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|  <p><b>Mackay</b><br/>REGIONAL COUNCIL</p> | <b>COUNCIL POLICY</b>                                 |                         |
|   | <b>Legal Assistance for Councillors and Employees</b> |                         |
|   | POLICY NO   | 096                     |
|   | DEPARTMENT  | OFFICE OF MAYOR AND CEO |
|   | PROGRAM   | LEGAL SERVICES          |
| ENDORSED BY COUNCIL   | 13 FEBRUARY 2019, FOLIO 60948                         |                         |

## 1.0 Scope

This policy applies to the Councillors and employees of Mackay Regional Council (MRC).

This policy does not apply to standard legal services and advices required as part of normal Council functions.

## 2.0 Purpose

This Policy establishes the requirement for the provision of legal assistance to Councillors and employees who may require personal legal representation as a direct result of their official roles with MRC.

## 3.0 Reference

- *Local Government Act 2009 (“LGA”)*
- *Local Government Regulation 2012 (“LGR”)*
- *Local Government Electoral Act 2011 (“LGEA”)*
- Mackay Regional Council Policy No. 002 - Reimbursement of Expenses and Provision of Facilities for Councillors

## 4.0 Definitions

**Council** shall mean the Mayor and Councillors of Mackay Regional Council.

**Employee or Councillor** is an employee of the MRC or a current or former Councillor or non-elected member of a council committee.

**Legal proceedings** may refer to a civil action, criminal action or investigation such as an inquiry or statutory administration or regulatory investigation.

**Legal representation costs** all costs including professional fees and disbursements that are reasonable and incurred in providing legal representation that was approved under this policy.

**LGA** shall mean the *Local Government Act 2009*

**Local Government** shall mean Mackay Regional Council.

**Local government administrator** includes a Councillor, the chief executive officer, an authorised person, another local government employee or an interim administrator.

**LGEA** shall mean the *Local Government Electoral Act 2011*.

**LGR** shall mean the *Local Government Regulation 2012*.

**MRC** shall mean Mackay Regional Council.

## 5.0 Background

MRC recognises that employees and Councillors, as a result of their roles, functions and duties of the local government may at times require personal legal representation. This applies where there is a clear nexus between their role at the local government and a legal proceeding against them. In some instances, it may be appropriate to provide financial assistance to meet the cost in obtaining legal representation.

An example is where an employee or Councillor is personally threatened with a legal action by an aggrieved party that believes the employee or Councillor will not, or has not, carried out their legislative or administrative role, functions or responsibilities in an appropriate manner.

## 6.0 Policy Statement

Section 235 of the *Local Government Act 2009* (“**LGA**”) provides that a local government administrator is not civilly liable for an act done under the LGA or the *Local Government Electoral Act 2011* (“**LGEA**”), or an omission made under the LGA or LGEA, honestly and without negligence. Instead, such a liability will attach to the local government.

The liability for actions performed in good faith by a council representative whilst performing their duties of their role therefore lies with the local government. As a result, MRC has adopted this policy to explain when MRC will fund or partly fund the cost of providing the appropriate legal representation to employees and Councillors.

This policy sets out the process which must be followed in dealing with requests for MRC to contribute towards costs regarding legal representation that are received from either employees or Councillors.

### 6.1 Roles & Responsibilities

Mayor - In the instance the CEO is the applicant for legal representation, the Mayor is to receive, assess and decide the request for legal assistance. The Mayor is then to make any other related decisions on behalf of the Council under this policy.

Chief Executive Officer (“CEO”) - The CEO is to receive, assess and decide any requests for legal assistance from an employee or Councillor. The CEO is to also make any other relevant decisions on behalf of MRC regarding this policy.

## 6.2 Delegation of Roles and Responsibilities

The CEO or Mayor may delegate its roles and responsibilities to a representative employee of MRC to assess an application made under this policy.

The CEO and the Mayor have the requisite delegation by the Council to incur the relevant liabilities and to approve the associated expenditure on behalf of the MRC in accordance with this policy.

## 6.3 Assessment Criteria

In assessing an application for legal representation the assessor must consider all four of the below criteria equally in coming to a decision.

The Criteria are:

1. Relevance

The legal representation costs must relate to a legal matter which arises from the performance, by either the Councillor or employee, acting in his or her role, functions and duties of the local government.

2. Made in good faith

The relevant actions of the employee or Councillor must have been made in good faith.

3. Requisite nexus to role of the Local Government

The legal costs are associated with the threatened or commenced legal proceedings against an employee or Councillor in their personally capacity, or, in exceptional circumstances, may be associated with legal proceedings which are proactively commenced to properly protect the interests of a Councillor, employee or the reputation of the local government.

4. Not personal in nature

The legal representation costs must not relate to a matter that is purely of an individual or private nature. The cost must arise from the performance by the employee or Councillor in their normal functions and duties of the local government.

## 6.4 Examples of costs that may be approved

If the four criteria above have been satisfied, the CEO or the Mayor in their respective roles may approve the payment of legal representation costs. Examples could include:

- Where an employee or Councillor is threatened by legal proceedings personally and the claim in the legal proceedings has the requisite nexus to their functions and duties performed in their

local government role. An example of this is an action against an employee or Councillor for defamation, a claim in damages or compensation, and the proceedings arise from a decision made or action taken by the employee or Councillor in the discharge of their local government role, functions or duties.

- Reasonable legal representation costs that may lead to legal proceedings to protect an employee or Councillor in a personal or physical sense in order to allow them to carry out their local government functions or duties safely. An example of this is an employee or Councillor obtaining a restraining order against a person who makes continual personal threats against that person in their capacity as a local government employee or Councillor.
- Reasonable legal representation costs for an employee or Councillor who is subjected to a statutory or administrative investigation by a regulatory authority when acting in their local government role.

Only in exceptional circumstances will MRC consider the payment of legal representation costs for an employee or Councillor to commence or consider commencing legal proceedings regarding actions in defamation or other personal proceedings against a person that pursues damages or compensation. Consideration of such circumstances will be given to the extent, frequency and impact of the actions that give rise to the request.

Only in exceptional circumstances will MRC consider the payment of legal representation costs for a Councillor that arise from, or are associated with, election issues or conduct associated with an election campaign, as MRC acknowledges the implied right to political communication as recognised in Australia.

Notably, MRC will not approve the payment of legal costs for an employee or Councillor to commence or consider commencing proceedings against the lawful act of another employee or Councillor.

## **6.5 Application Process**

An employee or Councillor who requires assistance with the costs associated with legal representation under this policy must make an application in writing. This application must be addressed to the CEO of MRC. In the instance the applicant is the CEO the application must be addressed to the Mayor of MRC.

The following details should be provided as part of the written application:

1. The facts surrounding the matter for which legal representation is sought; and
2. How that matter has the requisite nexus to the local government role, functions and duties of the employee or Councillor making the application; and
3. The nature of the representation that is likely to be required (e.g. written advice, legal representation in Court, preparing and lodging legal proceedings); and

4. An estimation as to the relevant legal costs; and
5. Reasons as to why MRC should provide the relevant assistance.

**NOTE:** *Such an application must be made before the incurring of any legal costs to which the application relates. The applicant must declare that they have acted in good faith.*

The applicant must also sign and date a written statement with the following;

- a) That they understand the terms of Legal Assistance for Councillors and Employees Policy
- b) That they acknowledge that any approval of the legal representation costs is conditional upon the repayment provisions set out in Repayment of Legal Costs section of the policy as well as any further conditions agreed upon between both parties.
- c) That they undertake to repay the legal representation costs to Council in accordance with Repayment of Legal Costs section of the policy.

Notably the applicant may also be required to sign a more formalised contractual document regarding the repayment of monies to MRC in return for the provision of assistance under the terms of this policy.

Any application made under this policy will be kept confidential and in alignment with the relevant privacy provisions of the LGA as well as the *Local Government Regulation 2012 (LGR)*.

## **6.6 Limitations**

The CEO or the Mayor of MRC may in approving an application under this policy set a maximum limit on the legal costs that will be paid.

An employee or Councillor may make a further or subsequent application to the MRC under this policy in respect of the same proceeding.

## **6.7 Possible Outcomes**

The CEO or the Mayor of MRC can refuse, grant or grant subject to conditions, an application for the payment of legal representation costs made under this policy.

In coming to their respective decision regarding an application under this policy, the CEO or the Mayor of MRC, may consult MRC's Legal Services unit or other employees to provide relevant assistance, advice or representation.

When a decision is made regarding the application, the decision can be subject to clauses such as a financial limit, requirement to enter into a formal agreement (e.g. security relating to the repayment) as well as the requirement for the repayment of the legal representation costs paid for by MRC under this policy.

The CEO or the Mayor of the Council should have regard to any insurance benefits that may be available to the applicant under the MRC's insurance policies or other similar arrangement.

If at any point (before or after the application has been approved) the CEO or the Mayor of MRC identify through a finding of a Court, tribunal inquiry, regulatory investigation or other similar independent body, the employee or Councillor whose application for legal representation costs has been approved -

- a) Did not act in good faith; or
- b) Provided false or misleading information regarding their application for assistance under this policy.

the legal representation costs paid by MRC are to be repaid by the employee or Councillor in accordance with the Repayment of Legal Costs section of this policy.

## **6.8 Reporting**

Any approved expenses incurred under this policy will be reported in MRC's financial statements in such a way that they are clearly identifiable and subject to audit review.

## **6.9 Repayment of Legal Costs**

An employee or Councillor whose legal representation costs have been paid by MRC is to repay MRC either;

- a) All or part of the legal costs, as determined by the assessor of the application.
- b) If monies are awarded in the form of costs orders, damages or any settlement relating to the matter for which MRC originally paid legal representation costs, the employee or Councillor is to repay such sum to the MRC up to the amount of legal representation costs that were incurred by the MRC under this policy

MRC may take the required action to recover any monies due and owing to it by an employee or Councillor under this policy.

## **7.0 Review of Policy**

This policy will be reviewed when any of the following occur:

1. The related documents are amended or replaced.
2. Other circumstances as determined from time to time by a resolution of Council

Notwithstanding the above, this policy is to be reviewed at intervals of no more than three years.

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Version Control:

| Version | Reason / Trigger | Change | Endorsed / Reviewed | Date     |
|---------|------------------|--------|---------------------|----------|
| 1       | New Policy       |        | Council             | 13.02.19 |
|         |                  |        |                     |          |