

Requirements for Prosecutions in the Local Court

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1. General Overview

The purpose of this paper is to provide the background to prosecutions in the Local Court and the requirements necessary to bring proceedings to a successful conclusion. Although prosecutions are brought by Council under many separate Acts and Regulations, procedure in the Local Court is governed by the Criminal Procedure Act 1986 and, in particular, Chapter 2 – General Provisions and Chapter 4 – Summary Procedure. A thorough knowledge of the procedure of Local Courts is essential if prosecuting officers are to be successful. If the correct procedure is not followed then many guilty defendants will escape punishment and the general administration of the law, and the Council may be brought into disrepute. Successful prosecutions act as a deterrent to the public and ultimately should result in better behaviour by residents.

2. Prosecutions

The proceedings taken by Council in Local Courts are to punish persons, including companies, for not obeying the law by their acts or omissions.

The matters prosecuted are regarded as criminal offences because the breaches are punishable by the State under the laws passed by it.

However, they are distinguishable from what generally is understood to be crime or criminal acts; e.g. murder, manslaughter or larceny, which are offences which require prosecution by the police or Director of Public Prosecutions.

Another important difference is that, generally speaking, a criminal act involves both an actus reus (guilty act) and a mens rea (guilty mind). Where the offence is one of strict or absolute liability, there is no need to prove mens rea. However, the onus in all criminal matters is to prove the offence beyond reasonable doubt if the defendant pleads not guilty.

3. The Role of Ritchie & Castellan

Matters which are referred to us for prosecutions may come via direct instructions from Council, or from the accused person electing to have a matter heard in Court as a result of the issue of a penalty infringement notice by Council Officers. Where a matter is referred to us without the issue of a penalty infringement notice we advise Council on selection of the appropriate charge, the adequacy of the evidence provided to us and what further evidence is needed to prove the charge. We may then need to advise the Council on the need to obtain corroborating evidence from any other witnesses, gathering physical evidence, documentary evidence, and the preparation of witness statements.

When the matter comes to Council via an election to have a matter which is the subject of a Penalty Notice determined in Court, the Court Attendance Notice (CAN) is issued by the State Debt Recovery Office. It is our role to be provided

with a report compiled by the prosecuting officer who issued the Penalty Notice, who will be named in the CAN to assess the evidence provided to us and to ensure that it is sufficient to prosecute the offence designated in the CAN.

4. The Most Common Prosecutions

Following is a list of the most common prosecutions brought by Council for offences under the following Acts and Regulations:-

- Road Transport (Safety and Traffic Management) Act. Section 71, Road Transport (Safety and Traffic Management) (Road Rules) Regulation Act 1999.
- Companion Animals Act 1998 – ss.13, 16 and 56.
- Road Transport (General) Act 2005 – s.28.
- Roads Act 1993 - s.112.
- Food Act 2003 – s.21(1).
- Protection of the Environment Operations Act 1997 ss.91(5), 97, 120(1), 145 and 146.
- Environmental Planning and Assessment Act – s.76A, 76B, 121B and 125.
- Local Government Act 1993 – s.632.

- Public Health Act – s.46(1).
- Food Act – s.21(1).]
- Swimming Pool Act 1992 – s.7(1) and Clause 5(1) of Swimming Pool Regulation 1998.

Prosecutions are the result of CANS being issued by Council or by the State Debt Recovery Office for breaches where a penalty notice has been issued and the person elects to have it heard in Court.

5. The Principle of Strict Liability

Offences most commonly prosecuted by Council are known as offences which attract “strict liability”. The legislation creating the offence will inevitably be phrased in such a way that the act or omission prohibited results in the person doing the act or omitting to do the act being automatically guilty of the offence. Like the Ten Commandments: “Thou shalt not offend”. For example, Section 28 of the Road Transport (General) Act 2005 prohibits vehicles with a laden mass exceeding a specified maximum mass from passing along or over a road, bridge or causeway. Sub Clause (4) for of this section states:-

*“Any person who fails to comply with the terms of a notice displayed for the purposes of this Act **is guilty of an offence.**”*

For a prosecution to be successful, all that has to be proved is that the accused person has failed to comply with the terms of such a notice. Council does not have to prove the state of mind of the person. That is, that the person knows it was an offence. This is known as “mens rea”, literally “guilty mind”. If it were otherwise, you would have to prove not only the elements, but also that the defendant knew in his mind that he was disobeying the sign beforehand.

By contrast, an offence under Section 116 of the Protection of the Environment Operations Act 1997 requires the Council to prove that a person “wilfully or negligently” caused a leak, spillage or other escape of liquid likely to harm the environment. This is an example of “mens rea”. That then requires the Council to prove that the act was done wilfully or negligently, and enables a defendant to defend the matter on the basis that the act was not done wilfully or negligently.

In many of the Acts which create strict liability offences, the statute or regulation often provides limited grounds for raising a defence to the charge; e.g. Australian Road Rule 165 provides five grounds as defences to restrictions on stopping and parking in Part 12.

6. Defence of honest and reasonable but mistaken belief

In strict liability offences, mens rea (a guilty mind), will be presumed unless and until the defence raises material showing the existence of an honest and reasonable, but mistaken, belief that the conduct in question is not criminal (*Proudman v Dayman* (1941) 67 CLR 541). If such defence is raised, the

burden of proof lies with the prosecution to negative any such belief beyond reasonable doubt (*He Kaw Teh v The Queen* (1985) 157 CLR 523). The likelihood of such a defence succeeding is remote as the mere lack of knowledge about the offence or the likelihood of the offence not occurring based upon a general understanding or assumption that everything was in order, would be insufficient to amount to a mistaken belief. For example, it is not a defence to say that a person did not see a load limit sign before driving on a road with a 5 tonne limit. Nor would it be a defence under Section 13 of the Companion Animals Act 1999 to say that the owner believed that the dog was under effective control as it had been trained to behave itself in public and therefore was not required to be on a leash.

Frequently in the Local Court a defendant will plead guilty with an explanation.

This is not the same as pleading a defence of honest and reasonable, but mistaken, belief. The explanation will often be accepted by the Magistrate and result in no conviction being recorded under s.10 of the Crimes (Sentencing Procedure) Act 1999, or in a reduced fine.

7. The Gathering of Evidence

The role of Council Officers in investigating matters and making recommendations in relation to prosecutions will be more effective by making a written record of events and interviews. Notes should be made in a notebook to record each matter as it arises in chronological order. The notebook/record should be preserved for later reference. Notes should also be made at the time of the interview of incident, as contemporaneous notes constitute best evidence

in proceedings and can often be determinative of a decision by the Court where there is a factual dispute between the Council Officer and the defendant in giving evidence.

Any person to be interviewed as a result of receiving information, or if the Officer forms a belief from his own observations, including what he has been told that the person may have committed an offence, should be cautioned once he becomes a suspect, before being questioned.

Interviews should be conducted with the purpose of obtaining an admission, otherwise the evidence is of limited value.

Further evidence relating to events which have taken place after the occurrence of an event is irrelevant. The only evidence which can be given after the date of an offence is to update the Court as to what followed the offence. For example, if a person is being prosecuted for failure to comply with a fire safety order, then evidence as to compliance after the date of the offence will be admissible to assist the Court in sentencing the offender.

There is a public interest in the accurate determination of facts in criminal proceedings, and compilation of reliable evidence by an investigating officer which may be admitted into evidence underlines this importance. A contemporaneous note made at the time of the interview or incident, or soon after the investigation has occurred, is more likely to be accurate and therefore more useful than one made from memory some days, or even weeks, later. If a

prosecution proceeds, the matter may not come to Court for many months. Moreover, the more extensive your notes the easier it will be for you to prepare your report for Council or your Supervisor. It also makes it easier for us to advise Council on the strength of the case and whether a prosecution is likely to succeed. Once the notes are incorporated in a typed report, it should be checked and signed by the officer compiling the report and then be attached to Council's file for future use.

Interviews may be tape recorded, but only with the consent of the person concerned. If you can get suspects to sign notebook records of an interview, the document will be admissible to prove the contents of the interview if the defendant has acknowledged the notes are a true record of the interview (s.86, Evidence Act 1995). When speaking with people as suspects, certain rights accrue to that person including a right to silence, the right to legal advice, and the right to understand the nature of the charge intended to be brought against them.

The interview should be recorded in the first person, that is, "I said" and "He said". You should always include the names of all persons present. You also need to obtain the full name and residential address of the potential defendant. CANs served by mail to unrepresented defendants must be posted to the person's residential address not less than 21 days before the first listing date.

8. The suspect

It is important to differentiate between suspects or persons of interest, and people with whom Council Officers have routine or inadvertent contact. A person will become a suspect if an investigating officer has received information that the person may be committing, or may have committed, an offence. A person will also be a suspect if the investigation officer forms a belief, from his own observations, including what he has been told, that the person may have committed an offence.

This is a different situation from one where an officer carrying out a routine patrol starts talking with a person with no idea that there has been an offence committed, or with no aim of eliciting information from the person in mind.

The difference is one that has important ramifications for the conduct of any subsequent investigation.

If speaking with people as suspects, certain rights accrue to that person, namely:

- the right to silence;
- the right to legal advice;
- the right to understand the nature of the charge intended to be levelled against them.

Once the investigating officer has formed a belief that there is sufficient evidence to establish that the suspect has committed an offence, the caution

must be given. Otherwise, any statement made, or act done, after the formation of the belief without a caution, is evidence improperly obtained and would not be admissible. (See s.138(1)(a) of the Evidence Act).

9. The Caution

Some legislation confers limited rights on investigating officers to require a person to answer questions. For example, under Section 204 of the Protection of the Environment Operations Act 1997, an authorised officer may request a person whom the authorised officer suspects on reasonable grounds to have offended or to be offending against the Act or Regulations to state his or her full name and residential address. Under Section 204(2A), an authorised officer may also require such a person to provide proof of their name and address. Section 680(1) of the Local Government Act 1993 also provides that an authorised officer who suspects a person of committing an offence under the Local Government Act 1993 in a public place may demand from the person his or her name and residential address. If possible, inspect a driving licence to confirm details.

In the absence of such a power, a Council Officer is required to issue the suspect with a caution before proceeding to question the suspect. A suitable caution may take the following form:

“I am an authorised Council Officer and produce to you my authority. I am investigating a matter reported to me and I suspect that you have been involved in (*state the offence*) I propose to ask you questions about this matter. You do

not have to answer any questions unless you wish to do so, but anything you do say will be taken down and may be used in evidence against you. Do you understand?"

In the absence of a caution, any evidence and admissions obtained may be excluded by the Court as being evidence improperly obtained. (See Section 139 of the Evidence Act).

If the person does not understand English the caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency. It should be given in writing if the person cannot hear adequately.

10. The Residential Address of the Suspect is important

Under Section 18 of the Local Courts (Criminal and Applications Procedure) Rule 2003, CANs may only be served in the following ways:-

- By handing it to the accused person; or
- By handing it to a person at the accused person's usual place of residence or business who is apparently of or above the age of 16 years; or
- If the accused person is in gaol by handing it to the officer in charge or sending it by post or facsimile or other electronic communication to the officer in charge.
- By sending it by post or facsimile **to the person's residential address** no less than 21 days before the first listing date for the offence; or

- By sending it by electronic communication to the person's email address.

In one instance recently where the proceedings had gone through several attendances before the Court, representation by a solicitor, and an ex-parte conviction yielding large fines, it was detected by the defendants' barrister that the address to which the CANs had been sent was not the usual place of residence of the defendants. As a result, and despite the fact this point had not been taken during appearances in the Court earlier, when the defendants applied for annulment of the convictions there was no option but to agree to the annulment and to withdraw the CANs which were then dismissed, as the initial service invalidated the proceedings for non-compliance with this rule.

Upon checking the Council's file, it was discovered that the defendants' address had been changed in the Council's records from their usual place of residence to the address of the property, which was commercial premises, by the lessee of the property. Where the CAN is to be served by mail it is therefore worthwhile to check the Council's records to make sure that the address of the property where the offence has occurred, is the person's residential or business address. The orders on which the prosecutions had been based had also been sent to the same address and did not comply with Section 153 of the Environmental Planning and Assessment Act 1979 which requires service at the last known place of abode or business address.

11. Companies and Business Names

Another problem which we have encountered is where a Penalty Infringement Notice is issued to a business name. A business name is not the same thing as a company. It is merely a name used by a person or persons. Usually it is registered under the Business Names Act 2002.

If the person you are interviewing claims to be a businessman and gives you a card or states a business name or, if from observations, you conclude that the defendant responsible for the breach is a business, you should always check to ascertain whether it is a company or a business name. You cannot issue a Penalty Infringement Notice to a business name. It must be issued to the owner of the business. For example, if a hotel trading as the Post Office Hotel carried out development without consent you could not issue a Penalty Infringement Notice to the Post Office Hotel. You would have to check to see who owned the name. If it was James Smith, then the Penalty Notice would have to be issued to him. On many occasions it would be indicated by James Smith t/as the Post Office Hotel. A company may also trade as a business name; e.g. Pub Company Pty Ltd t/as the Post Office Hotel.

A Company will generally be indicated by the abbreviations of "Pty Ltd" after the name eg "Post Office Hotel Pty Limited".

You can issue a penalty notice to a company. A Penalty Notice and CAN must be served by mail at the registered office address of the company (s109 of the Corporations Laws).

12. Photographs

With the advent of digital cameras and their issue to Council Officers, photographs are an excellent means of providing corroborating evidence of the offence being committed, or of the nature of the offence described in the statement of evidence. This is particularly so where penalty notices are issued for breaches of the Australian Road Rules. Although Council is not required to provide briefs of evidence for offences for which a penalty notice may be issued under clause 24 of the Criminal Procedure Regulation 2005, the practice has been adopted to provide Facts Sheets or statements prepared by the Officer in question. These documents often include a digital photograph. The report and photograph are served on defendants who attend Court. Usually, once a photograph has been sighted indicating the offence, a guilty plea is entered. Photographs are also very popular with the Magistrates, who often use the photographs to question a defendant who wishes to plead not guilty where, plainly, the photographed vehicle is in breach of the Australian Road Rules.

Photographs are also very useful in prosecutions involving development without consent, particularly where there is a series of inspections. It is good practice, in my view, for photographs to be taken at each inspection, particularly where a stop work order is given, and the work continues. The Magistrate only has to look at the consecutive photos to appreciate what additional work has been

done and how the defendant has aggravated the offence where continuance of the work proceeds despite the stop work notice.

The use of photographic evidence in breaches of the Food Act 2003, of course, is well recognised and that evidence carries considerable weight with Magistrates when confronted with excuses being offered by the defendant. A mere glance at the photographs usually indicates the dirty condition of premises and fittings which has led to the issue of the Court Attendance Notice.

The other aspect of photographic evidence which is important is whether the photographs are time and date stamped so they coincide with the information provided on the penalty notice, Facts Sheet and any statement.

With the advent of digital photography making it easier to provide photographs, we recommend that the downloaded photographs be carefully stored and used as evidence wherever possible, being one of the best means of presenting the evidence, illustrating the events in question, and obtaining a much truer impression of the circumstances of the alleged offence and its consequences.

13. Admissions

The dictionary to the Evidence Act defines “admission” in the following terms:

“Admission means a previous representation that is:

- (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
- (b) adverse to the person’s interest in the outcome of the proceeding.”

In plain English, it means any statement against the interests of the party who made it.

Admissions are only admissible if obtained after a person has been properly cautioned and the interview has been properly recorded and adopted, in a notebook or on tape.

Admissions are only admissible if obtained in circumstances where it is unlikely that the truth of the admission was adversely affected by circumstances, such as the age, personality, education, and any mental, intellectual or physical disability which the person may suffer or appear to suffer. Also, if the admission was made in response to questioning, the nature of the questions and the manner in which they were put and, finally, the nature of any threat, promise or other inducement made to the person questioned. (S.85 of the Evidence Act.)

14. Admissions by third parties

Admissions by a co-accused; for example, employees, cannot be used against others who are being prosecuted for the same offence at the same time unless the other person consents (s.83 of the Evidence Act). In the ordinary day-to-day prosecutions conducted by us in the Local Court, this situation would not likely occur. However, it could occur in situations such as prosecutions under the Protection of the Environment Operations Act 1997 for pollution of waters, where a company and the employee of a company are being prosecuted for the same offence.

15. Admissions made with authority

Generally speaking, the rule against hearsay evidence applies to statements made by one person concerning another person. For example, if Fred Jones told an officer that Tom Smith's dog had killed a dog owned by Michael Ryan, the statement would not be admissible evidence against Tom Smith if he were prosecuted. However, there are situations where the hearsay rule does not apply, where statements are taken to be an admission by a party if it is reasonably open to the Court to find that:

- the person had authority to make statements on behalf of another person in relation to the matter; or
- the person was an employee of another person or had authority otherwise to act for the other person and the admission related to a matter within the scope of his employment or authority; or
- the statement was made by the person in furtherance of a common purpose with the other party.

If you are questioning a person and you suspect that responsibility for the act or omission may lie with his employer, or that he has authority to act on behalf of another suspect, then you should carefully question that person to ascertain the exact relationship.

One of the most common situations which arise is on a building site where various trades are operating. Generally, there is a sign indicating the name, address and telephone number of the building contractor. This should be

carefully noted. Any person whom you suspect of carrying out an offence by act or omission should be questioned carefully, after the caution is given, to ascertain the exact standing of that person as to whether he is an employee or an independent contractor. If the person states he/she is an employee, then you should ascertain whether that person is in charge of the site and what his authority is to make statements on behalf of the contractor. If the person is an independent contractor and implicates another contractor, that evidence may be admissible under s.87 of the Evidence Act if it is considered to be in furtherance of a common purpose.

It is important to properly identify persons carrying out building or contract work and not assume that they are the same person whose name appears on a sign as the contractor responsible for the site.

In the same way, owners of objects such as skip bins which carry an identifying name and telephone number of the owner of the skip bin and which have been placed in breach of regulations, cannot be held to be automatically liable for the offence, as the ownership of the skip bin proves nothing. It is necessary to interview persons to find out how the skip bin has been placed in breach of a regulation before determining who is responsible for the offence and issuing the penalty notice or proceeding with the prosecution against the party responsible for its placement.

The same applies to objects which are placed on footpaths in shopping centres. It is not sufficient to presume that the object has been placed on the footpath by

the owner of the business. There must be an interview of that owner and, hopefully, an admission obtained in that interview to determine responsibility.

16. Attendance by Parties

If the prosecutor or both the prosecutor and defendant fail to appear on the appointed day, the Court is required to dismiss the prosecution unless for some reason the Magistrate believes it is proper to adjourn the hearing for mention (s.201 of the Act).

If, on the other hand, the prosecutor appears but the defendant does not appear either in person or by his solicitor, then the Court can hear and determine the matter *ex parte*, in the defendant's absence. Section 196 provides that where the prosecutor appears and the defendant fails to appear at the time fixed for the hearing, the Court may determine the proceedings, if it is satisfied as to service of the CAN and that the facts as alleged in the CAN constitute such an offence and that the matters set out in the CAN are sufficient to establish the offence.

Experience has shown that a large percentage of the CANS which are served in relation to offences are likely to be finally dealt with under this section. Again, where the presiding Magistrate decides to proceed under this section, he will often call for the prosecutor to give details of the offence from the Bar table or, alternatively, will peruse reports from the Council Officer in relation to the matter ("short facts"). Any photographs which illustrate the nature of the nature of the offence can also be tendered.

In the absence of the defendant, the Magistrate may require evidence additional to that in the CAN. Such evidence must be in the form of written statements which should have been served on the defendant. If this requirement cannot be met, the Court may require the additional evidence to be given orally (s.200 of the Act).

17. Information for Defendants and costs

In the past, defendants often complained to the Magistrate when being ordered to pay Court costs and professional costs. Court costs cover the filing fee paid by the Council to issue the CAN. Professional costs are payable for the attendance of one of our solicitors at the Court. In order to ensure that defendants are properly informed, we have prepared a memorandum which is served on defendants with statements or Facts Sheets, so that they are fully aware of the costs consequences of pleading guilty or not guilty. These are given to defendants prior to entering the Court and they are advised to read the sheet carefully. A copy of the memorandum is also provided to the sitting Magistrate as often as is necessary, so they are aware of the advice given to defendants.

18. Plea of Guilty

Section 192 of the Criminal Procedure Act 1986 provides that if the defendant appears at the hearing, the substance of the offence should be stated to him and he then be asked whether he pleads guilty or not guilty. If the defendant pleads guilty and does not show sufficient cause why he should be convicted, or not have an order made against him, the Magistrate must convict him or make

the order accordingly. It is then common practice for Magistrates to request the prosecutor to present an outline of the matter before the Court and hand up copies of the reports (generally referred to as “short facts”), prepared by Council Officers as a means of shortening the proceedings. Either party is entitled to give evidence relating to the severity of the penalty which should be imposed and to address the Court about the penalty.

19. Defended Matter

If both parties appear on the appointed day and the defendant pleads not guilty, then the Court will appoint a date for a hearing of the matter and order the service of a brief by Council.

20. The Hearing

Assuming that the Court Attendance Notice is regular, the prosecutor must produce his evidence. This will normally consist of oral evidence and documentary evidence. It is very important that all documentary evidence be in the proper form and that it strictly complies with the rules of evidence. If it does not, then the Court will reject it and the CAN will be dismissed because the prosecution has not proved its case. If, for instance, it is alleged that a Notice has not been complied with, then a complete copy of the Notice must be available in Court and evidence of its service on the defendant must be available.

Each witness who is called on behalf of the Council to give oral evidence is first examined by Council’s solicitor and gives evidence in chief. Then he is cross-

examined by the defendant or the defendant's solicitor on any relevant matter. After this, the witness may be re-examined by the solicitor for the Council, but the party conducting the re-examination is limited to explaining any matter arising out of the cross-examination of the witness.

At the close of the case for the Council, the defendant may submit that there is no case to answer. That is to say that the Council has not proved its case. Such an application may be made if an element or ingredient of the offence has not been proved or one of the formal matters has not been proven. If the Court is of the opinion that a necessary matter has not been proven, then it should uphold the defendant's submission and dismiss the CAN. If the Court holds that there is a case for the defendant to answer, the defendant must elect whether to give evidence and if he does, he then adduces his evidence in a similar fashion to the prosecution.

The prosecutor may, after the conclusion of the defendant's case, call evidence in reply which is limited to contradicting evidence given on behalf of the defendant. Fresh material cannot be introduced by the prosecution at this stage. Each party closes its case at the conclusion of its evidence.

The parties may then, if they so desire, address the Court about which evidence it should believe and whether it is sufficient to convict the defendant on the offence charged. It is important to stress that, at this time, it is the duty of the prosecutor to prove the offence alleged in the CAN and he must do so to the criminal standard of proof, that is proof beyond reasonable doubt. The

Magistrate after hearing the addresses then gives his decision whether the defendant is guilty or not.

21. Defects and Variance

When the matter comes on for hearing, the defendant may object that the CAN is defective because the facts alleged do not constitute a breach of the law. Alternatively, the defendant may object that the information is bad for duplicity, that is, that the information alleges more than one offence of different kinds. If the CAN does allege more than one different offence, then the prosecutor must select one offence and the others will be struck out. A CAN may include up to 3 counts for distinct offences of the same kind; e.g. 3 offences for 'No Stopping'.

Section 16 of the Act provides amongst other things that no objection can be taken to certain defects in the substance and variation in the form of the CAN. This section, however, is not a cure-all. It does not enable a Magistrate to convict of an offence if the CAN which discloses no offence, or to convict of an offence alleged in a CAN if the evidence does not support that offence, or to convict of an offence established by the evidence that it is different from that charged in the CAN. A CAN which omits to state an ingredient of a statutory offence is bad and is not saved by Section 16. If the limitation period has expired before the matter has been listed for hearing, there will be no opportunity to prepare and serve a fresh CAN in relation to the matter.

If unnecessary particulars are included in the information, that is a defect of substance or form but is not fatal. Inserting the incorrect date of the alleged

offence is not necessarily fatal and any difference between the CAN and the evidence may be regarded as a variance provided the evidence does not put the laying of the CAN out of time. Under Section 20 of the Act, CANs can be amended. Section 21(3) provides that if the defendant is prejudiced by any amendment, the Magistrate may upon such terms as he thinks fit, adjourn the hearing of the case to some future date.

22. Giving Oral Evidence at Court

A witness can only know of facts by reason either of:-

- (i) Having heard or read the statement by someone else that the facts exist, or;
- (ii) Having by his own senses seen, heard, felt, smelt or tasted; thus perceiving the facts to exist, or;
- (iii) Having by his senses perceived some other fact or facts from which he draws the inference or is of the opinion that the fact in question exists.

As regards (i), this is hearsay and not admissible evidence, except that confessions made by the defendant himself may be given in evidence as stated above. Thus, a Council Officer could not be called to give evidence that persons had come to the Council and complained that the premises in question were in filthy condition. But he could give evidence that he had heard the defendant admit that his premises were in a filthy condition when being questioned by the Council Officer.

As regards (ii) above, this is admissible evidence.

As regards (iii), the fact which the witness has perceived by his own senses is admissible, including his inference or opinion that the fact in question in the case exists (s.78 of the Evidence Act). Thus a witness could state his opinion that a building was a nuisance based on evidence of its actual condition. The weight to be given to such evidence by the Court will depend on the position held, qualifications and/or experience of the witness.

23. Examination of Witnesses

Until a witness is examined he must remain out of the Court room, and the Court normally directs all witnesses to leave the Court and the hearing of the Court. The actual parties, that is the prosecutor (prosecuting officer) and the defendant, may remain in the Court all through the hearing. Expert witnesses may be allowed to remain in Court in order to hear the evidence on which their opinion will be given. After a witness has given his evidence, he must stay in Court unless he is excused by the Magistrate.

A witness, once sworn, gives his evidence only in answer to questions put to him. He is first examined by the party calling him. The questions put must not be leading questions. This means that a question must not suggest a particular answer. Suppose for example, Council's solicitor desires a witness to give evidence that in a backyard there were accumulations of rubbish infested with mice and rats. He could not ask, "Did you see heaps of rubbish scattered about

the yard?” and “Upon turning up the rubbish, did you expose a number of mice?”

He would have to ask the witness some questions such as the following: “When you saw the yard, what was its state?”

If the witness states he saw heaps of rubbish there, the Council’s solicitor could ask, “What did you do to the rubbish?” Leading questions may, however, always be put about any matters which the other party does not dispute; e.g. the day, date and weather conditions.

When the party calling the witnesses has finished, the other party is entitled to question them by way of cross-examination. Leading questions may be put in cross-examination. During cross-examination, a witness may be asked questions to show that he is not a competent or truthful witness, that his recollection is vague and unsatisfactory and/or that he has a particular bias in the matter.

Always listen to the question that you are being asked and answer only that question. Don’t volunteer an answer. If you do not know, or cannot remember the matter in question, you should admit that and not guess at an answer which in many cases can be demonstrated to be just that and therefore not accurate. Do not argue with the cross-examiner even if you consider the questions are irrelevant or unhelpful. As you are no doubt aware, when a party puts a question which he is not entitled to put, for example a leading question in the examination or a question which is not relevant, the other party may object to

the question before the answer is given. The Magistrate then rules whether the question will be allowed.

Where there is no cross-examination of a witness, there is no basis for a court not to accept the unchallenged evidence. The failure to challenge some part of a prosecution case by putting a proposition to the prosecutor or witness under cross-examination may prevent the defendant from giving or calling evidence on that issue. This is known as the rule in *Browne v Dunn* (1893) 6 R 67.

24. Use of Notes

A witness cannot read his evidence. He may consult any notes he himself made at the time of, or shortly after, the event of which he is speaking by way of refreshing his memory, but he must then give his evidence without reading out of the notes. Sometimes a witness will be giving evidence and will be asked about a particular matter. He will be unable to remember precisely what he saw. After exhausting the witness' recollection in the witness box, the Council's solicitor can then seek leave for the witness to refresh his memory from his notes. The witness may then read his notes. He must then put them away and give his evidence based on recollection. Frequently expert witnesses are allowed to refer to their reports during the course of giving evidence. If they do refer to reports, or indeed if any witness refreshes his memory from notes, the defendant is entitled to ask to see the notes and to ask questions upon them. The notes must be made at the time the events in question took place ("contemporaneous notes"). Notes made weeks later by lay witnesses cannot be used to refresh their memory.

25. Expert witnesses

Expert witnesses can give their opinions in evidence both about the effects they have perceived themselves and also facts deposed to by other witnesses. An expert witness is one having particular scientific or technical knowledge about some matter in question, such as a doctor or analyst. Thus a doctor could state his opinion that a particular building with restricted facilities for ventilation would be injurious to the health of the persons occupying it. Likewise, an architect could give evidence about the extent to which the air would circulate in a particular building. The Court is always entitled to consider the reasons and the premises upon which the expert opinion is based and to form its own opinion on the value and weight of such evidence. *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

26. Penalties and Recovery of Fines

If the defendant is convicted of the offence, or if he pleads guilty, either party is entitled to put evidence to the Court as the question of penalty. The amount of the fine stipulated either in the relevant Act or other delegated legislation is a maximum and the Magistrate will, subject to that limit, determine the appropriate punishment. Often the Local Court has limited monetary jurisdiction; e.g. Food Act 2003 (\$10,000) and Environmental Planning and Assessment Act 1999 (\$110,000).

Even though the Magistrate thinks the offence has been proven, he may dismiss the charge under s.10 of the Crimes (Sentencing Procedure) Act 1999

or impose a nominal penalty if he thinks it expedient to do so on account of the good character of the defendant or the trivial nature of the offence, or because of extenuating circumstances attending its commission. Where a penalty is imposed in a prosecution on behalf of Council, the money is paid to the local authority. See Section 694 of the Local Government Act, 1993.

Where the Magistrate imposes a fine upon conviction and orders the defendant to pay Court costs and professional costs in relation to the matter, the Magistrate will allow 28 days for payment of the total amount. Fine is defined to include costs (Fines Act 1996, Section 4). If he is unable to pay the amount within the time provided by the Magistrate, he may approach the officers of the Local Court and make an application for a further extension of time.

In a case where the amount due is not paid and no application is made for an extension of time, the State Debt Recovery Office will serve a fine enforcement order on the fine defaulter and proceed with recovery.

27. Conclusion

Today I have outlined the requirements for successful prosecutions in the Local Court. Good evidence wins cases. This is the role of the prosecuting officer. A thorough and diligent preparation of facts, reports and statements makes the presentation of evidence much more effective.

When appearing as a witness, read and know your statement well beforehand, so you know you will present as a competent and confident witness to the defence and to the Court.

This will make our task easier and will result in better outcomes for Council and satisfaction to you.

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