

COMPLIANCE AND ENFORCEMENT POLICY



Responsible Department: Development and Economic Growth
Responsible Section: Planning and Regulatory Services
Responsible Officer: Manager Planning and Regulatory Services

Objective

The objective of this policy is to:

- Ensure that the Council's functions are exercised consistently and without bias, in accordance with its obligations under section 8 of the Local Government Act 1993;
- provide information for all internal and external stakeholders and interested parties about council's position on compliance and enforcement matters in the local government area;
- outline 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;
- outline how staff decide whether enforcement action is warranted and what type of enforcement action is appropriate in the particular circumstances;
- 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 the merits.

Introduction

Council has statutory obligations as a regulatory authority under several different pieces of legislation including in the monitoring of food service venues, the structural safety of buildings and public areas, ensuring the safety of public roads and other public spaces, the effective control of pollution (including noise, water, air and visual pollution), unsafe or unhealthy conditions and compliance with development consents, approvals and permits. As part of implementing our Community Strategic Plan we have also been provided with two Strategic Directions of a *Safe, Inclusive and Connected Community* and an *Environmentally Sustainable and Productive Shire*. This policy has been designed to deliver those statutory and strategic objectives in a transparent, efficient, fair and consistent manner.

Policy

1. Definitions

For the purpose of this policy, the following definitions apply:

Term	Meaning
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Authorised Officer	Staff member of the Council authorised under legislation and by internal delegations to carry out compliance action on behalf of the Council
Complaint	A complaint is an expression of dissatisfaction made about council services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required. For the purposes of this policy, a complaint does not include: <ul style="list-style-type: none"> • a report alleging unlawful activity (see definition below); • a request for information about a council policy or procedure; • a request for an explanation of actions taken by council; • a request for internal review of a council decision.
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.
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	Any activity or work that has been or is being carried out: <ul style="list-style-type: none"> • Contrary to the terms and conditions of a development consent, approval, permit or licence; • 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 a particular activity or work; • Without a required development consent, approval, permit or licence; • Contrary to legislation in relation to 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.

2. Compliance and enforcement principles

Principle	Action
Accountable and transparent	<ul style="list-style-type: none"> • acting in the best interests of public health and safety and in the best interests of the environment; • ensuring accountability for decisions to take or not take action; • acting fairly and impartially and without bias or unlawful discrimination;

	<ul style="list-style-type: none"> • providing information about compliance and enforcement priorities and reasons for decisions to improve understanding and certainty and promote trust by the regulated community; • ensuring meaningful reasons for decisions are given to all relevant parties, particularly when there is a departure from this policy; • acting on any complaints or concerns about the conduct of compliance officers in accordance with council’s complaints management policy and procedures; • advising people and organisations subject to enforcement action of any avenues available to seek an internal or external review of a decision.
Consistent	<ul style="list-style-type: none"> • ensuring all compliance and enforcement action is implemented consistently; • encouraging reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter.
Proportional	<ul style="list-style-type: none"> • ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach; • making cost-effective decisions about enforcement action; • taking action to address harm and deter future unlawful activity.
Timely	<ul style="list-style-type: none"> • ensuring responses to reports alleging unlawful activity and decision making in relation to those is timely.

3. 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;
- provide information to all relevant parties about any avenues to seek an internal or external review of a decision.

All reports alleging unlawful activity are to be entered into council's records management system and actioned in a timely manner by the appropriate business unit.

Only council staff with appropriate delegations from the general manager can undertake investigations or compliance and enforcement action in relation to this policy.

4. Responding to concerns about unlawful activity

How reports alleging unlawful activity will be dealt with by council

Council will record and assess every report alleging unlawful activity. 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.

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.

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, and any reasons for delay. 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. This means the objective is that 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 endeavour 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. They 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.

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;
- 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.

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;
- 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.

Any unreasonable conduct will be dealt with in accordance with the principles of the NSW Ombudsman's Managing Unreasonable Complainant Conduct Manual 2012 and any applicable council policy.

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.

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 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.

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.

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.

Neighbour disputes

When a dispute between two neighbours is a civil matter, council will often have no authority to resolve the issue in dispute, in such cases parties may be referred to LawAccess NSW and Community Justice Centres.

5. Investigating alleged unlawful activity

Not all reports alleging unlawful activity will warrant investigation. A preliminary assessment of all matters will be made to determine whether investigation or other action is required. Council will prioritise matters on the basis of risk to public safety, human health and environment.

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. For example, NSW WorkCover for workplace safety matters, the NSW Environment Protection Authority for possible environmental offences and Community Justice Centres NSW 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;
- 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;
- 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;
- whether the complaint is trivial, frivolous or vexatious;
- 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. Any decision not to investigate an allegation of unlawful activity will be recorded and the reasons for that decision clearly stated.

6. Taking 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 or trivial in nature;
- 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;
- 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;
- whether council is prevented from taking action based on earlier advice given, i.e. 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;
- 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.

7. Options for dealing with confirmed cases of unlawful activity

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. 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.

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
Very low	<ul style="list-style-type: none"> • take no action on the basis of a lack of evidence or some other appropriate reason;

	<ul style="list-style-type: none"> provision of information/advice on how to be compliant.
Low	<ul style="list-style-type: none"> negotiating with the person to obtain voluntary undertakings or an agreement to address; the issues of concern issuing a warning or a formal caution.
Medium	<ul style="list-style-type: none"> issuing a letter requiring work to be done or activity to cease in lieu of more formal action; issuing a notice of intention to serve an order or notice under relevant legislation, and then serving an order or notice if appropriate.
High	<ul style="list-style-type: none"> issuing a penalty notice; carrying out the works specified in an order at the cost of the person served with the order.
Very high	<ul style="list-style-type: none"> seeking an injunction through the courts to prevent future or continuing unlawful activity; commence legal proceedings for an offence against the relevant Act or Regulation.

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.

Penalty notices

Penalty notices are a way of imposing a fine on a person who an authorised officer believes is guilty of an offence without commencing criminal proceedings against them. Generally, penalty notices are appropriate where:

- The breach is not serious or ongoing, the degree of harm is low;
- The facts appear incontrovertible;
- The imposition of the penalty is likely to provide a practical and viable deterrent; and
- There are no aggravating factors.

Authorised officers can issue penalty notices in accordance with their statutory responsibilities and delegations, this policy and any guidelines or operating procedures.

Penalty notices are not appropriate where the breach is on-going or where the prescribed penalty is not adequate to address the severity of the offence. For example, repeated issuing of penalty notices is not appropriate where there have been ongoing instances of unauthorised activity such as ongoing non-compliance with conditions of consent. Council staff should also consider whether it is appropriate to issue a formal caution as an alternative to issuing a penalty notice in appropriate circumstances and in accordance with the Attorney-General's Caution Guidelines.

Where an authorised officer proposes (after conducting an investigation of a complaint and assessing the circumstances of the matter in accordance with the criteria outlined above) to issue a penalty notice, the issue of that notice should only be in circumstances where the authorised officer is satisfied that there is sufficient evidence to establish that the offence was committed.

In circumstances where it is proposed to issue a penalty notice on the basis of information provided only by a complainant (i.e. a person who is not a Council staff member) the evidence must include a statutory declaration signed by the proposed witness and confirmation that the witness is prepared to give evidence in court if necessary. Wherever possible it should also include objective evidence demonstrating the offence, for example, photographs. Council staff should be particularly cautious when issuing penalty notices based only on evidence provided by a complainant in such circumstances the matter should be referred to the Council's lawyer for advice.

8. Taking legal action

The 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;
- 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 the public interest requires legal action 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 to be considered when taking enforcement action apply. (See Section 6, Taking enforcement action).

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;
- 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.

9. Delegations

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

10. Approval

The Council approved this policy on DATE.

11. Review

The Manager Planning and Regulatory Services will review this policy every 3 years or as circumstances warrant (for example, where a particular judicial decision may have an impact on the procedures outlined in this policy).

References

- In writing this policy Council have referred to the policies and other materials of numerous councils and other bodies. We acknowledge the materials and assistance in writing this policy from the following:
 - City of Sydney Compliance Policy 2014
 - Gunnedah Shire Council Enforcement Policy
 - NSW Ombudsman Model Compliance and Enforcement Model Policy December 2015

History

MINUTE NUMBER:	MEETING DATE:	DESCRIPTION OF CHANGE: