

# RECOVERY OF COSTS ORDERS IN LITIGATION POLICY

**Responsible Department:** Planning, Strategy and People  
**Responsible Section:** Governance and Risk  
**Responsible Officer:** Manager Governance and Risk

## Objective

To provide a framework for Council's policy on pursuing costs orders in legal proceedings in accordance with its obligations as a public authority.

## Introduction

This policy details Council's position in relation to pursuit and recovery of costs orders in litigation, including circumstances under which Council may resolve to not pursue recovery of costs orders.

From time to time, Narrabri Shire Council is a party to proceedings before Courts, Tribunals, and Commissions in NSW and Australia. Some of these have the power to make costs orders in those proceedings, whereby one party is ordered to reimburse another party for some, or all, of their legal costs incurred in the case.

Under section 356 of the *Local Government Act 1993* (NSW), Council has the power to grant financial assistance to persons for the purpose of exercising its functions. This involves both providing funds to people and entities and waiving funds owing from people and entities to Council. Under the guiding and financial management principles set out in sections 8A and 8B of the Act, Council is required to act impartially in the local community's interests in a way that ensures financial sustainability and responsibility. Specifically, section 8A(b) requires that Council carries out its functions in a way that provides the best possible value for residents and ratepayers. This means Council must exercise due diligence and good governance when dealing with debtors.

## Policy

### 1. Definitions

Term	Meaning
<b>Commercial Unviability</b>	A situation where the cost of pursuing and/or enforcing a costs order significantly exceeds the likely amount that will be recovered by Council. Commercial unviability typically arises where there is no certainty of success in the pursuit and recovery of costs orders and the amount expected to be recovered is far less than the amount required to be expended to recover it.
<b>Costs</b>	Legal and other expenditure that is payable under a costs order made by a court, tribunal, or commission.
<b>Hardship</b>	A difficulty in paying a costs order as a result of: <ul style="list-style-type: none"> <li>1.1.1. Loss or change of income;</li> <li>1.1.2. Illness;</li> <li>1.1.3. Loss arising from an accident;</li> <li>1.1.4. Natural disaster or emergency situation;</li> <li>1.1.5. Death in the family;</li> </ul>

Term	Meaning
	1.1.6. Separation, divorce, or other family crisis; 1.1.7. Family violence; and 1.1.8. Some other temporary financial difficulty due to loss of income or increase in essential expenditure. Hardship in this sense may be permanent or temporary.

## 2. Presumption in Favour of Pursuit and Recovery

- 2.1. Unless Council resolves otherwise in accordance with this policy, Council will pursue all costs orders made in its favour against other parties in proceedings.
- 2.2. In pursuing costs orders, Council is to seek and consider the advice of Council's retained legal representatives in the matter as to:
  - a) The likely amount of the costs order if assessed;
  - b) The likelihood of recovering those costs or a portion of them; and
  - c) The best means of pursuing and recovering legal costs under a costs order in the circumstances.
- 2.3. Council is to consider that advice when deciding on the most effective method for maximising recovery of costs and minimising wasted expenditure.
- 2.4. In assessing the commercial viability of costs orders, at first instance Council should take advice on and consider serving an examination notice on the debtor pursuant to r38.1 of the *Uniform Civil Procedure Rules 2005* (NSW) and/or applying for an examination order under r38.2 of the *Uniform Civil Procedure Rules 2005* (NSW).
- 2.5. Where no exception applies, Council is to pursue recovery of all costs orders made in its favour.

## 3. Exceptions to the Presumption

- 3.1. There are two (2) exceptions to the presumption in favour of pursuit and recovery:
  - a) Hardship; and
  - b) Commercial unviability.
- 3.2. Where an exception applies, Council may, at its discretion, take one of the following actions:
  - a) Resolve to take no action on the costs order;
  - b) Resolve to suspend recovery of the costs order for a period of time;
  - c) Resolve to seek a lesser amount in satisfaction of the costs order than it might otherwise be entitled to, including a nominal amount; or
  - d) Resolve to agree to an instalment order for the total amount of the assessed costs or a lesser amount under clause 3.2.3.
- 3.3. A decision of Council under 3.2 will be exceptional and will only apply when the matter meets the requirements of this Policy.
- 3.4. All decisions of Council under 3.2 will be made on the merits of each case, and on a case-by-case basis.

## 4. Hardship Applications

- 4.1. A person ordered to pay costs to Council may apply to council seeking a resolution under clause 3.2 in accordance with this policy.
- 4.2. Where a party seeks that Council consider taking action under clause 3.2, they must lodge an application in accordance with this policy:
  - a) The application must be in writing in the form prescribed by Council. The prescribed form is Appendix A to this policy.
  - b) The application must be signed by the person applying or their legal representative.
- 4.3. The Application must include sufficient supporting evidence to justify the application, including but not limited to:
  - a) Bank statements

- b) Medical Certificates
  - c) Employment correspondence
  - d) Tax returns
  - e) Statutory declarations explaining circumstances
  - f) Evidence of Centrelink, Veterans Affairs, or other Government benefits
  - g) Letter from financial counsellor or other assistance service.
  - h) Other relevant evidence of hardship.
- 4.4. An application must be made no later than fourteen (14) days before the Ordinary Council Meeting at which the applicant seeks for it to be considered.

## **5. Assessment and Determination of Hardship Applications**

### **5.1. Assessment**

- (a) An assessment is to be conducted by the General Manager, or their delegate, of all hardship applications.
- (b) The assessment will have regard to:
  - (i) The nature of the hardship;
  - (ii) The duration of the hardship;
  - (iii) The applicant's financial position;
  - (iv) The nature of any assets disposed by the person since the costs order was made or during the proceedings;
  - (v) The amount of the costs order;
  - (vi) The likelihood of recovery;
  - (vii) The estimated cost of recovering the costs order;
  - (viii) Whether it would be fair and equitable to pass a resolution in accordance with clause 3.2; and
  - (ix) The likelihood and nature of a precedent being set by a resolution in accordance with clause 3.2.
- (c) Following consideration of the above factors, the General Manager, or their delegate, will submit a confidential report to an Ordinary Council Meeting. The report will:
  - (i) Describe the case the application relates to;
  - (ii) Identify the likely quantum of the costs order;
  - (iii) Discuss the basis of the application and its supporting evidence;
  - (iv) Make a recommendation for Council action under this policy; and
  - (v) Provide reasons for that recommendation, addressing the criteria at 5.2.
- (d) Where the report is prepared by a delegate of the General Manager, the report must be endorsed by the relevant director and the General Manager before it is brought before Council.
- (e) The report should be brought to the next Ordinary Council Meeting following its preparation, if reasonably practicable.
- (f) When an application is made, the General Manager may, at their discretion, suspend pursuit and recovery action on the costs order until the application is determined up to a maximum of three months, after which the matter must be brought before Council for decision on suspension pending consideration of the application.

### **5.2. Consideration and Decision by Council**

- (a) At the Ordinary Council Meeting, Council will consider the report and recommendation referred to at 5.3 and make a determination.
- (b) A determination by Council will take the form of a resolution.
- (c) The resolution will be for one of the options in clause 3.2, a deferral of decision for more information, or to refuse the application.

- (d) If Council does not make a decision at the second Ordinary Council Meeting following the application's submission, the application will be deemed to be refused.
- (e) Due to the nature of the information in the report, the item will usually be dealt with in a closed session of the council meeting

## 6. Commercial Unviability

- 6.1. In circumstances of commercial unviability, it is unlikely that Council will successfully recover most or all its costs without spending a significantly greater amount pursuing recovery. In those circumstances Council adopts the position that it would not be financially sensible or sustainable to pursue recovery of commercially unviable costs orders.
- 6.2. If the General Manager or their delegate, considering the advice under clause 2.2, identify that a matter may be commercially unviable, they are to bring a confidential report to an Ordinary Council Meeting in accordance with this policy.
- 6.3. A report under 6.2 must, at a minimum, contain:
  - (a) The amount, or estimated amount, of the costs order;
  - (b) The estimated cost of pursuing recovery of the costs order;
  - (c) Other factors relevant to commercial viability of pursuing recovery of the costs order;
  - (d) A synthesis of the advice given under clause 2.2 above; and
  - (e) A recommendation as to the appropriate course of action on a commercial basis, taking into account Council's legislative obligations.
- 6.4. Consideration and Decision by Council
  - (a) At the ordinary Council Meeting, Council will consider the report and recommendation referred to at 6.2 and make a determination.
  - (b) A determination by Council will take the form of a resolution.
  - (c) The resolution will be for one of the options in clause 3.2 or to refuse the application.
  - (d) Due to the nature of the information in the report, the item will usually be dealt with in a closed session of the council meeting

## 7. Writing Off Debt

- 7.1. If Council resolves to take no action on the debt in accordance with 3.2(a), The General Manager is to consider writing the debt off in Council's financial accounting systems in accordance with reg 213(5)(c) of the *Local Government (General) Regulation 2021* (NSW).
- 7.2. If Council resolves to accept a lesser amount in accordance with 3.2(c), the General Manager is to consider writing off the amount that the debt is reduced by in the Council resolution in Council's financial accounting systems in accordance with reg 213(5)(c) of the *Local Government (General) Regulation 2021* (NSW).

## 8. Review

- 8.1. This policy will be reviewed, at the very least, within twelve months of an ordinary Council election.
- 8.2. This policy may be reviewed on an as-needs basis.

## References

- *Local Government Act 1993* (NSW).
- *Local Government (General) Regulation 2005* (NSW).
- *Uniform Civil Procedure Rules 2005* (NSW).

## History

<b>Minute Number</b>	<b>Meeting Date</b>	<b>Description of Change</b>
236/2022	26 July 2022	Endorsed for Public Exhibition
305/2022	27 September 2022	Adopted