



**SNOWY MONARO**  
REGIONAL COUNCIL  
*Stronger together Better together*

# COMPLIANCE AND ENFORCEMENT POLICY

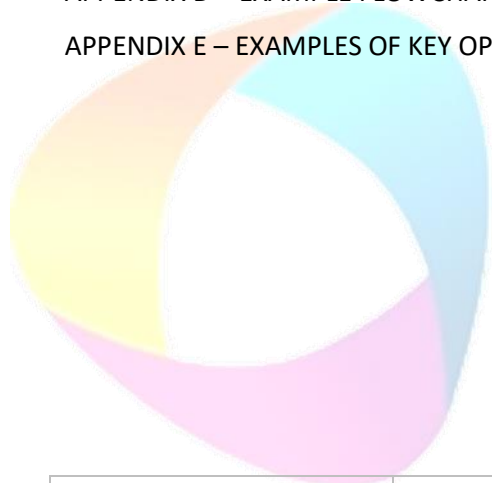
---

‘Council’s Responsible, Proportional and Appropriate  
Response to Alleged Unlawful Activities’



## Contents

Document Controlled Information .....	1
Related Document Information, Standards & References .....	1
1 Introduction .....	2
2 Purpose of Policy .....	2
3 Objectives .....	2
4 Organisational Approach .....	3
5 Definitions .....	3
6 Application of the Policy .....	3
7 Relevant Legislation .....	4
8 Compliance and Enforcement Principles .....	4
9 Responsibility .....	5
10 Responding to concerns about unlawful activity .....	5
11 Investigating alleged unlawful activities .....	9
12 Deciding whether or not to take enforcement action .....	10
13 Options for dealing with confirmed cases of unlawful activities .....	12
14 Taking legal action .....	14
15 Certification of Development .....	18
16 Role of Councillors in enforcement .....	19
17 Delegations .....	19
18 Education and Awareness .....	19
19 Discretion .....	19
APPENDIX A: DEFINITIONS .....	21
APPENDIX B: COMPLIANCE/ENFORCEMENT CHECKLIST .....	22
APPENDIX C: TAKING ENFORCEMENT ACTION .....	23
APPENDIX D – EXAMPLE FLOWCHART ENFORCEMENT PROCESS .....	25
APPENDIX E – EXAMPLES OF KEY OPTIONS AND POSSIBLE COURSES OF ACTION .....	26



## Document Controlled Information

<b>Title of Policy</b>	<b>SMRC Compliance and Enforcement Policy</b>		
<b>Responsible Department</b>	Building Certification Environmental Management	<b>Document Register ID</b>	250.2019.552.1
<b>Policy Owner</b>	Environment and Sustainability	<b>Review Date</b>	16/05/2022
<b>Date of Council Meeting</b>	16/05/2019	<b>Resolution Number</b>	186/19
<b>Document Status</b>		<b>Distribution</b>	Internal

## Related Document Information, Standards & References

The following Acts as administered by Council apply to this policy including related Regulations under these Acts:

<b>Related Legislation</b>	<ul style="list-style-type: none"> <li>• Local Government Act 1993</li> <li>• Environmental Planning and Assessment Act 1979</li> <li>• Food Act 2003</li> <li>• Protection of the Environment Operations Act 1997</li> <li>• Public Health Act 2010</li> <li>• Boarding Houses Act 2012</li> <li>• Swimming Pools Act 1992</li> <li>• Liquor Act 2007</li> <li>• Companion Animals Act 1998</li> <li>• Roads Act 1993</li> <li>• Roads Transport Act 2013</li> <li>• Impounding Act 1993</li> <li>• Fisheries Management Act 1994</li> <li>• Crown Lands Management Act 2016</li> <li>• Biosecurity Act 2015</li> <li>• Biodiversity Conservations Act 2016</li> <li>• Building Professionals Act 2005</li> <li>• Building Professionals Amendment Act 2008</li> <li>• Civil Liability Act 2002</li> <li>• Privacy and Personal Information Protection Act 1998.</li> </ul>
<b>Related Policies (Council &amp; Internal)</b>	<ul style="list-style-type: none"> <li>• Code of Conduct</li> <li>• Complaint Handling Policy</li> <li>• Enterprise Risk Management Policy</li> <li>• NSW Ombudsman – Enforcement Guidelines for Council 2015</li> <li>• NSW Ombudsman – Model Compliance and Enforcement and Model Policy 2015.</li> </ul>

## 1 Introduction

This policy provides information for internal and external stakeholders and interested parties about Council's regulations, compliance and enforcement activities. For example under Section 8 of the Local Government Act 1993, Snowy Monaro Regional Council has an obligation to ensure that the exercise of its regulatory powers is carried out with consistency and without bias.

Council regulatory responsibilities are applicable to actual unlawful activity, as well as a failure to take action (in order to be compliant with certain legal requirements). For simplicity, this policy refers to both an act and/or an omission by an alleged offender as 'unlawful activity'.

This policy distinguishes between a 'report alleging unlawful activity' and a 'complaint'.

For the purposes of this policy, a report alleging unlawful activity is where an individual expresses concern in relation to alleged unlawful activity, or they request service from Council about such matters. Council considers that a response or resolution to a report alleging unlawful activity is explicitly or implicitly expected by the individual, or may be legally required.

A complaint is where an individual expresses dissatisfaction about Council services, staff or the handling of a complaint. Therefore, a complaint may arise where an individual claims that Council staff have failed to take action in relation to a report alleging unlawful activity. A complaint will be recorded separately and responded to in accordance with Council's Complaint Handling Policy.

## 2 Purpose of Policy

The purpose of this policy is to provide structure for consistency and transparency in decision making, and to facilitate a proportional approach to compliance and enforcement. It is also intended to assist council staff to act promptly, effectively and consistently in response to allegations of unlawful activity, whilst ensuring the principals of natural justice are respected.

This policy outlines matters to be considered at the various stages of the enforcement process from the receipt and investigation of reports alleging unlawful activity, through to what enforcement option council will choose and whether to commence criminal or civil proceedings.

In certain circumstances council will have shared enforcement responsibilities with other regulatory authorities. This policy sets out a collaborative and cooperative approach to such matters. Advice and guidance is also provided on the role of Council in building and construction compliance matters where there is a private certifier, and the role of councillors in enforcement.

Responsible Council staff are not limited by this policy in their use of discretion and exercise of official functions. The full circumstances and facts of each case need to be considered and a decision made on each merits and in line with legislative requirements.

## 3 Objectives

The objectives of this policy are to:

- Help achieve the objectives of relevant legislation and management plans;
- Maximise compliance with legislation in line with community expectations;
- Enhance the community's capacity to protect the environment and enhance diversity;
- Ensure Council staff comply with Council's Code of Conduct when investigating an unlawful activity;
- Establish criteria to determine whether enforcement action is warranted and if so, ensure such action is in accordance with the Council Officers delegations in a timely, cost effective manner and proportional to the relative seriousness of the unlawful activities;
- Ensure Council takes a proactive approach to compliance and enforcement actions by taking a regulatory and educator role by providing information to the public about Council's role and policing an enforcement and compliance matters. This will encourage a culture of compliance aimed at self-regulation rather than Council imposed enforced action; and
- Provide guidance on implementing shared enforcement responsibilities and advice and guidance on the

role of the Principal Certifying Authority and Councillors in enforcement.

## 4 Organisational Approach

One of the principal functions of Council is to act as an educator, regulator and an enforcement agency in respect to a large range of legal duties applied by acts of parliament, regulations and orders made under them, including various local policies.

Compliance and enforcement is important:

- To prevent or minimise harm to health, welfare, safety, property or the environment.
- To improve the safety and amenity of residents and visitors to the area.
- For the collective good, the welfare of the community or the public interest.
- To promote social policies.
- To manage risks
- To uphold social order.
- To meet the expectations of the community.
- To make the regulatory community aware of their legal obligations and how to meet these obligations.
- Promote educational opportunities by keeping the community involved in the compliance and enforcement framework through Council's actions and activities.

## 5 Definitions

The key definitions of terms used in the policy are attached in Appendix A of this policy.

## 6 Application of the Policy

This policy applies to regulatory matters within Council's area of responsibilities including but not limited to:

- Development and building control;
- Pollution control including air, noise and water;
- Swimming pool safety;
- Environmental health;
- Public health and safety;
- Biosecurity - Weeds;
- Water and sewer;
- On-site sewerage Management Systems;
- Animal control;
- Food safety;
- Fire safety;
- Tree preservation;
- Unauthorised use of Council managed land;
- Parking and vehicle offences as relevant;
- Waste disposal and littering/illegal dumping; and
- Roads, footpaths, parks and reserves.

## 7 Relevant Legislation

This policy applies in relation to compliance and enforcement action relating to all Acts administered by Council as legislated including but not limited to Acts and associated Regulations, Standards and Policies outlined in the Controlled Document Information section of this Policy.

## 8 Compliance and Enforcement Principles

The following are the principles that underpin Council actions relating to compliance and enforcement:

Principle	Action
Accountable and transparent	<ul style="list-style-type: none"> <li>• acting in the best interests of public health and safety and in the best interests of the environment</li> <li>• ensuring accountability for decisions to take or not take action</li> <li>• acting fairly and impartially and without bias or unlawful discrimination</li> <li>• providing information about compliance and enforcement priorities and reasons for decisions to improve understanding and certainty and promote trust by the regulated community</li> <li>• ensuring meaningful reasons for decisions are given to all relevant parties, particularly when there is a departure from this policy</li> <li>• acting on any complaints or concerns about the conduct of compliance officers in accordance with council's complaints management policy and procedures</li> <li>• advising people and organisations subject to enforcement action of any avenues available to seek an internal or external review of a decision</li> <li>• disclose all evidence relevant to all alleged offences</li> </ul>
Consistent	<ul style="list-style-type: none"> <li>• ensuring all compliance and enforcement action is implemented consistently; and</li> <li>• encouraging reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter</li> </ul>
Proportional	<ul style="list-style-type: none"> <li>• ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach</li> <li>• making cost-effective decisions about enforcement action</li> <li>• taking action to address harm and deter future unlawful activity</li> </ul>
Timely	<ul style="list-style-type: none"> <li>• ensuring responses to reports alleging unlawful activity and decision-making in relation to those is timely</li> </ul>
Procedural Fairness	<ul style="list-style-type: none"> <li>• in most matters provide an opportunity for an alleged offender to provide an explanation, however there will be situations such as parking enforcement and other circumstances considered to represent a serious risk to public safety or the environment or the like which would preclude this opportunity</li> <li>• give due consideration to any written submission made by an alleged offender made whether directly to Council or via another agency (i.e. Office of State Debt Recovery)</li> <li>• make all appropriate enquiries, investigation and searches prior to making an enforcement decision</li> <li>• establish appropriate procedures to avoid an enforcement decision being influenced by an actual, potential or perceived conflict of interest</li> <li>• implement procedures to ensure pertinent information is provided to a complainant and alleged offender, subject to maintaining appropriate confidential provisions</li> <li>• act without bias and within statutory time frames</li> </ul>
Code of Conduct	<ul style="list-style-type: none"> <li>• Council officers carry out their activities and actions in accordance with Council's Code of Conduct ensuring any actual or potential conflict of interest situations are managed in a fair, consistent and impartial manner</li> </ul>

## 9 Responsibility

Council receives information about alleged unlawful activity from members of the public, contact from other government agencies and information gathered by its officers during proactive inspections.

All council staff who deal with reports alleging unlawful activity are responsible for implementing this policy.

Council staff are also responsible for ensuring that any other possible unlawful activity identified as a result of an inspection, proactive enforcement or other activity is brought to the attention of the appropriate business unit of Council.

Council staff are required to:

- Treat all relevant parties with courtesy and respect;
- Communicate with all relevant parties and provide feedback on the progress of an investigation and any reasons for delay without compromising the integrity of the investigation;
- Make full and proper records in relation to the assessment and investigation of reports alleging unlawful activity, including reasons for any decisions;
- Inform all relevant parties of reasons for decisions;
- Provide as much information as possible to all relevant parties about the outcomes of investigations to show that adequate and appropriate action was taken and/or is proposed to be taken in response to a report of alleged unlawful activity; and
- Provide information to all relevant parties about any avenues to seek an internal or external review of a decision.

All reports received by Council regarding unlawful activity will be entered into Council's Record Management System in accordance with Council's Policies and Procedures and actioned in a timely manner. All relevant staff undertaking an investigation into any unlawful activities will be required to undertake this task in line with their level of delegation issued by Council and/or General Manager and related legislation provisions.

Some reports will raise matters involving shared regulatory responsibilities between council and other authorities including the Environment Protection Authority, the NSW Police Force, the Office of Liquor, Gaming and Racing, NSW Fair Trading, NSW Food Authority, Crown Lands and NSW Health.

Council recognises that collaboration and cooperation between authorities to address issues of shared regulatory responsibility is the best approach. To this end, where there are shared legislative responsibilities, Council staff will liaise with relevant authorities to establish:

- Which authority will take the leading role on any joint investigation;
- Which activities each authority will carry out;
- Responsibilities for updating an individual where relevant; and
- Protocols for exchanging confidential information between the relevant authorities.

Council will reasonably endeavour to respond to requests for information or assistance on joint regulatory matters in a timely manner.

## 10 Responding to concerns about unlawful activity

### a) Means of Notification to Council

Council receives information about alleged unauthorised activities or other regulatory requests from member of the public, business operators, government agencies and information gathered by council officers during inspections undertaken.

Council will record all reports alleging unauthorised activities and regulatory breaches and assess all reports entered into Council's Record Management System. Each report will be allocated to the relevant team or officers for investigation and action.

Reports submitted to Council with the exception of cases of an urgent matter should be provided in writing (where possible) to ensure Council can carry out a full and proper investigation of the matter.



Council will respond to every such report unless the person raising the matter has indicated they do not wish to receive a response about council's handling of the matter, or the report is anonymous.

Generally speaking, Council's objectives when dealing with reports alleging unlawful activity are to:

- Maintain the collective good and welfare of the community;
- Prevent or minimise harm to health, welfare, safety, property or the environment;
- Consider the broader public interest having regard to council's priorities and any resource limitations; and
- Consider the report fairly and impartially.

It is important to note not all reports will need to be investigated. A preliminary assessment of all matters will be made to determine the priority for a response, and whether investigation or other action is required.

To assist Council with managing internal and external customer expectations and for the allocating of resources a risk category table has been developed as per Table 1 in this policy. This table outlines guidance on matters that Council will or will not action, the types of matters and anticipated response time commensurate to public health, safety and environmental harm.

An investigation of alleged unlawful activity may take a significant amount of time to complete, particularly where the issues are complex. If council decides to investigate, staff will give the person who reported the alleged unlawful activity regular feedback on the progress of the investigation. This does not mean that the individual can expect to be given details about every aspect of the investigation or information that would compromise the integrity of the investigation.

Decisions about what action should be taken by council are made at the council's discretion. Reports alleging unlawful activity will be resolved to the satisfaction of council, not necessarily the person raising the matter. Council will generally try to resolve matters as quickly and informally as possible so as to avoid the need to take formal action.

Council staff will endeavor to manage the expectations of people who report alleged unlawful activity, and in particular explain that in the absence of sufficient evidence of unlawful activity, council may be unable to take further action. Staff will also explain that council does not have unlimited resources and powers to deal with reports alleging unlawful activity. If council is unable to fully investigate or take action on a matter because it is restricted by any legal or resource limitations this will be explained to the individual.

While there are certain statutory requirements that must be met in relation to notices and orders Council staff will ensure that all explanatory communications are made in plain English and explain any technical language the law requires to be used.

## **b) Confidentiality of people who report allegations of unlawful activity**

People who report allegations of unlawful activity should not expect that their identities will remain confidential from the subject of their report in all circumstances. Council may have to disclose information that identifies them in the following cases:

- The disclosure is necessary to investigate the matter;
- Their identity has already been disclosed to the subject of their report directly or in a publicly available document;
- The individual was consulted following receipt of a Government Information (Public Access) Act 2009 application and did not object to the disclosure;
- The individual consents in writing to their identity being disclosed;
- The disclosure is required to comply with principles of procedural fairness; and
- The matter proceeds to court.

Council will take seriously any concerns an individual may have about their physical safety being endangered as a result of making a report. However, this may limit council's ability to investigate the matter.



**c) What council expects from people who report allegations of unlawful activity**

Council expects that people who report allegations of unlawful activity will cooperate and act in good faith in respect of any investigations conducted by council. This includes:

- Providing a clear description of the problem (and the resolution sought, if relevant);
- Giving all available and relevant information to council, including any new information about the alleged activity that may become known to the person following the making of their report;
- Not giving any information that is intentionally misleading or wrong;
- Cooperating with council's inquiries and giving timely responses to questions and requests for information;
- Treating council's staff with courtesy and respect; and
- Allowing the investigation to be completed without prematurely taking the matter to other agencies unless referred to by council.

If these expectations of the individual are not met, council may need to set limits or conditions on the continuation of the investigation or may need to restrict any further communications with the individual.

**d) What parties can expect from Council staff**

People who report alleged unlawful activity, as well as individuals or businesses that are subject to investigation and any enforcement action can expect that council staff will:

- Treat them with courtesy and respect;
- Advise them of the outcome of the allegation reported, including a full explanation of the reasons why that outcome was considered to be reasonable in the circumstances;
- Clearly explain decisions in plain English;
- Provide information about any relevant internal and external appeal processes that may be available;
- Carefully assess any new information provided by any party after a decision has been made and advise whether further action will be taken; and
- Abide by Council's Code of Conduct

**e) Complaints about Council's enforcement actions**

Any complaints about Council's handling of reports alleging unlawful activity will be recorded separately and handled in accordance with council's complaints management policy and procedures.

Where a person or organisation subject to enforcement action merely disputes council's decision to take enforcement against them, they will be directed to make representations in accordance with any relevant internal and external appeal processes.

Council staff will act on any complaints about the conduct of compliance officers in accordance with Council's complaints management policy and procedures and the code of conduct.

**f) Anonymous reports**

Anonymous reports will be recorded and assessed in accordance with the above requirements.

However, because it is not possible to seek clarification or additional information about a matter, it may be more difficult to evaluate the allegations and therefore these reports are less likely to warrant investigation.

**g) Unlawful activity outside business hours**

Unlawful activity can occur outside business hours. In particular, Council may receive reports about matters such as offensive noise and failure to comply with limitations on hours of operation during nights and weekends.

Due to resource and operational capability restraints on council, investigations into alleged unlawful activity outside business hours will be assessed on the basis of risk of harm to health, welfare, safety, property or the environment or it is otherwise in the public interest to take such action.

## h) Neighbour disputes

Council will at times receive reports from parties involved in neighbour disputes seeking council's involvement. When a dispute between two neighbours is a civil matter, council will often have no authority to resolve the issue in dispute. Some reports will raise several matters, some of which will require council's involvement and some of which will be personal to the parties.

Council staff will thoroughly assess such reports to determine whether there is evidence of any possible unlawful activity requiring action by council. Care will be taken to explain which aspects of a report Council can deal with and which cannot be dealt with and why. Where possible, individuals will be provided with information about how to resolve neighbour disputes including referral information resources such as LawAccess NSW and Community Justice Centres.

It is possible that one party will provide further information about a matter which changes council's decision about whether it will become involved. In such circumstances, Council staff will carefully consider the matter before taking action and document reasons for the new decision. Relevant parties will be advised about the reasons council has changed its position on a matter. Council staff will not change a decision about whether or not Council should be involved purely as a response to the conduct of an individual such as persistent demands or threats.

## i) Prioritisation of Investigation

The responsible officer who is tasked with prioritising the investigation will need to determine if any action is required depending on the level of risk to the public, occupant safety and the environmental harm that may be caused. The following Table 1 provides risk categories, initial response times and example reports that may fall into each category.

**Table 1. Risk Categories**

RISK CATEGORY				
VERY HIGH	HIGH	MEDIUM	LOW	VERY LOW
Permanent, long-term or reoccurring and serious damage to health, property or environment likely or very likely Large scale impacts Very serious offences Very high priority issue for council and community	Moderate, major or severe consequences likely or very likely Medium-large scale impacts Serious offences Very high priority issue for council and community	Moderate consequences are likely, serious impacts are very likely Small-medium scale impacts Moderate offence severity Very high priority issue for council and community	Consequences are minor or moderate and are unlikely or very unlikely to occur Small scale, isolated impacts Low level offence severity Very high priority issue for council and community	Provision of information/advice provided is insufficient/lack basis to take action. Legislation relating to report is administered by another government department.
INDICATIVE TIMEFRAME OF INITIAL RESPONSE				
Immediate and urgent response	Response within 48 hours	Response within 7 working days	Response within 14 working days	No action
EXAMPLE REPORT TYPES/ISSUES				
Significant pollution incidents Large scale clearing of vegetation containing threatened species Abandoned vehicles in an unsafe location Collapsed or unsafe building works in public areas Dog attacks Straying stock on major highways	Roaming dogs Unsafe buildings and building works Rubbish dumped in an unsafe location/hazardous Pollution incidents Breaches of tree preservation order Dangerous/restricted dog complaints Straying stock on major roads Sale or movement of prohibited matter – weeds.	Abandoned vehicles Storm water or drainage issues Dumped rubbish (not hazardous) Breach of consent conditions (eg waste management) Poor sediment control on building sites Noise complaints affecting several people	Minor consent breaches (eg no signage) Unauthorised signage Unauthorised land use Overgrown Aesthetic issues Neighbour disputes Nuisance complaints (eg domestic noise, barking dogs)	Building work carried out without approval now made lawful by Exempt and Complying Development Code.

Note: Food related incidences and complaint management to be responded to in accordance Council's instrument of appointment as a Category B agency of the Food Regulation Partnership agreement.

## 11 Investigating alleged unlawful activities

Not all reports alleging unlawful activities will warrant investigation and a preliminary assessment will be undertaken to determine if an investigation is required. Council will prioritise matters on the level of risk to public safety, human health and environment.

If there is insufficient information in the report to undertake a preliminary assessment, further information may need to be sought from the person who made the report or an inspection undertaken. Staff may also need to consult Council records and engage with other internal sections of Council to determine the relevant history and context of the matter.

### Circumstances where no action will be taken:

Council will take no further action if, following a preliminary assessment, it is identified that:

- Council does not have jurisdiction to investigate or is not the appropriate authority to take action on the issues raised. Where there is another appropriate authority or course of action, council may bring the matter to the attention of the authority or provide information and contact details to the individual. Some examples being SafeWork NSW for workplace safety matters, the NSW Environment Protection Authority for possible environmental offences and NSW Community Justice Centre for personal disputes;
- The report relates substantially to a matter previously determined by Council and no new or compelling information is presented which would cause Council to change its earlier decision. In this case, staff will acknowledge the report and advise that no further action will be taken as no new information had been provided (other than where the person has previously been advised they would receive no further response);
- The allegations relate to a lawful activity (eg where there is an existing approval or the activity is permissible without council approval or consent being required);
- The report is not supported with evidence or appears to have no substance; and
- The relevant manager, director or the general manager determines that investigation or other action would have an unreasonable impact on resources and/or is unlikely to achieve an outcome sufficient to justify the expenditure of resources.

### Relevant factors guiding decisions as to whether to take action:

When deciding whether to investigate, Council will consider a range of factors including whether:

- The activity is having a significant detrimental effect on the environment or it constitutes a risk to public safety;
- The report is premature as it relates to some unfinished aspect of work that is still in progress;
- The activity or work is permissible with or without permission;
- All conditions of consent are being complied with;
- Much time has elapsed since the events the subject of the report took place;
- Another body is a more appropriate agency to investigate and deal with the matter;
- It appears there is a pattern of conduct or evidence of a possible wide spread problem;
- The person or organisation reported has been the subject of previous reports;
- The report raises matters of special significance in terms of the council's existing priorities;
- There are significant resource implications in relation to an investigation and any subsequent enforcement action; and
- It is in the public interest to investigate the report.

The above are factors for council to consider and weigh in making a determination. Council staff are not limited in their use of discretion by these considerations and may decide to investigate based on these and other factors.

The objective of the processes council staff use when investigating incidents of alleged unlawful activity is to:

- Determine the cause of the incident;
- Determine if there has been a contravention of law, policy or standards;
- Gather evidence to the required standard to support any required enforcement action; and
- Determine any necessary action to mitigate the possibility of reoccurrence of similar incidents.

Any decision not to investigate an allegation of unlawful activity will be recorded and the reasons for that decision clearly stated.

## 12 Deciding whether or not to take enforcement action

When deciding whether to take enforcement action in relation to a confirmed case of unlawful activity, Council will consider the full circumstances and facts of the matter and the public interest. The following common considerations will assist council staff in determining the most appropriate response in the public interest:

### Considerations about the alleged offence and impact:

- The nature, extent and severity of the unlawful activity, including whether the activity is continuing;
- The harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity;
- The seriousness of the breach, including whether the breach is merely technical, inconsequential or minor in nature; and
- The time period that has lapsed since the date of the unlawful activity.

### Considerations about the alleged offender:

- Any prior warnings, instructions, advice that was issued to the person or organisation reported or previous enforcement action taken against them;
- Whether the offence was committed with intent;
- Whether the person or organisation reported has been proactive in the resolution of the matter and assisted with any council requirements and instructions;
- Any mitigating or aggravating circumstances demonstrated by the alleged offender; and
- Any particular circumstances of hardship affecting the person or organisation reported.

### Considerations about the impact of any enforcement action:

- The need to deter any future unlawful activity;
- Whether an educative approach would be more appropriate than a coercive approach in resolving the matter;
- The prospect of success if the proposed enforcement action was challenged in court;
- The costs and benefits of taking formal enforcement action as opposed to taking informal or no action;
- What action would be proportionate and reasonable in response to the unlawful activity; and
- Whether council is prevented from taking action based on earlier advice given, ie whether an estoppel situation has been created.

### Considerations about the potential for remedy:

- Whether the breach can be easily remedied;
- Whether it is likely consent would have been given for the activity if it had been sought; and
- Whether there is a draft planning instrument on exhibition that would make the unauthorised use legal.

### Legal or technical issues

Where legal and/or technical issues are in question, council staff will consider whether legal advice or professional advice from duly qualified staff or other experts should be obtained and considered. Council may also require a person subject to possible enforcement action to obtain professional advice in relation to issues of concern to Council for assessment as to whether further action is required.

### Requirements of Council staff considering enforcement action

Prior to taking enforcement action, council staff will take into account the above considerations as well as the evidence gathered during their investigation. Council staff must act impartially, be mindful of their obligations under Council's Code of Conduct and not act as a decision-maker in relation to any matter in which they have a personal interest. Enforcement action will not be taken purely as a response to the conduct of an individual such as persistent demands or threats.

Council staff are required to maintain records about critical thinking and decision-making processes in relation to reports alleging unlawful activity and any enforcement action, as well as records of interactions with relevant parties. Council staff will at all times adhere to council's internal approval processes prior to the commencement of any enforcement action.

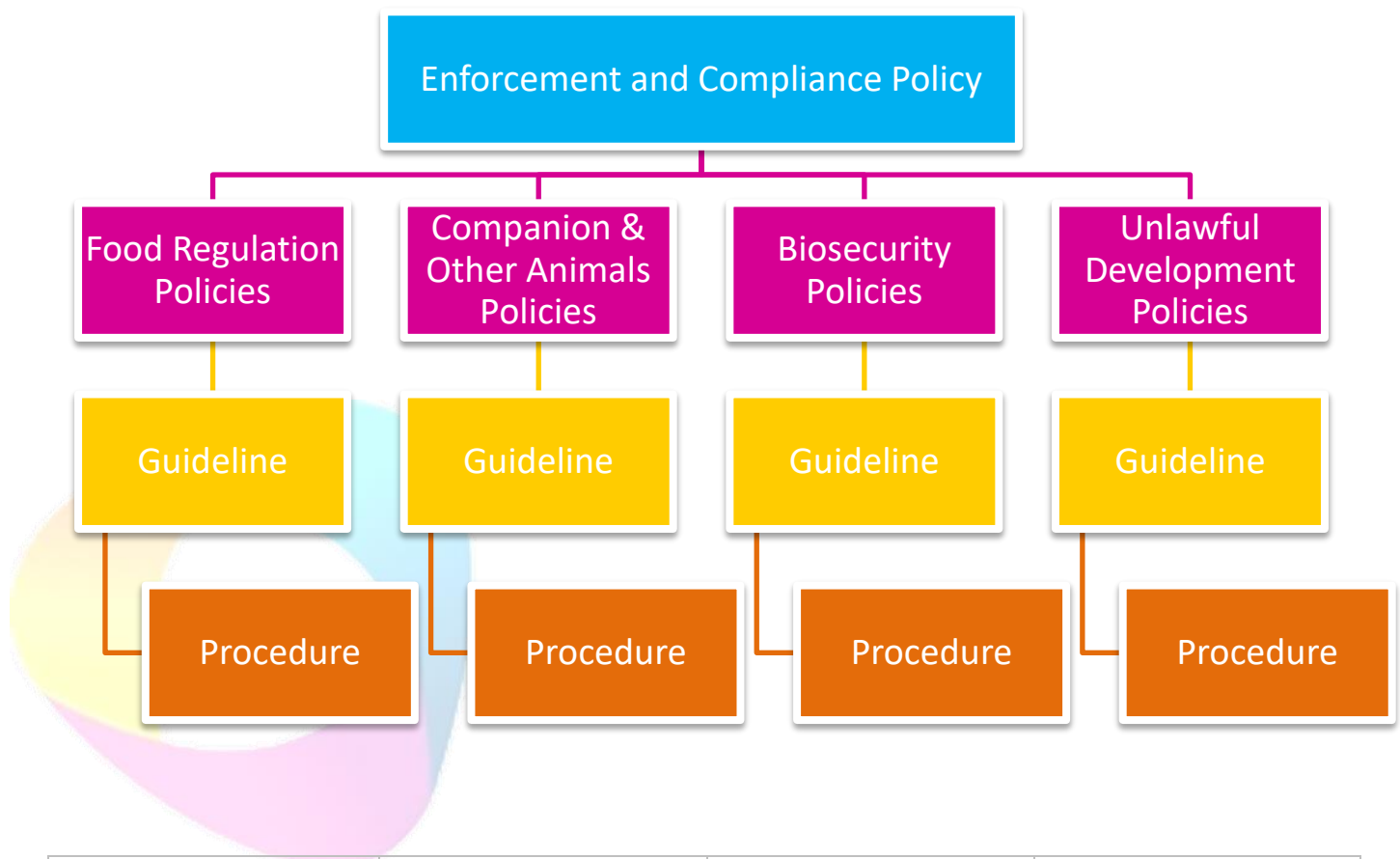
Council staff will take steps to ensure that any enforcement action is taken against the correct person or organisation. Where there are multiple possible parties to an alleged unlawful activity, it will generally not be appropriate to take enforcement action against every person who may be liable for the alleged unlawful activity. In such circumstances, council staff will be guided by legal advice in determining the appropriate persons to pursue.

### Policy / Guidelines Hierarchy

Council may adopt policy and guidelines that are specific for the type of regulatory actions and the circumstances in which enforcement action will or will not be taken.

This policy is based on the Model Policy and Guidelines developed by the NSW Ombudsman. This policy has been created as an overall guiding document for all compliance and enforcement matters and accompanied with subsequent policies and procedures specific to each of Council's services forms a suite of documents for all regulatory matters used by Council.

The relationship of this document in this regard is as follows:



## 13 Options for dealing with confirmed cases of unlawful activities

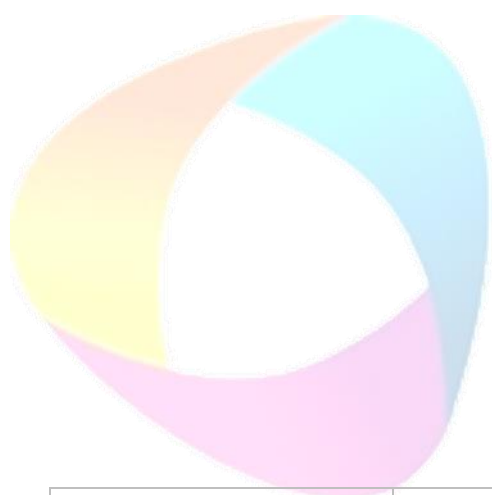
Council will try to use the most efficient and informal option to deal with unlawful activity wherever possible unless there is little likelihood of compliance with such options. Council staff will use discretion to determine the most appropriate response to confirmed cases of unlawful activity and may take more than one approach.

Any enforcement action taken by council will depend on the full circumstances and facts of each case, with any decision being made on the merits.

At all times, Council's key concerns are:

- To prevent or minimise harm to health, welfare, safety, property or the environment; and
- To influence behaviour change for the common good and on behalf of the community.

There are a range of enforcement actions available to Council as shown in Figure 1. Enforcement options are not necessarily mutually exclusive, for example, in some circumstances it may be appropriate to simultaneously issue a Notice/Order and a Penalty Notice. Each option considered by Council will reflect an escalation in response that is proportionate to the level of risk, the seriousness of the compliance breach or the need for a deterrent. It is also important to note that the options of enforcement action provided are a guide only and each case must be assessed on the particular facts of the matter being investigated and actioned.



**Figure 1: Enforcement actions available to Council****Remedial or Rectification Action****Court Order**

- An order from the court requiring certain things to be done to achieve compliance (civil proceedings)

**Order**

- A Notice / Order from Council requiring certain things to be done to achieve compliance

**Letter Requesting Undertaking**

- A letter requesting an undertaking that corrective action will be taken within a certain timeframe

**Negotiation**

- With alleged offender and written confirmation of commitments made

**Caution / Warning or Advisory Letter**

- To encourage future compliance and caution that further action may be taken

**Record the Breach**

- No further action - for very minor breaches only

**Penalty Action****Criminal Prosecution**

- In the Land and Environment Court or the Local Court

**Penalty Notice**

Note that it may be appropriate to use more than one enforcement option in some cases. If initial enforcement action does not achieve a satisfactory outcome, it may be necessary to proceed to a higher level of enforcement response. For example, if a warning letter or notice of intention does not achieve the desired response, it may be appropriate to give an Order; or if an Order is not complied with, it may be appropriate to bring enforcement or prosecution proceedings.

Level of Risk	Enforcement Options
Very Low	<ul style="list-style-type: none"> <li>• take no action on the basis of a lack of evidence or some other appropriate reason</li> <li>• provision of information/advice on how to be compliant</li> </ul>
Low	<ul style="list-style-type: none"> <li>• negotiating with the person to obtain voluntary undertakings or an agreement to address the issues of concern</li> <li>• issuing a warning or a formal caution</li> </ul>
Medium	<ul style="list-style-type: none"> <li>• issuing a letter requiring work to be done or activity to cease in lieu of more formal action</li> <li>• issuing a notice of intention to serve an order or notice under relevant legislation, and then serving an order or notice if appropriate</li> </ul>
High	<ul style="list-style-type: none"> <li>• issuing a penalty notice</li> <li>• carrying out the works specified in an order at the cost of the person served with the order</li> </ul>
Very High	<ul style="list-style-type: none"> <li>• seeking an injunction through the courts to prevent future or continuing unlawful activity</li> <li>• commence legal proceedings for an offence against the relevant Act or Regulation</li> </ul>



**Following up enforcement action**

All enforcement action will be reviewed and monitored to ensure compliance with any undertakings given by the subject of enforcement action or advice, directions or orders issued by Council. Reports alleging continuing unlawful activity will be assessed and further action taken if necessary. If the unlawful activity has ceased or the work has been rectified, the matter will be resubmitted for follow up action to ensure compliance outcomes are met. Should initial enforcement action be found to have been ineffective, Council staff will consider other enforcement options.

**14 Taking legal action**

Council and its delegated staff will be guided by legal advice in deciding whether to commence criminal or civil proceedings and will consider the following:

- Whether there is sufficient evidence to establish a case to the required standard of proof;
- Whether there is a reasonable prospect of success before a court; and
- Whether the public interest warrants legal action being pursued.

**Whether there is sufficient evidence to establish a case to the required standard of proof**

Council considers the decision to take legal action a serious matter, and as such will only initiate and continue proceedings once it has been established that there is admissible, substantial and reliable evidence to the required standard of proof.

The basic requirement of any **criminal** prosecution is that the available evidence establishes a prima facie case. The prosecutor is required to prove the elements of the offence beyond reasonable doubt.

In **civil** enforcement proceedings, council will require sufficient evidence to satisfy the court that an actual or threatened breach has occurred on the balance of probabilities.

**Whether there is a reasonable prospect of success before a court**

Given the expense of legal action council will not take legal action unless there is a reasonable prospect of success before a court. In making this assessment, council staff will consider the availability, competence and credibility of witnesses, the admissibility of the evidence, all possible defences, and any other factors which could affect the likelihood of a successful outcome.

**Whether upholding the public interest warrants legal action**

The principal consideration in deciding whether to commence legal proceedings is whether to do so is in the public interest. In making this determination, the same factors to be considered when taking enforcement action apply.

The following considerations relate more specifically to the decision to commence legal proceedings and will assist council and its delegated staff in making this determination:

- The availability of any alternatives to legal action;
- Whether an urgent resolution is required (court proceedings may take some time);
- The possible length and expense of court proceedings;
- Any possible counter-productive outcomes of prosecution;
- What the effective sentencing options are available to the court in the event of conviction; and
- Whether the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive.

**Time within which to commence proceedings**

Council staff must be aware of legislative time limits in which enforcement proceedings must be commenced. Sometimes legal action will be statute barred despite good evidence that unlawful activity has occurred.

## Legislative Provisions and Requirements

Specific provisions are contained within each piece of legislation relating to the appointment of Authorised Officers, Powers of Entry, Inspections & Investigations, Search Warrants, Issuing of Notices & Orders, Issuing Penalty Infringement Notices, Legal Proceedings, Appeals, Court Orders, Penalties, Compensation and other associated activities.

Specific provisions are also contained in most legislation to restrict Authorised Officers' access to residential premises, unless permission has been obtained accordingly or the inspection relates to a current approval or Council has obtained a Search Warrant.

Although Councils are provided with a range of Acts and Regulations, to regulate and enforce, the provisions are, in most cases, very specific and action may only be taken if certain matters or circumstances are evident and can be demonstrated by the Authorised Council Officer.

The Acts and Regulations do not provide Council with unfettered powers to take action in matters which are not specifically provided for in the legislation (e.g. actions or behaviour of parties and neighbour nuisances).

Council officers are required to be duly authorised and carry out their regulatory functions fully in accordance with these provisions.

## Exempt and Complying Development

The scope and application of exempt development and complying development has been significantly expanded in the past few years, under various statutory planning instruments, including the NSW Codes SEPP.

Exempt development relates to specified minor development, building work and renovations which do not require any approval from Council or an Accredited Certifier, subject to compliance with specified limitations and requirements.

Exempt development does not require any notification to Council or any approval from Council. The owner or builder is responsible to ensure compliance with the relevant requirements in the planning instrument for exempt development.

If the relevant requirements are not satisfied, an authorised Council officer can investigate the matter and take any necessary appropriate regulatory action, having regard to the considerations detailed in this policy.

Regulatory action may however not be warranted if the works are generally in accordance with the relevant limitations and requirements outlined in the planning instrument and Building Code of Australia.

Council acknowledges that home-owners and business proprietors have the right to undertake exempt development in accordance with the relevant requirements without undue interference by Council, and reasonable cause or evidence should be provided to Council to warrant investigation of work or development which may fall within this category of development.

Complying development relates to a wide range of development types (including new dwellings, alterations and additions to dwellings, granny flats, outbuildings, swimming pools, use of premises, alterations and additions to commercial and industrial development and other development). Complying development may be approved by a Council or private-sector Accredited Certifier and if the pre-determined prescriptive criteria is satisfied, it must be approved.

It is the role and responsibility of the appointed Certifying Authority (Council or private-sector Accredited Certifier) to ensure that complying development meets all of the prescriptive requirements before issuing a Complying Development Certificate. The certifier is also required to undertake relevant inspections and check compliance with the Complying Development Certificate including conditions of the Complying Development Certificate, before issuing an Occupation Certificate.

Councils do not have any authority to review or change the determination of a Complying Development Certificate and the validity of a Complying Development Certificate may only be challenged in the Land & Environment Court.

It is the role and responsibility of the Building Professionals Board (BPB) to investigate the conduct and complaints relating to Council and private-sector Accredited Certifiers. Under the Building Professionals Act 2005 the BPB has the ability to take appropriate regulatory action against a Certifier if found guilty of an offence or breach of the BPB Code of Conduct or Accreditation Scheme, including the issue of fines, education training and cancellation of accreditation.

Any queries and concerns relating to complying development should be referred directly to the relevant Certifier and the Certifier has an obligation to investigate the matter and to take appropriate action.

If the development is not being carried out in accordance with the Complying Development Certificate, the Certifier may issue a notice of intention to serve an order. A copy of which is forwarded to Council for assessment and any necessary regulatory action.

### **Parking Offences**

Whilst the enforcement of parking offences can, at times, cause concerns to drivers, residents and businesses, it is important to consider the rationale and importance of the road rules and parking restrictions which apply.

The Australian Road Rules contain the relevant rules and restrictions relating to traffic, parking and the safe use of our roads. The Rules are adopted throughout NSW under the Road Transport Act 2013 and associated Regulations.

Council's authorised officers will implement regulatory enforcement of parking offences in accordance with the relevant legislation, Road Rules, and Council's policies and procedures in a professional, appropriate, consistent and accountable manner.

### **Penalty Notices**

A number of the Acts and Regulations which Council administer provide the ability for Council officers to issue Penalty Notices for certain offences. The Penalty Notice system was introduced to provide an effective and efficient means to deal with those offences which are generally not serious enough to warrant instituting Court proceedings.

A Penalty Notice may be served if it is evident that an offence has been committed, but payment of the fine does not result in the recording of a criminal conviction. Non-payment of the fine is not dealt with by way of criminal sanctions, but is recoverable as a civil debt. However, a person may elect to have the matter heard in proceedings in the criminal jurisdiction of the Local Court.

Penalty notices may be issued by designated authorised officers under the relevant legislation. In many instances, authorised officers are not only Council officers, but include officers from other agencies such as the Police, Roads & Maritime Services, Environment Protection Authority and Building Professionals Board.

Penalty notices are generally most appropriate where:

- The breach is minor;
- The facts are apparently indisputable;
- The penalty is proportionate and appropriate for the particular offence or breach;
- The breach is a one-off situation that can be remedied easily; and
- The issue of a penalty notice is likely to be a practical and viable deterrent.

It may not be appropriate to issue penalty notices where:

- The breach is on-going;
- The penalty prescribed in the penalty notice would be clearly inadequate for the severity of the offence;
- The extent of impact or the harm to the environment or locality cannot be assessed immediately;
- The evidence may be insufficient or controversial and the matter may be unlikely to succeed in the event of a Court hearing;
- A significant period of time has elapsed since the alleged breach;
- Negotiations to find a resolution to the problem which is the subject of the breach are being conducted;
- A direction has been issued to perform specified work (i.e. via a Notice of Intention to serve an Order) within a timeframe and the time limit for such performance has not expired; and
- Multiple breaches have occurred.

Penalty Notices are generally most suitable for immediate and straight-forward offences or breaches, to uphold the objectives of the relevant regulatory requirements and to act as a deterrent against further similar breaches, including:

- Public place offences;
- Roads, traffic and parking offences;
- Waste and littering offences;
- Failure to comply with public notices;
- Certain animal control offences;
- Low-impact pollution incidents;
- Minor fire safety offences;
- Low-impact development control offences; and
- Essential Services certification offences

### Penalty Notice Review

To ensure that Council manages the penalty notice process and enforcement action in a consistent, transparent, accountable and unbiased manner, any requests or representations seeking reconsideration or waiving of a penalty notice should be made directly to Revenue NSW.

The Revenue NSW have in place specific guidelines (SDRO Review Guidelines), to assist and guide them when considering requests for the review of a penalty notice, in a consistent and transparent manner. As recommended by the NSW Ombudsman.

When reviewing a penalty notice, Revenue NSW may seek further information or refer the representations regarding the issue of the penalty notice to the Council for comment and advice.

Where representations seeking reconsideration or waiving of a penalty notice, are made to Council via the Revenue NSW recovery or directly, the General Manager's delegate will have due regard to upholding the integrity of the Council's regulatory and enforcement functions.

Council will generally not support the waiving of a penalty infringement notice unless:

- It is evident that an error has been made in the issuing of the penalty notice; or
- Documentary evidence is provided from a registered Health Practitioner that the offence occurred due to the result of a medical emergency or incident; or
- The extent of evidence or circumstances may affect the successful prosecution of the offence the subject of the penalty notice in the event of a Court hearing or appeal; or
- It is evident that Council has acted unreasonably or inappropriately in the issuing of the penalty notice; or
- After consideration of legal advice or the exceptional circumstances of the case and it considered appropriate to do so.

Where representations are made to the Revenue NSW seeking reconsideration or waiving of a penalty notice, the decision to waive a penalty notice is a matter for the Revenue NSW alone. In some cases, Revenue NSW may consult with Council prior to making a determination.

### Penalty Notice – Caution Guidelines

In certain circumstances it may be appropriate that Council instead of issuing a penalty notice gives an official Caution to an offender. Council may give an official Caution for minor or inconsequential reaches or in other exceptional circumstances (e.g. in circumstances where there has been no environmental impact or harm and there are no safety concerns or material impact upon the community).

An official Caution should be given by Council's authorised officer in accordance with the Caution Guidelines approved by the NSW Attorney General.

It is generally not appropriate to issue an official caution for parking offences to ensure that the objectives and requirements of the Australian Road Rules are maintained and upheld in a consistent, accountable and transparent manner, except in exceptional circumstances (e.g. medical or health reasons) or in relation to inconsequential or trivial matters.

## 15 Certification of Development

Council retains its regulatory role and enforcement powers where a private certifier has been appointed the Principal Certifying Authority (PCA). However, if a private certifier is appointed the PCA, it is not council's responsibility to ensure building and construction compliance.

The 'certification' of development in NSW is carried out by building certifiers known as Accredited Certifiers and Principal Certifying Authorities. Accredited Certifiers and Principal Certifying Authorities can be private certifiers or Council certifiers. The NSW Building Professionals Board is the statutory authority that administers building certifiers under the Building Professionals Act 2005.

Construction Certificates, Compliance Certificates, Subdivision Certificates and Occupation Certificate (collectively known as Part 4A Certificates) and Complying Development Certificates are determined and issued by an Accredited Certifier or a Principal Certifying Authority appointed for a particular development.

Part 4A Certificates, including Construction Certificates and Complying Development Certificates (whether issued by a council certifier or a private certifier) are statutory Certificates. Council has no power to revoke or amend a Part 4A Certificate or a Complying Development Certificate. These types of certificates may only be declared "invalid" by the Land and Environment Court of NSW as a result of judicial review proceedings.

The NSW Building Professionals Board (BPB) is the responsible authority to investigate complaints about all Certifiers and the BPB also undertake proactive audits of Certifiers.

Accredited Certifiers must comply with the relevant requirements of the Environmental Planning and Assessment Act 1979 and Building Professionals Act 2005. The Building Professionals Board (BPB) can take appropriate disciplinary action against Certifiers, if found to be in breach of relevant legislative provisions or the terms and conditions of their accreditation, including the BPB Code of Conduct.

Reports regarding alleged non-compliance should be referred directly to the appointed Certifier for investigation and appropriate action.

In the case of non-compliance and depending on the nature and extent of the non-compliance, the Certifier would generally inform the owner or builder of the non-compliance and the action to be taken to address the matter. If the matter is not resolved within a given period or if the non-compliance is of substantial or sensitive nature, the Certifier may directly issue a Notice of Intention to serve an Order upon the owner or builder.

A Notice of Intention to serve an Order outlines the particular alleged breach or non-compliance and it advises the person (i.e. owner or builder) to make representations to Council, for consideration prior to Council determining the appropriate course of action in the matter.

The representations may provide reasons for the alleged breach or non-compliance and they may seek to demonstrate why Council should not take regulatory action in the matter (e.g. issue an Order and/or issue a penalty notice or commence legal proceedings for the offence). Council must consider representations made within the specified period, prior to determining whether or not to serve an Order (e.g. to remove unauthorised works or comply with a development consent requirement).

In most cases, reports regarding alleged noncompliance should be referred directly to the Certifier for appropriate action. Except in the case of an emergency or urgent matter, in which case, the report may also be provided to Council.

Generally speaking, matters relating to the construction of the development and compliance with the approved plans and conditions of consent should be referred directly to the Certifier for appropriate action. Matters relating to 'off-site' environmental or amenity impacts (e.g. pollution incident, working hours breach or public safety matter) may be referred directly to Council for investigation and prompt regulatory action may be able to be taken by a Council Ranger or Compliance Officer to address the matter.

The Environmental Planning and Assessment Act 1979 and Regulation provides Certifiers with a degree of discretion in specified matters (e.g. to determine if a particular matter is not inconsistent with the development consent or condition of consent).



Council does not carry out any assessment of construction certificates, complying development certificates or other certificates issued by an accredited certifier and any enquiries or concerns regarding the certificates and development encompassed in the certificates must be referred directly to the certifier for assessment and response. All accredited certifiers are subject to the BPB Code of Conduct and a complaint may be lodged with the BPB if the certifier is in breach of the Code or other regulatory provision.

Council and private certifiers will work together to resolve any issues when they arise to achieve compliance with the development consent or complying development certificate. Council staff will take steps to ensure individuals are clear about which agency performs which role.

## 16 Role of Councillors in enforcement

Decision making relating to the investigation of reports alleging unlawful activity and taking enforcement action is the responsibility of appropriately authorised Council staff or the council itself.

Individual councillors do not have the right to direct Council staff in their day-to-day activities. Councillors can help individuals who raise concerns with them by satisfying themselves that their Council's policies are being carried out correctly, however they cannot ignore or alter a policy in order to satisfy the demands of special groups.

The General Manager may present certain decisions to be ratified by the elected council if this is necessary or desirable, and the councillors may also have the right to call for a report about particular issues to a Council meeting.

## 17 Delegations

Council staff delegations for taking action under this policy are included in Council's Delegation Register.

## 18 Education and Awareness

Council aims to take a proactive approach in preventing unauthorised development and other activities or breaches by providing information to the public and applicants about planning and building requirements, conditions and regulatory requirements to be satisfied. Council will consistently review education and awareness mechanisms to order to pre-empt potential unlawful activities within it's area.

Council provides education programs and information to raise awareness and educate the community about compliance, enforcement, regulatory requirements and land owners/occupiers responsibilities to meet community expectations.

Council's website is a key tool that will be used to inform the community of information relating to Council services and related legislation including environmental health, waste, building and development, companion animals, water and wastewater and footpath licencing to name a few.

Council recognises that prevention, advice, regulation and mediation are all mechanisms that can be used for a reasonable solution for parties without the need to take enforcement action.

## 19 Discretion

The taking of enforcement action by Council is a discretionary power. This means that, whilst Council is provided with the authority to enforce a law, this does not mean that there is legal obligation to do so, or at the insistence of a third party.

Council's decision whether or not to take regulatory action is determined, essentially, by the following criteria:

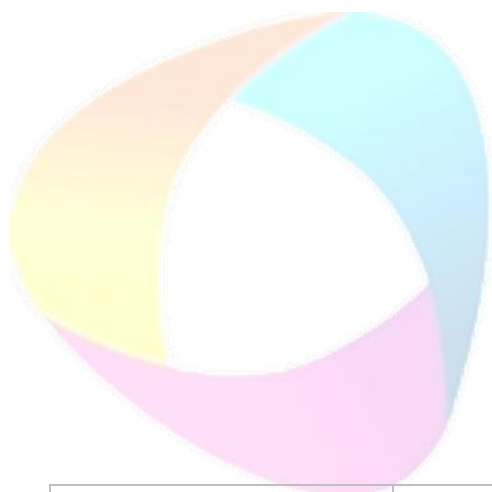
- There is sufficient evidence to prove that the offence has occurred and the person/s responsible for the offence;
- It must be evident from the facts and the circumstances of the case, that the taking of regulatory action would be appropriate (having regard to the matters for consideration as outlined in this policy); and
- The action is in the public interest.

When exercising discretion, Council is obliged to:

- Use discretionary powers in good faith, including for the intended and authorised purpose;
- Base their decisions on facts and findings supported by evidence, only relevant considerations and not irrelevant ones;
- Give proper, genuine and realistic consideration to the merits of the case, including weighing-up the importance of relevant factors;
- Exercise discretion independently and not under the dictation of a third party or body;
- Make decisions in accordance with relevant rules or policies but not inflexibly; and
- Observe the basic rules of procedural fairness.

The decision to pursue regulatory action will also be made impartially and will not be influenced by any inappropriate reference to race, religion, sex, national origin or political association, nor will it be influenced by matters that are of a civil nature or a private dispute.

Council's regulatory powers will not be used to address matters that have been the subject of assessment under a statutory approval process.

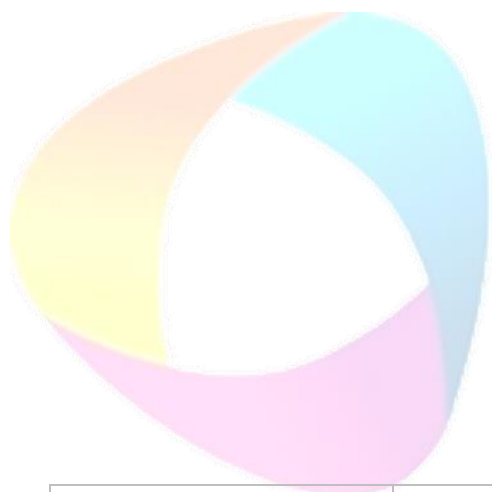




## APPENDIX A: DEFINITIONS

The following are the definitions of key terms in this policy:

Term	Meaning
Complaint	<p>A complaint is an expression of dissatisfaction made to or about Council, its services and/or handling, where a response or resolution is explicitly or implicitly or legally required. A complaint can be about the following:</p> <ul style="list-style-type: none"> <li>• <b>Policies, procedures and processes</b> – this usually relates to dissatisfaction with service charges, policy decisions or an agreed practice covered by a policy or procedure;</li> <li>• <b>Employees</b> – usually relates to dissatisfaction with the behavior of a Council employee;</li> <li>• <b>Quality of service</b> – generally related to the quality of the finished job such as service not up to an expected standard, or the work or service taking longer than previously specified.</li> </ul>
Enforcement	Actions taken in response to serious or deliberate contraventions of laws
Regulation	Using a variety of tools and strategies to influence and change behaviour to achieve the objectives of an Act, Regulation, or other statutory instrument administered by council.
Compliance	The fact of obeying a particular law or rule, or of acting according to an agreement.
Report alleging unlawful activity	An expression of concern or a request for service in relation to alleged unlawful activity, where a response or resolution is explicitly or implicitly expected or legally required.
Unlawful activity	<p>Any activity or work that has been or is being carried out contrary to the below and/or failure to take required action in order to be compliant with:</p> <ul style="list-style-type: none"> <li>• terms or conditions of a development consent, approval, permit or license</li> <li>• an environmental planning instrument that regulates the activities or work that can be carried out on particular land</li> <li>• a legislative provision regulating a particular activity or work</li> <li>• a required development consent, approval, permission or license.</li> </ul>
Estoppel	<p>Is a legal rule which prevents a person from later denying conduct or words which have been relied, and acted, upon by another person to their detriment. The issue is whether the conduct of the Council could lead to an expectation that it will not take action in a particular circumstance or that it is not concerned about the conduct in question. For example:</p> <ul style="list-style-type: none"> <li>• Has the owner/occupier previously been notified that the Council would not be taking action?</li> <li>• Has the matter previously been brought to the attention of the Council yet no action taken?</li> <li>• Has the Council contributed to the owner/occupier acting upon a reasonable expectation that no action would be taken?</li> </ul>



## APPENDIX B: COMPLIANCE/ENFORCEMENT CHECKLIST

When deciding whether to take enforcement action, the Council will consider the circumstances of the case. These include:

	YES	NO
1. Has the Council created estoppel* situation?	<input type="checkbox"/>	<input type="checkbox"/>
2. Has a preliminary risk category assessment been undertaken and documented?	<input type="checkbox"/>	<input type="checkbox"/>
3. Is the breach a technical breach only?	<input type="checkbox"/>	<input type="checkbox"/>
4. Has the time of the unlawful activity been determined?	<input type="checkbox"/>	<input type="checkbox"/>
5. How has the unlawful activity affected the natural or built environment and the health, safety and amenity of the area?	<input type="checkbox"/>	<input type="checkbox"/>
6. Would consent have been given if it had been sought?	<input type="checkbox"/>	<input type="checkbox"/>
7. Can the breach be easily remedied?	<input type="checkbox"/>	<input type="checkbox"/>
8. Does the person in breach show contrition?	<input type="checkbox"/>	<input type="checkbox"/>
9. Are there any particular circumstances of hardship affecting the complainant or the person subject of the complaint?	<input type="checkbox"/>	<input type="checkbox"/>
10. Has the person subject of the complaint received a previous warning or other non-coercive approach or has formal legal action been taken?	<input type="checkbox"/>	<input type="checkbox"/>
11. Would an educative approach be more appropriate than a coercive approach?	<input type="checkbox"/>	<input type="checkbox"/>
12. What are the costs and benefits of taking formal enforcement action as opposed to taking informal or no action?	<input type="checkbox"/>	<input type="checkbox"/>
13. Is there sufficient evidence to establish a prima facie case? Is there some doubt over the evidence of offence/s?	<input type="checkbox"/>	<input type="checkbox"/>
14. What are the chances of success if the proposed enforcement action was challenged in court?	<input type="checkbox"/>	<input type="checkbox"/>
15. Is there a draft planning instrument on exhibition that would make the unauthorized use legal?	<input type="checkbox"/>	<input type="checkbox"/>
16. Have the principles and objectives of this Policy been considered and addressed?	<input type="checkbox"/>	<input type="checkbox"/>
17. Is taking action in the public interest including there being a reasonable prospect of success?	<input type="checkbox"/>	<input type="checkbox"/>
18. Has the alleged offender been given an opportunity, if appropriate, to provide information as to why enforcement action should not be instituted?	<input type="checkbox"/>	<input type="checkbox"/>
19. Has the alleged offender been advised, if appropriate, that no response to a show cause letter will result in the commencement of enforcement action?	<input type="checkbox"/>	<input type="checkbox"/>
20. What is the likely length and net expense of the legal action?	<input type="checkbox"/>	<input type="checkbox"/>
21. Is the proposed enforcement action within powers delegated by Council or the General Manager or will a formal Council resolution be required?	<input type="checkbox"/>	<input type="checkbox"/>

The Council will ensure that the principals of natural justice are adhered to prior to a decision being made. The following principals will be addressed and implemented by the Council:

- Whoever is the subject of concern must know all the allegations in relation to their action;
- All parties to the complaint must have the right to be heard;
- All relevant submissions and evidence must be considered;
- Matters which are not relevant must not be taken into account;
- The person who makes the complaint must not determine the matter; and
- The decisions-maker must be fair and just.

## APPENDIX C: TAKING ENFORCEMENT ACTION

When deciding whether to take enforcement action in relation to a confirmed case of unlawful activity, council will consider all the circumstances of the matter. The section below is intended to assist staff by providing further explanation of matters to be taken into consideration when deciding whether to take enforcement action.

### Considerations about the alleged offence and impact

- the nature, extent and severity of the unlawful activity including whether the activity continued
- the harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity
- the seriousness of the breach, including whether the breach is merely technical, inconsequential or minor in nature
- the costs and benefits of taking formal enforcement action as opposed to taking informal or no action
- the time period that has lapsed since the date of the unlawful activity.

Consideration should be given to the nature, extent and severity of any actual or potential impact of the unlawful activity. If there is actual or potential detriment to the natural or built environment, to the health or safety of residents or the amenity of an area, this would normally warrant a decision to take action to remedy or restrain the breach. It is also important to consider whether the unlawful activity is ongoing or has ceased.

Consideration should be given to whether the likely costs and benefits of any enforcement action is justifiable where breaches result in no material impacts upon any other party or the health, safety and amenity of the environment and community. A breach of a technical, inconsequential or minor nature, in the absence of any other aggravating factor, will generally not warrant a decision to take action to remedy or restrain the breach.

Legislation may provide time limits in which to commence proceedings and take enforcement action, and sometimes prosecution will be statute barred despite good evidence that unlawful activity has taken place.

In addition, consideration should be given to the time which the offence or breach occurred and the 'reasonableness' of taking enforcement action if a significant time has lapsed since the time of the offence or breach.

### Considerations about the alleged offender

- any prior warnings, instructions, advice that was issued to the person or organisation reported or previous enforcement action taken against them
- whether the offence was committed with intent
- whether the person or organisation reported has been proactive in the resolution of the matter and assisted with any council requirements and instructions
- any mitigating or aggravating circumstances demonstrated by the subject of the report
- any particular circumstances of hardship affecting the person or organisation reported.

Consideration should be given to the previous history of the offender. If prior warnings, instructions or advice has been issued to the person or organisation reported which was not followed, a more formal and coercive enforcement approach would appear more appropriate.

Consideration should be given to whether the offence was committed deliberately, recklessly or with gross negligence. It may be appropriate that cases of this nature are more likely to result in prosecution. Where an offence was committed as a result of an accident or genuine mistake, providing education and guidance or a formal warning may be more suitable in achieving desired outcomes.

Where the offender has been proactive in the resolution of the matter and has assisted council in the resolution of the matter, it may be that the public interest would not be best served by prosecuting the offender, especially if the offending conduct or work has been rectified. If the offender has demonstrated a lack of contrition and is uncooperative with the investigation or remediation, a prosecution or monetary penalty would appear more appropriate.

Consideration should be given to any genuine mitigating circumstances of the offender such as age, physical or mental health, disability and any financial hardship of the offender resulting in an inability to pay.

### Considerations about the impact of the enforcement action

- the need to deter any future unlawful activity
- whether an educative approach be more appropriate than a coercive approach in resolving the matter
- the prospect of success if the proposed enforcement action was challenged in court
- the costs and benefits of taking formal enforcement action as opposed to taking informal or no action
- what action would be proportionate and reasonable in response to the unlawful activity
- whether the council has created an estoppel situation.

Consideration should be given to the deterrent effect, both on the offender and others. Prosecutions, because of their great stigma if a conviction is secured, may be appropriate even for minor unlawful activity where they might contribute to a greater level of overall deterrence.

When deciding whether to take an educative approach or enforcement approach, consideration should be given to the following matters:

- the reasonable likelihood that the person may have known or should have known the relevant requirements or rules
- the level of contrition shown by the responsible person
- whether the parties have previously been advised of the regulatory requirements or provisions
- whether or not any previous warnings or instructions have been provided
- the apparent level of intent shown by the responsible person.

It may not be appropriate to take enforcement action if the chances of success, in the event of an appeal or hearing, are unlikely. In such situations, you would need to identify the causes of that likelihood and address them in the particular case or as a general issue.

Consideration should be given to what is reasonable in the particular circumstances that apply. This includes a reasonable proportionality between the ends to be achieved and the means used to achieve them.

Consideration is to be given to what is reasonable in the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the breach.

Legal proceedings are expensive. When doing a cost-benefit analysis, costs and benefits should be assessed broadly and indirect costs and benefits should also be considered.

Estoppel is a legal rule which prevents a person from later denying something which may have previously been relied on, and acted upon by another person.

Consideration should be given to whether the actions of council have created a reasonable expectation that no enforcement action would be taken.

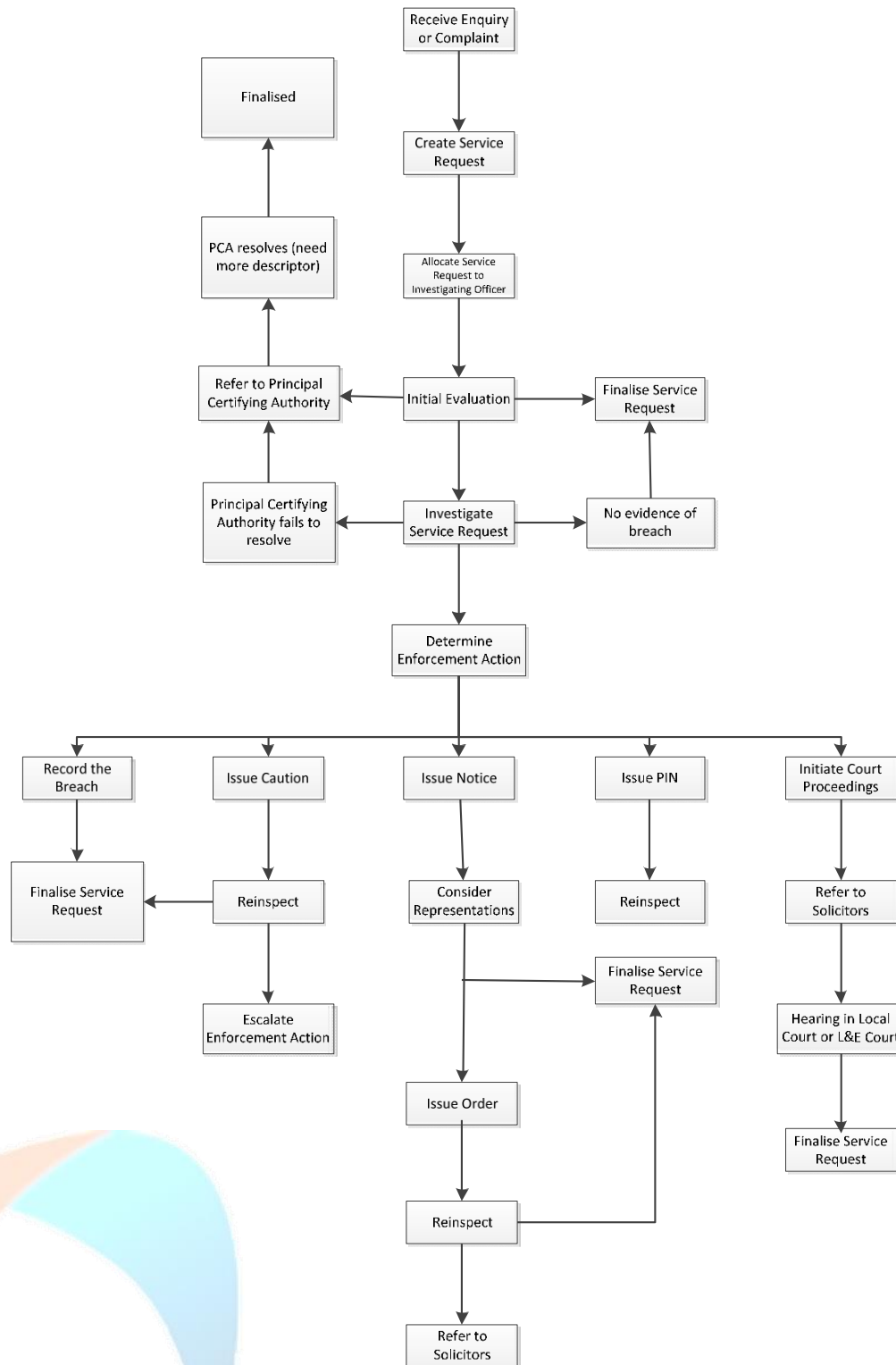
### Considerations about the potential for remedy

- whether the breach can be easily remedied
- whether it is likely consent would have been given for the activity if it had been sought
- whether there is a draft planning instrument on exhibition that would make the unauthorised use legal.

If there is evidence of a significant issue of unlawful activity and that matter can be easily remedied by some action on the part of the person the subject of the report, there is a less compelling case for enforcement action, depending on the other circumstances of the case such as the conduct of the offender.

If retrospective approval is possible, it may be reasonable to allow an opportunity to obtain this prior to taking other enforcement action. In some cases, compliance by informal means may be the most efficient way to resolve the matter and other enforcement action may not be necessary. This needs to be balanced with other considerations such as the public interest in enforcing the law.

## APPENDIX D – EXAMPLE FLOWCHART ENFORCEMENT PROCESS



## APPENDIX E – EXAMPLES OF KEY OPTIONS AND POSSIBLE COURSES OF ACTION

Offence Scenario	Act / Reg.	Details of the case	Warning / Education	Penalty Infringement Notice	Notice &/or Order	Local Court Proceedings	L&EC Proceedings (eg class 4)
<b>Dangerous dog/dog attack</b>	Companion Animals Act	Dog has attacked another animal or person		✓	✓	✓	
<b>Nuisance Dog Order</b>	Companion Animals Act	Failure to comply with a Nuisance Dog Order (i.e. possible danger to other people, unrestrained or barking dog)		✓		✓	
<b>Potential for pollution</b>	POEO Act	Location of stockpile of soil/sand may cause pollution incident (i.e. in rain)	✓ (first occasion)				
<b>Pollution incident – minor</b>	POEO Act	Soil, sand or other waste has or is likely to enter stormwater system		✓	✓		
<b>Site management</b>	Local Govt. Act or EP&A Act	Articles located on footpath without approval – possible safety hazard	✓	✓	✓		
<b>Building work outside of hours</b>	Env. Planning and Assessment Act	Carrying out building works outside of hours permitted in DA	✓ (first occasion)	✓	✓		
<b>Unauthorised building works – major</b>	Env. Planning and Assessment Act	Substantial unauthorised building work or non-compliance with consent – Planning and BCA compliance issues			✓	✓	✓
<b>Fire safety offence – general</b>	Env. Planning and Assessment Act	Failure to submit annual fire safety statement after due date or failure to maintain fire safety measures or exit system	✓	✓	✓		
<b>Fire safety – major</b>	Env. Planning and Assessment Act	Substantial fire safety breach or fire safety upgrading of development			✓	✓	✓
<b>Traffic/Parking</b>	Aust. Road Rules	Parking vehicle in a ‘School-Sone’ or in a ‘No Stopping’ area		✓			
<b>Traffic/Parking</b>	Aust. Road Rules	Parking of vehicle contrary to relevant adopted and sign posted parking requirements		✓			
<b>Food Safety – general</b>	Food Act	Failure to comply with Food Safety Standards	✓ (minor breach only)	✓	✓		
<b>Obstruction on footpath</b>	Roads Act	Unauthorised use of Council footpath for alfresco dining	✓	✓	✓		
<b>Illegal Dumping</b>	POEO Act	Illegally dump waste in public place	✓	✓		✓	
<b>Priority Weeds on land not being controlled</b>	Biosecurity Act	Failure to control priority weeds on land	✓	✓	✓	✓	

- In some cases, the particular breach may be remediated or resolved prior to proceeding to the service of Notices, Orders or legal proceedings i.e. via negotiations or by promptly obtaining relevant approvals.
- Prior to determining an appropriate course of action, consideration is required to be given to the circumstances of the case and the courses of action contained in the above table may not be suitable or sufficient in all cases.
- In the case of a minor inconsequential or trivial breach, Council’s authorized officer may issue a written warning or a formal caution, where appropriate.