities and defendants who may be spared or excused from Court appearances.

It is submitted that there would be a further public benefit in being able to resolve these matters in a non-adversarial fashion.

However, the Council has been advised that it is not legally able to accept such offers or approaches. There are two main obstacles at present to this approach:

1. the defendant's Court election has the effect of voiding or nullifying the original Penalty Notice, therefore there is no fine or penalty to be paid or collected²; and
2. Once the Court Attendance Notice is issued, the matter must be determined or disposed of by the Court. Therefore, if the Council were to ask the Court to withdraw the matter, it would be withdrawn and dismissed by the Court. Having been dismissed, there is then no scope for the Court to order or compel the defendant to pay any fine or any other amount, thus leaving the Council out-of-pocket not only by the loss of the fine amount, but also the drafting and filing costs of the Court Attendance Notice³ and professional costs⁴.

So, in summary there are any number of matters in which the defendant offers to pay the prescribed fine amount, and the Council in good faith would be prepared to accept that offer if it were lawful to do so and thus avoid an otherwise unnecessary adversarial criminal proceeding.

However, the only options presently available to the Council where a defendant no longer wishes to go to Court are to withdraw the Court Attendance Notice entirely, or to proceed with the Prosecution on the basis that the Magistrate may (on the defendant's guilty plea) record a conviction and order that a fine be paid, plus Court and professional costs.⁵

Where the prosecutions do proceed, there are of course many occasions on which the Court makes an order pursuant to section 10 of the *Crimes (Sentencing Procedure) Act 1999*. This results in the matter being dismissed without conviction or penalty (although costs may be awarded in this situation).

Where such an order is made by the Court, the Council is again left in the position whereby it has been put to considerable effort and expense, and despite the defendant's offer to pay the fine amount, no fine amount is paid, and the defendant is still required to attend Court to have the matter dealt despite having expressed a desire to avoid Court. The Court itself also remains burdened with the matter in its list despite both parties being willing to resolve the matter without a Court hearing.

² See s 23A of *Fines Act 1996*

³ Currently \$79.00

⁴ Council presently adopts fees and charges pursuant to the *Local Government Act 1993*

⁵ There is a third option, which is to withdraw the Court Attendance Notice and then re-issue a new Penalty Notice to the defendant. This option is considered unfeasible by Council because in many cases the statutory time limit on the issue of a Penalty Notice will have elapsed.

Furthermore, the reissue of a Penalty Notice would create further delay, expense and work to all concerned whereas the reforms sought aim to streamline the overall process.

So, at present there is no way in which a Defendant can pay the original fine without proceeding to Court and risk at best a section 10 (without conviction) or at worst a criminal record with an increased fine plus court and professional costs.

Reform Options

The objective of any reform would be to create an avenue whereby it would be open to the Prosecution Authority and the defendant to conclude the matter by the defendant's payment of the statutory prescribed fine amount, with a cost component to reflect the filing, service and professional costs associated with issuing the Court Attendance Notice.

This might be achieved in a number of ways:

1. A reform, primarily of the Chapter 7, Part 3 of the *Criminal Procedure Act* 1986⁶, and also of the *Fines Act* 1996, whereby the defendant's Court election, and subsequent issuing of a Court Attendance Notice would have the effect of staying (rather than nullifying or voiding) the original penalty notice. That stay would operate until such time as the matter is disposed of by the Court or otherwise settled.

This proposal would keep the Penalty Notice in existence, so that if the defendant wishes to pay the penalty amount after having elected to go to Court, the Penalty Notice can be relied on as the basis for that payment, and the matter could be settled by receipt of that payment (plus costs if applicable) in conjunction with the consensual withdrawal of the Court Attendance Notice.

2. An amendment to section 10 of the *Crimes (Sentencing Procedure) Act*,⁷ that would allow a Court to dismiss Penalty Notice Matters without conviction but order that the original fine amount plus Costs be payable. An option may be to limit the operation of that new provision only to Penalty Notice offences; or only to certain matters as scheduled by Regulations.⁸

Such a reform would allow these matters to be resolved quickly by the Presiding Magistrate- that is, the parties could indicate that by consent it is agreed that the fine is to be paid, and no conviction is sought. Indeed, the new provision could possibly be framed in terms requiring that no conviction be recorded⁹ where the parties reach such an agreement for resolution of the matter.

⁶ And associated Regulations as necessary

⁷ Or the insertion of a new section allowing certain matters to be dealt with by way of fine without conviction.

⁸ As noted in the Commission's Consultation Paper on the present matter, a similar provision exists in other Australian jurisdictions, for example in the *Infringement Act* 2006 (Victoria); see *Consultation paper at para 5.111*.

⁹ Perhaps "other than in exceptional circumstances", or subject to some other readily understood legislative proviso.

However, such a proposal still has considerable merit- it would allow the Court and the public to see that the deterrent effect of the fine remains, but without exposing the Magistrate to the difficult consideration of having to impose a conviction for a "minor" matter in which would have resulted in no conviction had the Penalty Notice been paid at the outset.

As such, it could be said that such a reform would provide Magistrates with a greater range of discretion in dealing with Penalty Notice Offences.

There are, no doubt, other possible reform models that create an avenue by which defendants could "rescind" their Court election and offer to pay the Penalty Notice sum. The Council welcomes the Commission's consideration of any proposed reform that would address this set of circumstances.

Regardless of what reform model may be adopted, the Council recognises that it may be appropriate that the new or amended legislation be drafted so as to ensure that the consent of the defendant is required before the matter is settled by way of payment of the prescribed penalty amount.¹⁰

This element of mutual consent would ensure that the process remains fair and transparent, and that any particular defendant may proceed to have the matter heard and determined by a Court if he or she sees fit.

In short, there would seem to be any number of cases in which both defendant acknowledges that the fine should be paid, and the Prosecuting authority would be agreeable to receive that amount- and the Local Court may well be happy to have numerous matters removed from its lists- and yet in the present scheme of things this mutually satisfactory outcome cannot be achieved.

A reform of this area would also provide additional public benefits by reducing the number of summary matters before the Local Court, and provide a non-adversarial avenue to resolve these Penalty Notice offences.

Defendants would also benefit from this change, as it is a frequent complaint to Council from defendants that the time, effort and expense of attending Court is a great inconvenience to them once they have reached the decision that they would rather pay the prescribed penalty amount and have the Penalty Notice thus resolved.

It is acknowledged that such a reform would require some attention to detail in its scope and operation, and that it may be appropriate to ensure that matters

¹⁰ Indeed, Council's submission to the Commission in this review is predicated on the number of approaches and requests it receives from defendants offering to pay the Penalty Notice amount- it is not the case that Council is approaching defendants about payment. The aim of the proposed reform is to accommodate those requests.

such as Costs and filing fees payable in addition to the original fine would need to be limited to just and appropriate levels.

No particular submissions are made on those finer points at this stage.

We do ask, however, that the Commission give consideration to the issues raised, as we are sure that this problem affect not only this particular Council, but any number of other organisations and bodies empowered to issue and prosecute penalty notice matters.

Yours faithfully
MACEDONE LEGAL

JASON KEANE

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