



**COMPLIANCE &  
ENFORCEMENT  
POLICY**

**P2.0066.2**

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## COMPLIANCE & ENFORCEMENT

**DIVISION:** Planning and Environment

**BRANCH:** Waste & Compliance Services

**CATEGORY:** 2

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### PART 1 - INTRODUCTION

#### 1. BACKGROUND

- 1.1 One of Camden Council's roles is to act as an enforcement authority under a broad range of legislation. Authorised Officers are required to make decisions and use discretion about appropriate enforcement action when non-compliant issues are identified.
- 1.2 Council has a responsibility under Section 8 of the *Local Government Act 1993* to ensure that its regulatory activities are carried out in a consistent manner and without bias.
- 1.3 Council's regulatory and enforcement actions should be exercised to ensure the health, safety and environmental protection of all stakeholders, including residents, visitors, workers and business operators, and in the interests of the broader community. All stakeholders should have confidence in the decision making and internal review processes.
- 1.4 In order to satisfy these needs this Policy has been developed and is broadly based on the 'Model Policy' prepared for Local Councils by the NSW Ombudsman.
- 1.5 Council supports and welcomes the positive assistance of the community in reporting issues of concern and undertakes to work collaboratively with the community to promote the benefits of compliance as a way of sustaining a safer quality of life for all.
- 1.6 This Policy uses a graduated and risk-based approach to taking enforcement action, for example, the issue of a warning or Caution, which, if not successful in resolving the issue, may be followed by statutory notices and orders, and finally some form of enforcement proceedings either via a penalty notice or court action if compliance cannot be achieved by any other method.
- 1.7 This policy also recognises, in some situations, the gravity of the incident or other circumstances determines that an escalated approach is not appropriate and immediate regulatory action is required e.g. where an activity is or is likely to result in a significant public health or safety risk, or is or likely to cause environmental harm.

#### 2. OBJECTIVE

- 2.1 Council is opposed to unlawful and non-compliant activities and aims to provide and deliver regulatory services in a fair, equitable and consistent manner designed to protect the natural, built and social environment.

- 2.2 This policy aligns with Key Direction 6 – *Strong Local Leadership* in Councils Community Strategic Plan.
- 2.3 This policy references specific roles for Council acting as both an educator and a regulator.
- 2.4 This policy aims to:
- a) Ensure all regulatory activities meet Council's Charter of responsibilities under Section 8 of the Local Government Act
  - b) Assist Authorised Officers to respond promptly and effectively to complaints of unlawful activity and undertake proactive investigations
  - c) Ensure Authorised Officers comply with Council's Code of Conduct when investigating any unlawful activity
  - d) Establish, where required, operational guidelines and procedures for Authorised Officers and the community which incorporate the principles of procedural fairness and natural justice where decisions are made in a consistent, fair, equitable and transparent manner
  - e) Establish criteria to determine whether enforcement action is warranted and if so, ensure such action is in accordance with the Authorised Officers Delegation of Authority in a timely, cost effective manner and proportional to the relative seriousness of the situation
  - f) Ensure appropriate options are considered prior to the implementation of enforcement action
  - g) Take a proactive approach to compliance by providing information to the public about Council's role and policy on enforcement and encourage a culture of compliance aimed at self-regulation rather than Council imposed enforcement action
  - h) Provide a service which embodies good practice and ensures that Council is a Model Litigant by behaving ethically, fairly and honestly in litigation.

### 3. SCOPE

- 3.1 This Policy applies to all areas where Council has a compliance and enforcement role under various Acts and Regulation.
- 3.2 All employees who deal with complaints and the enforcement of relevant legislation are responsible for implementing this Policy.
- 3.3 The application of the Policy includes but is not limited to:
- Abandoned vehicles
  - Asbestos management
  - Boarding houses
  - Brothels
  - Public/ commercial/ private swimming pools
  - Development control
  - Environmental and pollution control issues

- Failure to comply with a condition of an approval, an Order or Notice
  - Fire safety
  - Food safety
  - Removal of trees or clearing vegetation from land
  - On-site sewage management (septic systems)
  - Parking control
  - Public health and safety
  - The control over the keeping of animals and companion animals
  - The regulation of unlawful development activities
  - Waste
  - Any other functions for which Council is the Appropriate Regulatory Authority.
- 3.4 Any enforcement action will be in accordance with this policy, relevant NSW legislation and Revenue NSW Guidelines.
- 3.5 Whilst it is intended the principles in this policy will have general application, there may be cases where the particular circumstances justify departure from these principles.
- 3.6 In any situation where an Authorised Officer considers taking action which varies from the policy and any associated guidelines/procedures, the Authorised Officer will discuss the reasons for the variance with their Team Leader/Manager and will document and implement the agreed course of action.
- 3.7 This policy applies to Council's enforcement functions and supports the concept of an escalated and proportionate approach to most non-compliant issues except for parking, traffic and like matters.
- 3.8 While this policy covers all matters to be taken into account when exercising discretion about compliance and enforcement matters, it recognises that Authorised Officers working with traffic and parking matters are faced with different time frames and decisions which need to be made on the spot.
- 3.9 When enforcing the road rules, Authorised Officers will carry out traffic and parking duties in a fair, equitable and consistent manner which includes a zero tolerance approach in school zones (ie strict enforcement of the rules).
- 3.10 Other offences, such as certain development consent breaches eg hours of operation and some environmental offences (eg illegal burning of waste/plastics), may be dealt with using penalty notices due to the transient nature of the offence and the impracticality of using notices and orders to deal with the issue.

#### 4. DEFINITIONS

- 4.1 **Authorised Officer** means a Council officer with delegated authority to carry out specific duties and take any necessary enforcement action. Such officers carry specific authorities under various Acts, which include prescribed powers of entry to certain properties.
- 4.2 **Caution** means a formal warning given instead of a penalty and advising enforcement action will follow if there is a recurrence. Any consideration to issue a Caution should be in accordance with the Caution Guidelines issued by the NSW Attorney General.
- 4.3 **Cautioning** means the verbal process an officer is required to undertake to issue a

Caution to an alleged offender once the officer has considered an offence has occurred and which allows the officer to use any subsequent statement/s made by the alleged offender as evidence.

4.4 **Civil Proceedings means:**

- Notices, orders and directions issued pursuant to various legislation.
- Class 4 proceedings in the Land and Environment Court seeking an order to remedy a breach of the EP & A Act, the *Local Government Act*, the *Protection of the Environment Act* or any other Act, if the breach is causing or is likely to cause harm to the environment.
- Interlocutory relief for matters causing or with reasonable potential to cause serious environmental harm. In such proceedings, it is likely the Council would be required to provide an undertaking as to damages.

4.5 **Complainant** means a person lodging a complaint with Council.

4.6 **Council** means Camden Council.

4.7 **Criminal Proceedings** means:

- The issuing of a penalty notice;
- Prosecuting an offence in the Local Court with the use of a Court Attendance Notice;
- Prosecuting for an offence in the summary jurisdiction of the Land and Environment Court (Class 5 proceedings).

4.8 **EP&A Act** means the *Environmental Planning and Assessment Act 1979*.

4.9 **Fines Act** means the *Fines Act 1996*.

4.10 **Issuing Agency** means Council.

4.11 **Offence** means an offence under NSW legislation.

4.12 **Prima facie** means the presentation of sufficient evidence to support a legal claim.

4.13 **Procedural Fairness** means the use of fair and proper procedures as part of the decision making process.

4.14 **Revenue NSW** means the former State Debt Recovery Office, responsible for collecting revenues, administering grants and recovering debts on behalf of the people of NSW.

4.15 **Unauthorised/ unlawful activity** means any activity that is:

- Contrary to the terms or conditions of a development consent, approval or permission
- Contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land
- Contrary to a legislative provision regulating particular activity of work
- Without a required development consent, approval, permission or licence
- Contrary to legislation for which the Council is the appropriate regulatory authority, and
- Includes any activity, place or structure which is a risk to public health and safety but excludes any parking or traffic offences which are dealt with in accordance with the Australian Road Rules.

## **PART 2 - POLICY STATEMENT**

### **5. ENFORCEMENT & COMPLIANCE PRINCIPLES**

5.1 Camden Council; as a responsible regulator, is committed to:

- a) Acting with consistency, impartiality, objectivity and fairness
- b) Avoiding any discrimination on the basis of race, religion, political association, sex or national origin
- c) The adoption of a risk-based, graduated and proportionate response (where appropriate) to legislative non-compliance
- d) Providing every opportunity for compliance by all stakeholders by indicating the relevant penalties for non-compliance
- e) Providing written advice or directions in a clear and simple manner
- f) Ensure any action taken is in the public interest and the action is in proportion to the offence
- g) Ensure any action taken by Council is justified, against the correct person(s), cost effective and based on sound evidence which will withstand robust scrutiny
- h) Ensure any decision to take no further action or issue a caution is in the public interest and in accordance with relevant guidelines (e.g. Revenue NSW)
- i) Avoiding any actual, perceived or potential conflict of interest situations
- j) Conducting all investigations in accordance with the Code of Conduct and making decisions in a professional manner with appropriate integrity
- k) Creating awareness and seeking support from all stakeholders including workers and business operators and the broader community in the need for compliance when dealing with relevant issues
- l) Ensuring action is instigated within legislative time limits, and
- m) Disclosing all evidence relevant to an alleged offence and assisting the Court, as required.

### **6. APPLICABLE LEGISLATION**

6.1 Legislation to which this policy applies is outlined in Relevant Legislative Instruments.

### **7. PROCEDURAL FAIRNESS**

7.1 Council is committed to natural justice and acting fairly in all aspects of the implementation of this policy. In order to achieve this outcome, Council will:

- a) 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 that would preclude this opportunity
- b) Give due consideration to any written submission made by an alleged offender made either directly to Council or via another agency (e.g. Revenue NSW)
- c) Make appropriate enquiries, investigations and searches prior to making an enforcement decision
- d) Establish appropriate procedures to avoid an enforcement decision being influenced by an actual, potential or perceived conflict of interest
- e) Implement procedures to ensure pertinent information is provided to a complainant and alleged offender, subject to maintaining appropriate confidentiality provisions, and
- f) Act without bias and within statutory time frames.

## **8. CODE OF CONDUCT**

8.1 Authorised Officers carrying out their duties, including the consideration of some form of enforcement action, will have due regard to the contents of Council's Code of Conduct, which is available on Council's website.

8.2 It is Council's expectation all inspections, investigations and customer interactions will be carried out in a respectful manner and in accordance with Council's Values and attuned to any language or cultural considerations. All Authorised Officers involved in any compliance or enforcement matter should:

- a) Not permit personal views, or prejudices to influence their attitude towards any person or duty required to be undertaken
- b) Respond to any reasonable request or lawful direction of any supervisor or manager of the Council
- c) Not commit any act which constitutes dereliction of duties
- d) Not commit any act that brings Council into disrepute
- e) Not publicly criticise Council in any way that is demeaning, defamatory or brings disrespect or embarrassment to Council
- f) Not publicly criticise any Council employee in any way that is demeaning, defamatory or brings disrespect to Council
- g) Not obey any order or direction which is contrary to the law
- h) Report any such unlawful order to the attention of an immediate supervisor, Manager or, if required, the General Manager
- i) Not solicit or receive any gift that is contrary to Council's Code of Conduct.

- 8.3 Authorised Officers who are accredited under the Building Professionals Board scheme must also satisfy the code of professional conduct requirements of such scheme.
- 8.4 Authorised Officers should abide by their delegations & be equipped with their specific authorisation identification (with photograph) under the relevant Acts.
- 8.5 Decision making relating to the investigation of reports alleging unlawful activity and taking enforcement action is the responsibility of the Authorised Officer or the Council itself.
- 8.6 Councillors are bound by the Code of Conduct and must ensure that when representing the community on enforcement matters they are aware of their obligations under the Code.

## **9. CONFLICT OF INTEREST**

- 9.1 If a situation arises where an officer believes a perceived or actual conflict of interest exists, they must refer the matter to the relevant Team Leader or Manager.

## **10. DISCLOSURE OF INFORMATION**

- 10.1 Authorised Officers will respect the privacy and confidentiality of information received however, due to statutory obligations and policy requirements, confidentiality cannot always be guaranteed.
- 10.2 The complainant's identity may be disclosed where:
  - a) Access to the information is permitted under legislation including but not limited to the *Government Information (Public Access) Act 2009*
  - b) Legal action is commenced, and the information is disclosed in evidence
  - c) The person consents to the disclosure of the information
  - d) The principles of natural justice dictate that information be disclosed to the person who is the subject of the complaint
  - e) Council is of the opinion that disclosure of information is necessary to effectively investigate the matter.
- 10.3 Authorised Officers will also observe the information protection principles in the *Privacy and Personal Information Protection Act 1998* and Council's Privacy Management Plan, which provide in certain circumstances for information to be shared with other public sector agencies for law enforcement purposes.
- 10.4 Reasons for decisions regarding compliance and enforcement action will be made available unless to do so would cause a breach of the law. Reasons may not be given in any case where the information may cause harm to an informant, witness or the alleged offender, or in circumstances that would significantly prejudice the administration of justice.

10.5 Some Authorised Officers have access to external electronic databases including the NSW Companion Animals Register and the Roads and Maritime Services Vehicle Ownership Register. Neither of these are registers to which the general public or other Council officers have access. The information on both registers is protected from general disclosure and can only be used for the lawful exercise of functions under the relevant Acts. Authorised Officers are subject to routine external auditing in regard to the use of the databases.

## 11. RECEIVING AND RESPONDING TO CUSTOMER REQUESTS

11.1 Council's expectation is that all customer requests will be electronically recorded and dealt with in accordance with Council's Customer Service Charter and having regard to the seriousness of the issue and other priorities.

11.2 All complaints will be initially assessed within practical time constraints and appropriate action taken in accordance with this policy.

11.3 All complaints will be investigated unless:

- a) Council is not the Appropriate Regulatory Authority
- b) The matter has already been actioned and resolved
- c) Insufficient information has been provided
- d) The complaint is premature and relates to an unfinished aspect of work still in progress
- e) A private Principal Certifying Authority is responsible for monitoring compliance with the conditions of development consent (Council will work cooperatively with relevant agencies and Private Certifiers to achieve compliant outcomes)
- f) The activity is determined to be lawful and does not require an approval
- g) A Development Approval, Complying Development Certificate or any other lawful authority has been granted for the work
- h) The complaint is trivial, frivolous or unreasonable in nature
- i) The complainant is solely seeking a monetary resolution from a third party
- j) The complaint relates to a civil matter or dispute (e.g. private matter between neighbours).

11.4 In situations where Council is the Appropriate Regulatory Authority, the relative seriousness of each matter will determine the priority attached to a particular complaint. As a guide, the following risk categories can be applied:

**a) High Risk:**

- Significant environmental or safety risk to life or property e.g. discharge of toxic waste to a water body, likely collapse of a shop awning over a public road, removal of a swimming pool fence or barrier, a fire safety issue, dangerous retaining wall, demolition of a heritage item, asbestos removal
- Serious community safety or public health issues (e.g. dog attack, food poisoning, Legionnaires case)
- Urgent matters as directed by Council's senior management.

**b) Medium Risk:**

- Major non-compliance with approval
- Non-life threatening fire safety or similar safety matter
- Unauthorised use or building work where the opportunity to collect critical evidence is not lost (tree removal or demolition).

**c) Low Risk:**

- Minor non-compliance with approval
- Neighbour dispute.

11.5 An assessment after the initial response may result in a complaint being assigned a more appropriate or different risk priority category. Some legislation including the *Companion Animals Act* and *Swimming Pools Act* include mandatory response times for actioning complaints.

11.6 Representations from the Mayor, Councillors or Members of Parliament will also be actioned in accordance with the above risk priority categories. However, a response on either an action or proposed action will be provided promptly as a matter of priority in accordance with Council's procedures.

11.7 Complainants must be informed of the action taken in regard to their customer request in accordance with Council's Customer Service Charter.

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

11.9 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.

11.10 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.

## **12. ANONYMOUS COMPLAINTS**

12.1 Anonymous complaints may not be investigated. The decision to investigate includes, but is not limited to, the subject and seriousness of the matter, the likely reliability of the complaint, ability to access further information, available staff resources and work health and safety responsibilities.

12.2 When an anonymous complaint is investigated, an appropriate record of the investigation will be made.

## **13. FRAUDULENT COMPLAINTS**

13.1 A fraudulent complaint is where a person lodges a complaint with Council in someone else's name without that person's knowledge or where the nature of the complaint is untrue. Such complaints will be treated as unreasonable unless a valid basis for such a complaint can be established. The decision to investigate such a matter will be based on the same criteria as for anonymous complaints.

## **14. USE OF STATUTORY DECLARATIONS**

14.1 The investigation of some complaints may from time to time warrant consideration of the use of a statutory declaration and or statements by the complainant if a matter is to proceed. Any residents who complete a statutory declaration should be informed they may be required to appear in court as a witness should the matter be defended.

14.2 The completion of a statutory declaration by itself does not guarantee further enforcement action will be undertaken by Council.

14.3 In all circumstances involving the use of statutory declarations by residents, the relevant officer/s needs to be satisfied:

- a) A justified nuisance/offence exists which cannot be resolved without recourse to some other form of enforcement action.
- b) Other fair and reasonable attempts to resolve the matter have been unsuccessful.
- c) The witness will appear in court if required.
- d) The witness will be able to satisfy a Magistrate that they are a credible and impartial witness with a legitimate reason(s) for seeking resolution via the court.

14.4 Unless the above matters can be satisfied, other alternatives including private action or the use of mediation through the Community Justice Centre should be considered.

## **15. DEALING WITH UNREASONABLE CUSTOMER CONDUCT**

15.1 As per Council's Dealing with Unreasonable Customer Conduct Policy, unreasonable customer conduct refers to any behaviour by a customer that, because of its nature or frequency, raises substantial health, safety, resource or equity issues for Council Officials, other service users and customers or the customer himself/herself. Unreasonable customer conduct is grouped into five categories of conduct:

- a) Unreasonable persistence
- b) Unreasonable demands
- c) Unreasonable lack of cooperation
- d) Unreasonable arguments
- e) Unreasonable behaviour.

15.2 Council has a zero tolerance policy towards any harm, abuse or threats directed towards Council staff or officials.

15.3 Any customer conduct of this nature will be dealt with under the Dealing with Unreasonable Customer Conduct Policy and in accordance with Council's duty of care and work health and safety responsibilities. This may include limiting or adapting the ways that Council interact with and/or deliver services by restricting who the customer has contact with, what they can contact Council about and when and where they can contact Council. Alternatively, a customer's access to Council services may be terminated.

15.4 Further information can be obtained from Council's Dealing with Unreasonable Customer Conduct Policy.

15.5 Enforcement action will not be taken purely as a response to the conduct of an individual such as persistent demands or threats.

## **16. CONSULTATION WITH OTHER AGENCIES**

16.1 There will be situations, such as the investigation of a complaint, where Council has no legal or geographical jurisdiction, or operational responsibility, and consequently the matter should be referred to the relevant agency without delay.

16.2 Agencies may include but not be limited to: NSW Police, NSW Department of Planning and Environment, Local Land Services, Fair Trading NSW, NSW Department of Primary Industries, Safework NSW, NSW Environment Protection Authority, NSW Food Authority, NSW Health, the Building Professional Board, Transport NSW, Fire and Rescue NSW, and Rural Fire Service.

16.3 Council will consult with the responsible agencies to facilitate a coordinated and constructive compliance approach and keep the complainant informed.

## **17. COMPLAINTS MANAGEMENT - PRIVATE CERTIFIERS**

17.1 In terms of Council's development compliance role, complaints are received from time to time regarding various matters on building construction sites where Council is not the Principal Certifying Authority.

- 17.2 In such situations, in the first instance the complainant should be advised to contact the Principal Certifying Authority directly to ensure all relevant details are accurately communicated to the Principal Certifying Authority.
- 17.3 Alternatively, should an external observation by an Authorised Officer of a building site which is under the jurisdiction of a Principal Certifying Authority (not being Council) disclose significant non-compliant issues, Council will initially draw the matter to the attention of the Principal Certifying Authority.
- 17.4 If a complaint or observation relates to an urgent matter involving a life threatening situation or significant environmental damage or an on-going matter where valuable evidence may not be available if an immediate response is not commenced, an Authorised Officer may undertake an immediate investigation to assess the seriousness of the situation.
- 17.5 If the complaint is substantiated, Council will consider action in accordance with this policy and the Principal Certifying Authority will be informed of any action taken by Council.
- 17.6 In any situation where it is considered a Principal Certifying Authority has acted incorrectly, improperly and/or unprofessionally, a report may be forwarded to the Manager recommending referral of the matter to the Building Professionals Board.
- 17.7 Relevant factors for determining if a matter should be referred to the Building Professionals Board are:
- a) The seriousness of the failure to act professionally
  - b) Any previous history of complaints
  - c) The level of cooperation from the Principal Certifying Authority to rectify the problem/s
  - d) The adequacy of changes made by the Principal Certifying Authority to procedures or practices to ensure that future problems will be minimised.
- 17.8 Examples of matters that might be referred to the Building Professionals Board include but are not limited to:
- a) Significant departure from the development consent where the Principal Certifying Authority does not appear to be taking appropriate action to address the issue
  - b) The persistent failure to submit relevant certificates or other documentation to Council within the specified time period
  - c) Complying Development Certificates that do not meet the development standards for the relevant State Environmental Planning Policy.

## **18. BUILDING INFORMATION CERTIFICATES**

- 18.1 Council recognises that persons who may have carried out unlawful building works may, as an option, apply for a Building Information Certificate under Part 6 – Division 6.7 of the EP&A Act to retain the structure. If a building certificate is issued, Council cannot ask for demolition or alterations unless after 7 years of fair wear and tear.

18.2 Irrespective of whether a Building Information Certificate is applied for, Council may take action against a person who carried out unlawful works.

18.3 The action may include the issuing of a penalty notice or commencement of criminal proceedings, where it is considered appropriate and necessary for punitive action to be taken, having regard to the restriction provisions provided under Section 9.57 of the EP&A Act.

18.4 Building Information Certificate applications to support unlawful building works will be expected to provide the same level of details in plans, certificates, specifications and other documents as would be required for assessing a Development Application, a Construction Certificate, a Complying Development Certificate and/or an Occupation Certificate.

## 19. PROACTIVE COMPLIANCE MONITORING

19.1 In addition to responding to complaints and enquiries about alleged unlawful activity, Council also provides a number of proactive compliance programs around high risk regulatory areas. These areas include:

- a) Food premises inspections
- b) Public Health Inspections (eg skin penetration premises)
- c) Public swimming pool water quality monitoring
- d) Onsite sewage management systems (septic tanks)
- e) Fire safety
- f) School Zone compliance.

19.2 Compliance action may be initiated where non-compliance is identified in the course of a proactive compliance inspection, in which case the principles outlined in this policy will also be applied.

## 20. THE DECISION PROCESS - TAKING ENFORCEMENT ACTION

20.1 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. Authorised Officers are required to maintain appropriate records about decision making processes in relation to reports alleging unlawful activity and any enforcement action, as well as records of interactions with relevant parties. Authorised Officers will at all times adhere to Council's internal approval processes and delegations prior to the commencement of any enforcement action. The following common considerations will assist Council staff in determining the most appropriate response in the public interest:

- a) **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 technical, inconsequential or minor in nature

- The time period that has lapsed since the date of the unlawful activity
- b) **Considerations about the alleged offender:**
- Any prior warnings, instruction, 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
  - Any particular circumstances of the person or organisation reported (e.g. health, young offender)
- c) **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
  - Whether Council may be prevented from taking action based on earlier advice given
- d) **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

20.2 Authorised Officers 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, Authorised Officers will be guided by legal advice in determining the appropriate persons to pursue.

20.3 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.

## 20.4 Requirements of Authorised Officers in considering enforcement action

Prior to taking enforcement action, Authorised Officers will take into account the above considerations as well as the evidence gathered during their investigation. Authorised Officers 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.

## 21. OPTIONS FOR DEALING WITH CONFIRMED CASES OF UNLAWFUL ACTIVITY

21.1 Council will try to use the quickest and most informal option to deal with unlawful activity wherever possible unless there is little likelihood of compliance with such options. Authorised Officers 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:

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

The following enforcement options to be considered by Council are ordered to reflect an escalation in response that is proportionate to the level of risk, the seriousness of the confirmed breach or the need for a deterrent:

| Level of risk | Enforcement options   |
|---------------|---|
| Low           | <ul style="list-style-type: none"><li>• Taking no action based on a lack of evidence or some other appropriate reason</li><li>• Providing information/advice on how to be compliant</li><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><li>• Seeking an injunction through the courts to prevent future or continuing unlawful activity</li><li>• Commencing legal proceedings for an offence against the relevant Act or Regulation</li></ul> |

### 21.2 Following up enforcement action

All enforcement action will be reviewed and monitored to ensure compliance with any undertakings given by the subject of the 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 ongoing compliance outcomes are met. Should initial enforcement action be found to have been ineffective, council staff will consider other enforcement options.

## **22. CRIMINAL AND CIVIL PROCEEDINGS**

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

a) **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.

b) **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 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.

c) **Whether the public interest requires legal action to be pursued**

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 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
- Time within which to commence proceedings
- 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

- Whether the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive.

## **23. RECOVERY OF FINES & LEGAL COSTS**

23.1 In relation to the recovery of legal costs Council will:

- a) Seek to recover fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the court
- b) Seek to recover the penalty imposed by the court where such penalty is imposed
- c) Consider any recommendations of its legal representative/s to accept a lesser amount than the full legal cost if the acceptance will result in Council not incurring further and unnecessary legal costs.

## **24. COMMUNITY AWARENESS**

24.1 Council will take every opportunity to promote ongoing community awareness with regard to compliance/enforcement. This may include, but is not limited to, website references, the publication of press releases and the periodic inclusion in any community newsletters with a view to improving community confidence and awareness.

24.2 Awareness initiatives that focus on residents, developers and business operators will adopt an educational approach designed to engage and promote:

- a) An awareness of this policy
- b) The minimisation of non-compliance by improving the knowledge of legislation within the community
- c) The benefits of complying with the legislation and the consequences of not complying

## **25. POLICY MONITORING & REVIEW**

25.1 To ensure this Policy remains contemporary, it will be reviewed every 3 years or after legislative changes.

25.2 The processes will include, but not be limited to, determining the levels of compliance in regulated/core business activities and the emergence of any apparent trends, the success or otherwise of specific types of enforcement action and the effectiveness of any education campaign/s.

□ \* \* \*

**RELEVANT LEGISLATIVE INSTRUMENTS:** *Australian Road Rules 2014*  
*Boarding Houses Act 2012*  
*Companion Animals Act 1998*  
*Contaminated Land Management Act 1997*  
*Crown Land Management Act 2016*  
*Environmental Planning & Assessment Act 1979*  
*Fines Act 1996,*  
*Food Act 2003*  
*Impounding Act 1993*  
*Local Government Act 1993*  
*Local Government (General) Regulation 2005*  
*Motor Dealers and Repairers Act 2013*  
*Biosecurity Act 2015*  
*Protection of the Environment Operations Act 1997 and Regulations (multiple)*  
*Public Health Act 2010*  
*Public Health Regulation 2012*  
*Swimming Pools Act 1992*  
*Roads Regulations 2018*  
*Road Transport (General) Regulation 2013*  
*Rural Fires Act 1997*  
*Building Professionals Act 2005*  
*Sydney Water Act 1994,* and  
The Regulations relating to the above Acts.

**RELATED POLICIES, PLANS AND PROCEDURES:** Asbestos Policy  
Feedback Policy  
Animal Care Facility Adoption Policy  
Dealing with Unreasonable Customer Conduct  
Swimming Pools Inspection Program  
Code of Conduct  
Guidelines for Councillor Access to Information and Advice

**RESPONSIBLE DIRECTOR:** Director Planning and Environment

**APPROVAL:** Council

**HISTORY:**

| Version | Approved by | Changes made     | Date       | EDMS Number |
|---------|-------------|------------------|------------|-------------|
| 1       | Council     | New policy       | 08/03/2016 | 16/137442   |
| 2       | Council     | Minor amendments |            |             |