



# SUSTAINABLE COMMUNITIES ADVISORY COMMITTEE MEETING

To be held at 5pm on

**Tuesday 2 July 2024**

Joyce Wheatley Community Centre, Terralong Street, Kiama  
NSW 2533

## Order of Business

- 1 Apologies
- 2 Acknowledgement of Traditional Owners
- 3 Declarations of Interest
- 4 Confirmation of Minutes of Previous Meeting
- 5 Business arising from the minutes
- 6 Reports for Information
- 7 General business
- 8 Closure

## Members

Cr Neil Reilly, Mayor  
Cr Imogen Draisma  
Michael Bowden  
Narreda Grimley  
Liam Pettigrew  
Alan Smith  
Jessica Rippon | Director  
Planning, Environment and  
Communities

28 June 2024

To the Chair and Committee members:

**NOTICE OF SUSTAINABLE COMMUNITIES ADVISORY COMMITTEE MEETING**

You are respectfully requested to attend a **Sustainable Communities Advisory Committee Meeting**, to be held in the **Joyce Wheatley Community Centre, Terralong Street, Kiama NSW 2533** on **Tuesday 2 July 2024** commencing at **5pm** for the consideration of the undermentioned business.

Yours faithfully



Jessica Rippon  
**Director Planning, Environment and Communities**

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**AGENDA FOR THE  
SUSTAINABLE COMMUNITIES ADVISORY COMMITTEE  
TUESDAY 2 JULY 2024**

**1 APOLOGIES**

**2 ACKNOWLEDGEMENT OF TRADITIONAL OWNERS**

*"I would like to acknowledge the traditional owners of the land on which we meet, the Wadi Wadi people of the Dharawal nation, and pay my respect to Elders past and present."*

**3 DECLARATIONS OF INTEREST**

Confirmation of Minutes of Previous Meeting

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**4 CONFIRMATION OF MINUTES OF PREVIOUS MEETING**

**4.1 Sustainable Communities Committee - Minutes - 4 June 2024**

**Attachments**

1 Minutes - 4 June 2024

**Enclosures**

Nil

***RECOMMENDED***

That the Minutes of the Sustainable Communities Committee meeting held on 4 June 2024 be received and accepted.

**Item 4.1**



# **MINUTES OF THE SUSTAINABLE COMMUNITIES ADVISORY COMMITTEE MEETING**

commencing at 5pm on

**TUESDAY 4 JUNE 2024**

Kiama Municipal Council  
Manning Street, KIAMA NSW 2533

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**MINUTES OF THE SUSTAINABLE COMMUNITIES COMMITTEE**

4/6/24

**MINUTES OF THE SUSTAINABLE COMMUNITIES ADVISORY  
COMMITTEE**

**HELD AT KIAMA MUNICIPAL COUNCIL**

**ON TUESDAY 28 MAY 2024 AT 4PM**

**PRESENT:** Cr Neil Reilly, Mayor  
Michael Bowden  
Narreda Grimley  
Liam Pettigrew  
Alan Smith  
Cr Karen Renkema-Lang (observer)  
Cr Stuart Larkins (observer)  
Jessica Rippon | Director Planning, Environment and Communities

**1 APOLOGIES**

Cr Imogen Draisma

**2 ACKNOWLEDGEMENT OF TRADITIONAL OWNERS**

The Mayor declared the meeting open and acknowledged the traditional owners:

*"I would like to acknowledge the traditional owners of the Land on which we meet, the Wadi Wadi people of the Dharawal nation, and pay my respect to Elders past and present."*

**3 DECLARATIONS OF INTEREST**

Nil

**4 CONFIRMATION OF MINUTES OF PREVIOUS MEETING**

**4.1 Sustainable Communities Advisory Committee - 23 April 2024**

**RECOMMENDED**

That the Minutes of the Sustainable Communities Advisory Committee meeting held on 23 April 2024 be received and accepted.

(Alan Smith/Narreda Grimley)

**MINUTES OF THE SUSTAINABLE COMMUNITIES COMMITTEE**

4/6/24

**5 BUSINESS ARISING FROM THE MINUTES**

Nil

**6 REPORT OF THE DIRECTOR PLANNING, ENVIRONMENT AND COMMUNITIES**

**6.1 Short Term Holiday Rentals**

**RECOMMENDATION**

That:

1. The Committee note the contents of the report.
2. At the next meeting a further workshop be held on Short Term Holiday Rentals.

NOTES:

- The Committee discussed the contents of the report and the request provided by Alan Smith following his recent attendance at the South Precinct Meeting.
- The Mayor attended the 2024 Coastal Australian Coastal Council's Conference held on 29-31 May where a Professor Nicole Gurrán had compiled a research paper on "Short Term Rentals in Urban and Coastal Communities: Impacts and Policy Responses". An overview of findings presented at the conference was provided by the Mayor.
- A detailed discussion about STRA impacts and also work that was already being undertaken was carried out during the meeting.
- In order to explore the topic further the Committee agreed to hold a workshop at the next meeting.

**6.2 Post exhibition endorsement: Kiama Coastline Coastal Management Program**

**RECOMMENDATION**

That the Committee note the contents of the report to Council.



**MINUTES OF THE SUSTAINABLE COMMUNITIES COMMITTEE**

4/6/24

**7      REPORTS FOR INFORMATION**

The following Reports for Information be received and note

[7.1 Growth and Housing Strategy - Verbal Update:](#)

NOTES:

- A verbal update was provided on the progress of the Strategy.
- Discussion about dwelling targets was also held.
- The Committee was advised that the Community Engagement Report would be provided to the June Council meeting.

**8      GENERAL BUSINESS**

Council Policies

- Discussion took place on the upgrading of policies on Council's website.

**9      CLOSURE**

There being no further business the meeting closed at 4.56pm

These Minutes were confirmed at the Ordinary Meeting of Council held on 25 June 2024

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Chair

**5 BUSINESS ARISING FROM THE MINUTES**

## 6 REPORTS FOR INFORMATION

### 6.1 Discussion and Workshop Short Term Rental Accommodation

Responsible Director: Planning, Environment and Communities

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Item 6.1

#### **RECOMMENDED**

That the Committee provide outcomes of the workshop to Council for consideration

#### **Details**

- Following the previous report provided in June 2024 the Committee sought to hold a workshop to further discuss short term rental accommodation.
- It is expected that at the meeting several items will be discussed relating to the current status and approach to STRA.
- A copy of a compliance policy from Byron Shire Council is also attached for discussion as it relates to the overall approach the Council takes to compliance work.
- The Mayor has requested that the Committee could review and work through policies to provide outcomes to a future Council meeting. As part of the Delivery Program and Operational Plan, Council has committed to review its compliance policy and this could be a good project for the Committee to work through.
- The compliance matters that are handled by Council staff can be found on Council's website at : <https://www.kiama.nsw.gov.au/Services/Regulation-and-enforcement#section-1>
- A copy of the Short-Term Rentals in Urban and Coastal Communities: Impacts and Policy Responses is also provided for reference and discussion at the workshop.

#### **Attachments**

- 1 Sustainable Communities Committee - 2nd July 2024 - Policy-Enforcement-2020-current\_policies
- 2 Sustainable Communities Committee - 2nd July 2024 Enforcement-Policy



# Policy

## Enforcement

### 2020

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### Information about this document

Original Date Adopted by Council	10 June 2011
Resolution No	11-380
Document Owner	Director Sustainable Environment and Economy
Document Development Officer	Community Enforcement Coordinator
Review Timeframe	4 years
Last Review Date	21 October 2020
Next Scheduled Review Date	21 October 2024

### Document History

Doc No.	Date Amended	Details/Comments eg Resolution No.
#879049		
#1054767	24/3/11	Report and draft policy to Council Strategic Planning Meeting 25 March 2011.
#1072690	25/3/11	Res 11-380 Amendments to Draft Policy – placed on public exhibition from 12/5/11 to 9 June 2011
#1103173	10/6/11	No submissions received – policy adopted after the exhibition period in accordance with Res 11-380
E2016/14523	25/08/16	Res 16-449 Review of Enforcement Policy – Draft Policy placed on public exhibition
E2016/14523	11/11/16	No submissions received – policy adopted after the exhibition period in accordance with Res 16-449
E2020/73343	21/10/20	Minor updates: EP&A Act section numbering updated; updated references to related policies; new template for improved accessibility

**Further Document Information and Relationships**

Related Legislation	The Government Information (Public Access) Act 2009 Fines Act 1996 Environmental Planning and Assessment Act1979 Local Government Act 1993 Protection of the Environment Operations Act 1997
Related Policies	<a href="#">Managing unreasonable customer conduct Policy</a> <a href="#">Homelessness Policy</a>
Related Standards, Procedures, Statements, documents	

Note: Any reference to Legislation will be updated in the Policy as required. See website <http://www.legislation.nsw.gov.au/> for current Acts, Regulations and Environmental Planning Instruments.



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#E2020/73343





## 1. Objectives

- To assist Council staff in responding promptly, consistently and effectively to reports of alleged unauthorised activity.
- To provide a system of assessing whether reports alleging unauthorised activity require investigation and whether enforcement action is warranted.
- To provide options for dealing with confirmed cases of unauthorised activity.
- To ensure Council makes enforcement decisions in an unbiased, consistent, balanced and impartial manner.
- The implementation of risk-based regulation to protect the environment, local economy and the community of Byron Shire.
- To achieve outcomes that result in a change of behaviour of alleged offenders.

## 2. Scope

### Statutory Regulations

A local government regulatory function is any function under an Act, Regulation or other statutory instrument which empowers local government to create, impose, enforce or administer rules that control the actions of others.

### Enforcement and Regulatory Functions

Enforcement can be seen simply as the pointy end of regulation. Broadly speaking, enforcement can be seen as any punitive measure taken against an individual or a business for breaching a law. Measures range from lower level options such as cautions to imprisonment at the top end of the scale.

It is now widely accepted that enforcement should focus not just on punishment, but equally on changing the non-compliant behaviour, remedying and addressing the problems caused by non-compliance and acting as a deterrent to future and general non-compliance. Therefore enforcement is one among many options that can be chosen to achieve the overall objectives of a regulatory scheme.

Seeing enforcement and compliance in a broader context of councils' regulatory responsibilities enables councils to have an overarching objective and be deliberate about what compliance outcomes they want to achieve rather than just react to reported instances of non-compliance. If the goal is to change behaviours to achieve beneficial outcomes in the interests of the community and to address harm caused by non-compliance, then the options available to councils are many and can be tailored to individual circumstances.

Council's regulatory responsibilities are applicable to actual unauthorised 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 'unauthorised activity'.



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Councils have many and varied regulatory functions, including but not limited to:

- Planning – eg, development controls, development consents, certification of complying developments, and change of use approvals.
- The NSW Land and Environment Court has stated the following:

*There is a need for the upholding of the integrity of the system of planning and development control. This system depends on persons taking steps to obey the law by ascertaining when development consent is required and then obtaining development consent before carrying out development. Development must be carried out in accordance with the terms of the development consent obtained. (Pittwater Council v Scahill [2009] NSWLEC 12)*

- Building and construction – eg, certification and compliance with building standards, and fire safety requirements.
- Environmental protection – eg, native vegetation, noxious weeds, waste management, noise control, coastal protection, underground petroleum storage systems, stormwater drainage, sewage and grey water systems, contaminated land, and solid fuel heaters.
- Public health and safety – eg, food safety, mobile food vendors, skin penetration businesses, cooling towers, warm water system, and swimming pools.
- Parking and transport – eg, road openings and closures, structures in or over roadways or footways, traffic management plans and controls, public car parks, and road access.
- Companion animals management – eg, registration of dogs and cats, dangerous dogs, and surrendered animals.
- Liquor and restaurants – eg, controls on licensed premises, and restaurants on footpaths.
- Public areas and issues – eg, illegal camping, graffiti, hoardings, signs, waste bins, protection of public places, busking, street theatre, parks and playgrounds, public events, trees, and filming.
- Other activities – eg, hairdressers, beauty salons, mortuaries, backpacker accommodation, boarding houses, camping grounds, and caravan parks.

This policy distinguishes between a 'report alleging unauthorised activity' and a 'complaint'. These terms are defined in this policy.

This policy provides information for all internal and external stakeholders and interested parties about council's position on compliance and enforcement matters in the local government area.

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.



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It is also intended to assist council staff to act promptly, effectively and consistently in response to allegations of unauthorised activity.

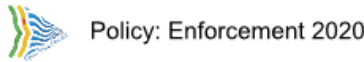
This policy outlines matters to be considered at the various stages of the enforcement process from the receipt and investigation of reports alleging unauthorised activity, through to what enforcement option council may choose and whether to commence criminal or civil proceedings.

In *Ryde City Council v Echt* (2000) 107 LGERA 317 the Court of Appeal held that “a Council does not have a duty or responsibility to exercise a statutory power or take proceedings to enforce conditions of development consent”. It is important for customers making reports of unauthorised activity to understand that Council is not compelled to take enforcement action on the premise that a law or rule merely exists.

Responsible council staff are not limited by this policy in their exercise of discretion and of official functions. The full circumstances and facts of each case need to be considered and a decision made on the merits. The NSW Ombudsman Enforcement Guidelines for Council’s (December 2015) are to be used in support of this Policy.

**Compliance and enforcement principles**

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 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> </ul>
Consistent	<ul style="list-style-type: none"> <li>• ensuring all compliance and enforcement action is implemented consistently</li> <li>• encouraging reports about possible unauthorised 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 unauthorised activity.</li> </ul>



Principle	Action
Timely	<ul style="list-style-type: none"> <li>ensuring responses to reports alleging unauthorised activity and decision making in relation to those is timely.</li> </ul>

### 3. Definitions

<b>ARA</b>	Appropriate Regulatory Authority under the provisions of the Protection of the Environment Operations Act 1997.
<b>CAN</b>	Court Attendance Notice issued and filed in accordance with the Criminal Procedure Act 1986. A CAN may be used to commence summary proceedings in the local court. A CAN specifies the offence and its essential particulars as well as the address of the court where the matter is to be heard.
<b>Complaint</b>	<p>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.</p> <p>For the purposes of this policy, a complaint does not include:</p> <ul style="list-style-type: none"> <li>a report alleging unauthorised activity (see definition below)</li> <li>a request for information about a council policy or procedure</li> <li>a request for an explanation of actions taken by council</li> <li>a request for internal review of a council decision.</li> </ul>
<b>CRM</b>	Customer Request Management System. A computer based system for registering and tracking reports of alleged unauthorised activity.
<b>Caution</b>	A formal electronic warning given instead of a penalty to somebody who has done something unauthorised or illegal, advising that enforcement action will follow if it is repeated.
<b>Council</b>	Byron Shire Council or an employee of Byron Shire Council.
<b>Defendant</b>	The accused person against whom criminal proceedings are brought.
<b>Enforcement</b>	Actions taken in response to serious or deliberate contraventions of laws.
<b>EP&amp;A</b>	Environmental Planning and Assessment Act 1979.
<b>Estoppel</b>	Legal rule of evidence which prevents a party from making an allegation or denial that contradicts what it had previously stated, or what has been legally established, as the truth.
<b>Fines Act</b>	Fines Act 1996.
<b>GIPA</b>	The Government Information (Public Access) Act 2009.
<b>ICAC</b>	Independent Commission Against Corruption.



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<b>Informant</b>	The person whom brings about criminal proceedings.
<b>Issuing Agency</b>	Council.
<b>Issuing Officer</b>	A person (other than a police officer) authorised to issue a PIN for an offence.
<b>LGA</b>	Local Government Act 1993.
<b>Offence</b>	An offence under a NSW law for which a PIN may be issued.
<b>PIN</b>	Penalty Infringement Notice. Sometimes referred to as an 'on-the-spot' fine or SEIN (self-enforcing infringement notice) and now commonly referred to as a 'Penalty Notice'. PINs may only be issued for prescribed offences and the value of the fine is also prescribed by legislation. Further information about penalty infringement notices can be found at <a href="http://www.byron.nsw.gov.au">www.byron.nsw.gov.au</a>
<b>Plaintiff</b>	The person whom brings about civil proceedings.
<b>Precautionary Principle</b>	Where the possibility exists of serious or irreversible harm, lack of scientific certainty should not preclude cautious action by decision-makers to prevent such harm.
<b>Procedural Fairness</b>	Procedural fairness is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. It requires a fair and proper procedure be used when making a decision. Council considers it highly likely that a decision-maker who follows a fair procedure will reach a fair and correct decision.  The term procedural fairness is thought to be preferable when talking about administrative decision-making because the term natural justice is associated with procedures used by courts of law. However, the terms have similar meaning and are commonly used interchangeably. For consistency, the term procedural fairness is used in this policy document.
<b>POEO</b>	Protection of the Environment Operations Act 1997.
<b>Regulation</b>	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.
<b>Respondent</b>	The party against whom civil proceedings are brought. The party against whom proceedings are brought in the Land & Environment Court proceedings.
<b>Report alleging unauthorised activity</b>	An expression of concern or a request for service in relation to alleged unauthorised activity, where a response or resolution is explicitly or implicitly expected or legally required.
<b>SDRO</b>	State Debt Recovery Office
<b>Technical Breach</b>	A minor divergence from the terms of an Act, Regulation, Order, Development Consent or other document or direction.



<p><b>Unauthorised Activity</b></p>	<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 licence</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 licence.</li> </ul>
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## 4. Statement

### 4.1 Background

Council becomes aware of unauthorised activity in a variety of ways, from the proactive actions of Council staff to the receipt of requests from members of the community and general public.

When Council is appointed the Principal Certifying Authority for development and building works, Council staff will identify breaches of consent and unauthorised building work and uses.

In their environmental protection or public health roles, Council staff may discover pollution incidents and unhealthy premises that require enforcement action. Furthermore, enforcement, compliance and environmental health officers issue PINs for parking, animal control, pollution, environmental protection, unsafe food activities breaches of the LGA, building site offences, and associated activities.

Council officers who are not involved directly in enforcement matters will also commonly identify potential unauthorised activity and report them for investigation and action pursuant to this policy.

Nevertheless, while Council is proactive in the detection of unauthorised activity, not all offences are readily discernible and early detection can only be achieved with support and direct advice from the community.

### 4.2 Submitting reports of unauthorised activity

Reports of unauthorised activity can be submitted to Council either in writing or verbally. In either case, the report will be recorded in Council's Customer Request Management system (CRM) and will be allocated a unique reference number. The management and response times for CRM's are subject to Council's Customer Service Charter Policy.

### 4.3 Responding to reports about unauthorised activity

In responding to confirmed reports of unauthorised activity Council staff are required to:

1. treat all relevant parties with courtesy and respect



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2. where appropriate communicate with relevant parties and provide feedback on the progress of an investigation and any reasons for delay without compromising the integrity of the investigation
3. make full and proper records in relation to the assessment and investigation of reports alleging unauthorised activity, including reasons for any decisions
4. where possible inform all relevant parties of reasons for decisions
5. provide as much information as possible to 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 unauthorised activity
6. provide information to all relevant parties about any avenues to seek an internal or external review of a decision.

#### 4.4 How reports alleging unauthorised activity will be dealt with by council

Council will record and assess every report alleging unauthorised 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.

Generally speaking, council's objectives when dealing with reports alleging unauthorised activity are to:

1. maintain the collective good and welfare of the community
2. prevent or minimise harm to health, welfare, safety, property or the environment
3. consider the broader public interest having regard to council's priorities and any resource limitations
4. consider the report fairly and impartially.

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 unauthorised 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 unauthorised 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 unauthorised 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 unauthorised activity, and in particular explain that in the absence of sufficient evidence of unauthorised 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



unauthorised 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.

#### **4.5 Confidentiality of people who report allegations of unauthorised activity**

People who report allegations of unauthorised 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:

1. the disclosure is necessary to investigate the matter
2. their identity has already been disclosed to the subject of their report directly or in a publicly available document
3. the individual was consulted following receipt of a Government Information (Public Access) Act 2009 application and did not object to the disclosure
4. the individual consents in writing to their identity being disclosed
5. the disclosure is required to comply with principles of procedural fairness
6. 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.

#### **4.6 What council expects from people who report allegations of unauthorised activity**

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

1. providing a clear description of the problem (and the resolution sought, if relevant)
2. 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
3. not giving any information that is intentionally misleading or wrong
4. cooperating with council's inquiries and giving timely responses to questions and requests for information
5. treating council's staff with courtesy and respect
6. allowing the investigation to be completed without prematurely taking the matter to other agencies unless referred to by council.
7. not making demands of Council or its staff to do or say things that are unauthorised or unreasonable in the circumstances.





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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.

Inappropriate conduct by a person reporting unauthorised activity may limit Council's capacity to take enforcement action. Council often relies upon reports by members of the community in its implementation of enforcement action. In taking enforcement action it is critical for Council to obtain information from reliable witnesses. Given that most formal enforcement actions are appealable in court Council must be confident in its ability to defend a legal challenge. Council has obligations to use its resources in an efficient manner, and this includes legal expenditure. The assessment of a witness's availability and reliability in any potential legal challenge is an essential part of Council meeting its legal and financial obligations.

Actions that may result in a person being assessed as an unreliable witness may include:

1. Offensive, abusive or threatening conduct towards Council staff, other witnesses or the alleged offender.
2. Failing to declare to Council formal disputes with the alleged offender, such as existing or previous litigation.
3. Providing false or misleading information to Council.
4. Carrying out the same or similar alleged unauthorised activity as the accused.
5. Publically disclosing information that is confidential, false or misleading during the course of an investigation.
6. Taking unreasonable action that may threaten Council's integrity or Council's capacity to resolve an enforcement matter.

Council's capacity to take effective enforcement action may be compromised if a person reporting unauthorised activity becomes an unreliable witness. If this occurs Council has the discretion to conclude an investigation or withdraw enforcement action. In these circumstances Council will inform the person reporting the alleged unauthorised activity of alternative options available to resolve their concerns.

Alternative options may include, but are not limited to formal mediation or third party action in a relevant court of law.

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

#### 4.7 What parties can expect from council staff

People who report alleged unauthorised activity, as well as individuals or businesses that are subject to Council investigation of alleged unauthorised activity can expect that council staff will:

1. treat them with courtesy and respect
2. 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



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3. clearly explain decisions in plain English
4. provide information about any relevant internal and external appeal processes that may be available
5. carefully assess any new information provided by any party after a decision has been made and advise whether further action will be taken.

#### 4.8 Complaints about council's enforcement actions

Any complaints about council's handling of reports alleging unauthorised 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 law enforcement officers in accordance with council's complaints management policy and procedures and the code of conduct.

#### 4.9 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. An anonymous report will hamper the nature of any enforcement action Council may consider.

#### 4.10 Unauthorised activity outside business hours

Unauthorised 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 unauthorised 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.

In circumstances where Council officers are not available during certain hours of the day, Council may ask members of the community to make observations of the alleged unauthorised activity. Witness statements from civilians are important and can greatly assist Council in its investigations. If a member of the community volunteers to Council to make observations they must do so within the limits of the law and not put themselves at risk.

#### 4.11 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



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matters, some may require council's involvement and some of which will be personal to the parties.

Council staff will assess such reports to determine whether there is evidence of any possible unauthorised 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 may be that a minor unauthorised activity is entwined with a neighbour dispute and a resolution to that activity may be better resolved via civil means through 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.

#### 4.12 Investigating reports of alleged unauthorised activity

Not all reports alleging unauthorised activity will warrant investigation. A preliminary assessment of all matters will be made to determine whether investigation or other action is required. On an annual basis Council will adopt a Compliance Priorities' Program which will allocate Council's regulatory responsibilities and functions into Very High, High, Medium and Routine categories.

As of the date of this policy Council does have an annual Compliance Priorities' Program and this program must be used in undertaking the abovementioned preliminary statement.

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 other internal business units to understand the relevant history and context of a matter.

#### **Preliminary circumstances where no investigative action may be taken**

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

1. 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 SafeWorkNSW for workplace safety matters, the NSW Environment Protection Authority for possible environmental offences and Community Justice Centres NSW for personal disputes
2. 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



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- 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)
3. the allegations relate to a unauthorised activity (eg where there is an existing approval or the activity is permissible without council approval or consent being required)
  4. the report is not supported with evidence or appears to have no substance
  5. 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.

#### 4.13 Relevant factors guiding decisions as to whether to take investigative action

When deciding whether to investigate, council may consider a range of factors including whether:

1. the activity is having a significant detrimental effect on the environment or it constitutes a risk to public safety
2. the report is premature as it relates to some unfinished aspect of work that is still in progress or is yet to occur
3. the activity or work is permissible with or without permission
4. all conditions of consent are being complied with
5. much time has elapsed since the events the subject of the report took place, the matter is legally stale
6. another body is a more appropriate agency to investigate and deal with the matter
7. it appears there is a pattern of conduct or evidence of a possible wide spread problem
8. the person or organisation reported has been the subject of previous reports
9. the report lacks information that would give Council lawful reason to act
10. the report is trivial, frivolous or vexatious
11. the report raises matters of special significance in terms of the council's existing priorities
12. there are significant resource implications in relation to an investigation and any subsequent enforcement action
13. it is in the public interest to investigate the report
14. the report has already been dealt with

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. Discretionary powers are fully explained in Section 5 of the NSW Ombudsman Enforcement Guidelines for Councils 2015.



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

1. determine the cause of the incident
2. determine if there has been a contravention of law, policy or standards
3. gather evidence to the required standard to support any required enforcement action
4. determine any necessary action to mitigate the possibility of reoccurrence of similar incidents.

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

#### 4.14 Taking enforcement action

Council has discretion in deciding whether to take enforcement action on the basis of the available evidence and the circumstances of the individual case. At the conclusion of an investigation, Council may have one or more of the following options;

1. Take no action;
2. Counsel the alleged offender;
3. Issue an electronic caution;
4. Issue a PIN;
5. Issues Notices and Orders;
6. Commence criminal proceedings;
7. Commence civil proceedings;
8. Report broader matters to the elected council.

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

1. Has Council created an estoppel situation?
2. Is the breach a technical breach only?
3. When was the unauthorised activity carried out and for how long?
4. How has the unauthorised activity affected the natural or built environment and the health, safety and amenity of the area?
5. Would consent have been given if it had been sought?
6. Can the breach be easily remedied?
7. Does the person in breach show contrition?
8. Are there any particular circumstances of hardship affecting the complainant or the person the subject of the CRM?
9. Has the person the subject of the CRM received a previous warning or other non-coercive approach or has formal legal action been taken?
10. Would an educative approach be more appropriate than a coercive approach?
11. What are the costs and benefits of taking formal enforcement action as opposed to taking informal or no action?



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12. What are the chances of success if the proposed enforcement action was challenged in court?
13. Is there a draft planning instrument on exhibition that would make the unauthorised use legal?
14. What action would be reasonable and proportionate in this case?
15. What would be in the public interest?

#### 4.15 The nature and seriousness of the unauthorised activity

Council will have regard to the impact the unauthorised activity is causing on amenity or harm to the environment. If action is required, Council will consider what is reasonable in the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the unauthorised activity.

#### 4.16 Relevant factors

Where unauthorised activity is identified, the seriousness of the unauthorised activity will guide the appropriate enforcement response. The following factors are relevant to determining the significance of the unauthorised activity:

1. the **severity** or **seriousness** of the unauthorised activity, which includes:
  - a. the degree of harm or potential harm resulting from the unauthorised activity, including whether it seriously endangers human health or safety, the environment, or the economic or social fabric of the community;
  - b. whether any environmental harm caused by the unauthorised activity is temporary or long lasting;
  - c. the magnitude or degree of non-compliance – whether the non-compliance is trivial or not;
  - d. whether the offence occurred on public lands and has harmed the value of those lands to the community;
  - e. the level of any unjust benefit to the alleged offender arising from the unauthorised activity and whether the unauthorised activity was motivated by financial gain.

Certain legislation for example POEO or EP&A stipulates a hierarchy of seriousness within the legislation framework. Under such circumstances the factors (above) are used to determine the significance of the unauthorised activity within the statutory hierarchy.

2. the public interest, including for example:
  - a. the cost to the general community of the unauthorised activity (e.g. whether the offence caused harm to public lands including for example, Bill Posting and Graffiti) and the cost of taking further action in response to the unauthorised activity;
  - b. the need to deter an offender and the broader community from committing further offences of a similar nature in the future (particularly if the offence is prevalent);
  - c. whether pursuing the unauthorised activity would be of little or no utility (for example, where a change in the law is imminent which would make the activity lawful).



3. aggravating or mitigating factors - this refers to the negative and positive circumstances surrounding the offender’s commission of the offence, including for example:
  - a. whether the alleged offender committed the unauthorised activity deliberately or by mistake;
  - b. whether the alleged offender has shown a willingness to co-operate with Council and to comply in the future;
  - c. whether the alleged offender has a history of prior unauthorised activity and, if so:
    - i. whether Council has taken action;
    - ii. whether the unauthorised activity is continuing (the alleged offender has not ceased or abated the offence); and
    - iii. the length of time which has elapsed since the unauthorised activity occurred.

The applicability of, and weight to be given to, each of the above factors will depend on the circumstances of each case. Investigating officers will make determinations on the level of significance with reference to internal policies, peer review, supervisor support Council resolutions and legal advice where appropriate. Council officers will operate only within their delegated authority.

Classifying a unauthorised activity – low, medium or high?

Note: the classification of high includes the category very high as it is referred to in the current “Compliance Priorities Program”

After the above factors have been considered, suspected unauthorised activity will be classified as being of low, medium or high significance. This classification will, in turn, guide the appropriate action to be taken. In all cases professional judgment will need to be exercised when making the classification.

The following table provides examples in determining the significance of an unauthorised activity in consideration of the factors listed in this policy.

**Table 1:** Examples in determining significance of unauthorised activity

Severity/ seriousness	Public interest	Aggravating or mitigating factors	Significance of unauthorised activity
Low to moderate environmental harm	Public interest low due to minimal cost to the community and the “one-off” nature of the unauthorised activity with minimal need for deterrence against further unauthorised activity.	No significant aggravating factors; Offender co-operated with investigation.	LOW
Moderate, short-	Public interest likely to be	No significant	LOW

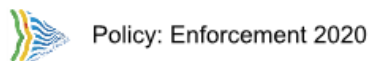


<i>Severity/seriousness</i>	<i>Public interest</i>	<i>Aggravating or mitigating factors</i>	<i>Significance of unauthorised activity</i>
term loss of amenity; Low environmental harm	moderate due to the need to deter the offender from further unauthorised activity of this nature but little public perception of the unauthorised activity.	aggravating factors; Offender rectified unauthorised activity quickly when notified by Council.	
Moderate or high degree of environmental harm	Public interest high due to the unauthorised activity impacting on the amenity of several residential neighbours and the need to deter against further unauthorised activity of this nature.	Significant aggravating circumstances due to offender knowingly committing the unauthorised activity despite likely impacts.	HIGH
Large magnitude of unauthorised activity; High level of unjust benefit; Low to moderate risk of environmental harm	Public interest moderate due to the need to deter the offender against further unauthorised activity of this nature,	Aggravating circumstances due to offender knowingly committing the unauthorised activity for significant financial gain.	HIGH
High level of compliance with approval / consent	Public interest moderate due to the need to deter the offender against further unauthorised activity of this nature.	Minor aggravating circumstances due to offender submitting false and misleading information about the unauthorised activity.	MEDIUM
Low level of compliance with approval / consent	Public interest high due to the high public perception of the unauthorised activity and likelihood of the offender committing further unauthorised activity.	No mitigating circumstances due to offender failure to acknowledge the unauthorised activity and instigating measures to prevent further unauthorised activity.	HIGH

#### 4.17 Enforcement options

When unauthorised activity has been identified, it is then necessary to determine the appropriate enforcement response for the particular unauthorised activity. Enforcement options include actions to restrain or remedy unauthorised activity, and actions to punish an offender. The range of enforcement options available to Council in descending order of significance is shown in Figure 2.





Enforcement options are not necessarily mutually exclusive; for example in some circumstances it may be appropriate to contemporaneously issue an Order and a penalty notice.

Figure 2: Enforcement actions available to the Council

<p><b>Court order</b></p> <p>An order from the Court requiring certain things to be done to achieve compliance (civil proceedings)</p>	<p><b>Criminal Prosecution</b></p> <p>in the Land and Environment Court or the Local Court</p>
<p><b>Order</b></p> <p>Council will issue Orders requiring certain things to be done to achieve compliance</p>	<p><b>Penalty Notice</b></p> <p>Council will issue Penalty Notices for matters listed in the Fixed Penalties Handbook</p>
<p><b>Letter requesting undertaking</b></p> <p>A letter requesting an undertaking that corrective action will be taken within a certain timeframe</p>	<p><b>Negotiation</b></p> <p>with alleged offender and written confirmation of commitments made</p>
<p><b>Warning or advisory letter</b></p> <p>to encourage future compliance and caution that further action may be taken</p>	<p><b>Record the breach</b></p> <p>No further action – for very minor breaches only</p>

#### 4.18 Choosing the appropriate enforcement response

In all cases, Council will choose an enforcement response which is proportionate to the seriousness of the offence and which:

1. sets a proper precedent for future cases;
2. is consistent with the intent and objectives of the legislation;
3. is an appropriate use of Council's resources;
4. does not adopt an unreasonable or extreme interpretation of a condition of approval or consent. Council will cast itself as the "reasonable person"; and
5. is consistent with responses previously adopted for similar incidents.

Enforcement options which may be appropriate for unauthorised activities determined to be of low, medium or high significance are set out below. It is important to remember that the following is a guide only and each case must be assessed on the particular facts. A summary of the guide is provided in Table 2.

Enforcement options for unauthorised activities of **low significance**:

1. take no action but record the unauthorised activity (only where the degree of harm and severity of the unauthorised activity are low to very low, some mitigating



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- circumstances exist, there are no aggravating circumstances, and the public interest does not compel further action);
2. send an electronic warning or advisory letter to the alleged offender to encourage them to comply in the future;
  3. negotiate a corrective action with the alleged offender and confirm commitments made in writing;
  4. send a letter identifying the unauthorised activity and requesting an undertaking that corrective action will be taken within a specific timeframe;
  5. issue an Order under [Sections 9.34 to 9.36](#) and [Schedule 5, Parts 1-3](#) of the EP&A Act, for example to cease specified activities, comply with a development consent or project approval, and/or effect a remedy or restraint of the alleged unauthorised activity.

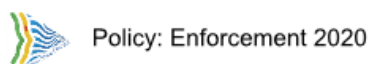
Enforcement options for unauthorised activity of **medium significance**:

1. send an electronic warning or advisory letter to the alleged offender to encourage them to comply in the future;
2. negotiate a corrective action with the alleged offender and confirm commitments made in writing;
3. send a letter identifying the unauthorised activity and requesting an undertaking that corrective action will be taken within a specific timeframe;
4. issue an Order, for example to cease specified activities, comply with a development consent or project approval, and/or effect a remedy or restraint of the alleged unauthorised activity;
5. issue a PIN.

Enforcement options for unauthorised activity of **high significance**:

1. send a letter identifying the unauthorised activity and requesting an undertaking that corrective action will be taken within a specific timeframe;
2. issue an Order;
3. commence civil proceedings in the Land and Environment Court seeking Court Orders requiring certain things to be done to achieve compliance or to remedy or restrain an alleged unauthorised activity;
4. issue a PIN;
5. commence criminal prosecution proceedings in the Land and Environment Court or in a Local Court.

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 does not achieve the desired response, it may be appropriate to give an Order or to seek an Order from the Court; or if an Order is not complied with it may be appropriate to bring enforcement or prosecution proceedings.



**Table 2: Enforcement Options Summary**

Enforcement action	Significance of unauthorised activity		
	High	Medium	Low
Prosecution	*		
Court Order	*		
Penalty Notice	*	*	
Order	*	*	*
Letter requesting undertaking	*	*	*
Negotiated outcome		*	*
Warning letter		*	*
Record unauthorised activity			*

**4.19 Irrelevant considerations in choosing an enforcement response**

The decision as to the appropriate action will not be influenced by:

1. the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
2. the personal feelings of the investigating officers concerning the offence or the alleged offender;
3. the possible political advantage or disadvantage to the Government, Council or to any political party, group or individual;
4. the possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or otherwise involved in its conduct; or possible media or community reaction to the decision.

**4.20 When may a caution be given instead of a PIN?**

1. A caution may be given if:
  - 1.1. The offence is one for which a PIN may be issued;
  - 1.2. The issuing officer has reasonable grounds to believe that an offence has been committed; and



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- 1.3. The issuing officer believes it is appropriate to give a caution in the circumstances.
- 1.4. Cautions to be a formal caution and given electronically.
2. In deciding whether to give a person a caution, the officer must exercise his or her discretion based on the facts of each individual case, and having regard to this Policy or other applicable Council guidelines or standard operating procedures.
3. An issuing officer or agency must only give a caution if there are reasonable grounds to believe that an offence has been committed. This is the same test used when deciding whether or not to issue a PIN. Every element of the offence must appear to be present and there must be sufficient evidence to prove the offence.
4. It is appropriate to give a caution in the circumstances.
  - 4.1. The decision to give a caution, rather than issue a PIN, requires the exercise of good judgement, involving an assessment of all the circumstances.
  - 4.2. Without limiting the discretion to give a caution, the matters that should be taken into account when deciding whether it is appropriate to give a person a caution instead of a PIN include:
    - a. The offending behaviour did not involve risks to public safety, damage to property or financial loss, or have a significant impact on other members of the public;
    - b. The officer has reasonable grounds to believe that the person has a mental illness or intellectual disability;
    - c. The officer has reasonable grounds to believe that the person is homeless;
    - d. The officer has reasonable grounds to believe that the person is under 18;
    - e. The officer has reasonable grounds to believe that the person has a special infirmity or is in very poor physical health;
    - f. The offending behaviour is at the lower end of the scale of seriousness for that offence or is minor in nature.
    - g. The person claims on reasonable grounds that they did not knowingly or deliberately commit the offence;
    - h. The person admits the offending behaviour and shows remorse; The person is cooperative and/or complies with a request to stop the offending conduct. For example, a person stops in a no parking zone for longer than the required time but does not leave the vehicle unattended and agrees to move the vehicle when directed.
    - i. There are other reasonable grounds for giving a caution in all the circumstances of the case. For example, the offence was committed because of a medical or other serious emergency, or the person is a visitor from interstate or overseas and was not aware that their conduct constituted an offence or the person doesn't speak or read English and/or is unable to read or comprehend signs, directions etc.
  - 4.3. The fact that one or more of these factors is present does not mean that the officer is obliged to issue a caution. All the circumstances of the case should be taken into account to determine whether a caution is an appropriate and reasonable response to the offence.
  - 4.4. In considering whether there are reasonable grounds to believe that a person has a mental illness, intellectual disability, special infirmity, is in very poor



physical health or is homeless, officers should form their own judgment having regard to all the circumstances, including the appearance, speech and behaviour of the person. Any documentary evidence produced by the person may also be taken into account.

- 4.5. In deciding whether to issue a caution, it may be relevant to consider whether the person has been issued with a caution for the same or similar offence before. However, the fact that someone has been issued with a caution previously does not mean that they cannot be given another caution

#### 4.21 When a caution must not be given

An issuing officer must not give a person a caution if they are not able to issue the person with a PIN for the same behaviour. For example, an issuing officer must not give a caution if:

1. he or she does not have reasonable grounds to believe that an offence has been committed, or
2. each element of the offence is not present, or
3. there is insufficient evidence to prove the offence, or
4. the person has a lawful excuse.

Cautions to be recorded electronically

The fact that a caution has been given to a person is to be recorded, including;

1. The date of the caution;
2. The name of the officer who gave the caution;
3. The offence for which the caution was given;
4. The name and address of the person given the caution; and
5. The date, place and approximate time that the offence was alleged to have been committed.

What if a caution is given by mistake?

Giving a caution in relation to an offence does not affect the power of Council to take other action it would otherwise be allowed to take in respect of an offence.

1. This provision is intended to be a safeguard so that alternative action can be taken by the issuing agency instead of a caution if it later becomes apparent, having regard to applicable guidelines, that a caution was not the most appropriate response.
2. For example, if the Council later discovers that a person's conduct was, in fact, so serious that a caution was not the most appropriate response, it could issue a PIN or commence court proceedings instead of the caution. Any other action must take place within the applicable statutory limitation period e.g. further action would have to be taken within 6 months of the date of the alleged offence for summary offences, or 12 months for traffic-related offences.
3. Similarly, if Council discovers that a person's conduct was lawful and that a caution should not have been given, it must update any record of the caution accordingly.



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4. Council should have good reasons for taking alternative action after an issuing officer has already cautioned a person for an offence.
5. It is not intended that a person should receive both a caution and a PIN for the same offence. Officers should decide which is the most appropriate response in all the circumstances of the case.

#### 4.22 Applications for internal review

1. Applications for review should be made to the SDRO, which will either conduct the review or refer the application to Council.
2. Applications may be made by any person to whom a PIN has been issued.
3. Applications for review must be in writing, and must include:
  - a. the mailing address of the applicant,
  - b. the grounds on which review is sought, and
  - c. appropriate supporting evidence.
4. Applications may be made even if the PIN amount has been fully paid or paid in part.

#### 4.23 Requirements for internal review under the Fines Act

Council has the power to internally review the decision to issue a PIN. If the elected Council makes a decision that Council will not pursue an enforcement matter, then the General Manager is bound to implement that decision.

In the implementation of this Policy it is recognised that the governance framework is generally inconsistent with ad hoc intervention of the elected Council in enforcement matters and that it should not intervene in operational aspects of the exercise of Council's regulatory functions.

In the implementation of this Policy it is also recognised that the LGA envisages that the elected Council will primarily be involved in the *creation and review of the council's (as defined in the (LGA) Dictionary) policies and objectives relating to the exercise of the council's regulatory functions.*

The following sets out the basic requirements for such reviews.

#### 4.24 When must an internal review under the Fines Act be conducted

Council may review a decision to issue a PIN and may do so on its own motion.

Purpose and scope of internal review:

1. The purpose of internal review is to determine, on the available information, whether a PIN was correctly issued, and whether any circumstances warrant withdrawal of the PIN.
2. Internal review cannot result in any variation of the amount to be paid under the PIN, nor any variation in options for payment (these are the responsibility of the SDRO)



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3. If an application for internal review raises allegations of poor performance or misconduct by law enforcement officers, this may require a separate investigation, independent of any review of the decision to issue PIN.

Person who may conduct the review:

1. The internal review must be conducted by Council's Legal Counsel.
2. Legal Counsel must not review PINs if they have any actual, potential or perceived conflict of interest or personal interest in the outcome of the decision relating to that PIN, including:
  - a. Where the PIN was issued to a relative, family member, business partner or friend of the person, or
  - b. Where the person's relative, family member, business partner or friend issued the PIN.

In such a case, the internal review will be conducted by the General Manager.

Matters to be taken into account on review:

1. Internal reviews must ensure that discretionary powers are exercised in good faith and in a way that is consistent with Part 3 Division 2A of the Fines Act and this Policy.
2. To help ensure the integrity of the review process, applications must be determined with reference to the written application and wherever possible, to any statement or other information provided by the applicant, such as medical, psychological or case worker reports.
3. The review must also take into account the grounds upon which the application for review has been made and whether, given the person's application, prosecution of the offence would be likely to be successful and/or, whether it is appropriate to continue the enforcement process.
4. Council may request additional information from the applicant, in writing. The review can be conducted without the additional information if this is not provided within 14 days of the request.

Extension of deadline for enforcement:

While a review is under way, the deadline for the enforcement of that PIN is extended. However, the deadline for enforcement cannot be extended beyond the applicable statutory limitation period for that offence.

#### 4.25 Grounds for review

The Fines Act stipulates mandatory grounds on which a PIN must be withdrawn. On review, a PIN must be withdrawn if Council finds that:

1. The PIN was issued contrary to law
  - a. A PIN is only issued according to law if every element of the offence appears to be present and there is sufficient evidence to prove every element of the offence.



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- b. A person cannot lawfully be issued with more than one PIN for a single offence. This does not mean that a person who repeats an offence, or a vehicle detected for repeat offences, cannot be given a PIN for each separate offence committed.
- 2. The issue of the PIN involved a mistake of identity. A PIN must be withdrawn if it has been issued to the wrong person. For example, Council issues a PIN for an offence, but the offender has provided another person's identification documents.
- 3. The PIN should not have been issued, having regard to exceptional circumstances relating to the offence:
  - a. In some cases, a PIN should not have been issued due to exceptional circumstances relating to the offence.
  - b. An example of exceptional circumstances which may mean that a PIN should not have been issued is set out below. However, this does not mean that a PIN must be withdrawn in every case where there are exceptional circumstances. Regard must be had to what is reasonable in all the circumstances of each case, including the nature and severity of the offence.

	Example
Medical emergency	A person parks longer than they were entitled to because <ul style="list-style-type: none"> <li>o They experienced unexpected trauma during a medical appointment</li> <li>o they were visiting someone in hospital and their condition worsened or death was imminent, and it was not reasonable to leave at that time.</li> </ul>

A caution should have been given instead of a PIN, having regard to the relevant caution guidelines.

#### 4.26 Outcome of review

After conducting a review of a PIN that has been issued, Council may confirm the decision to issue a PIN or may withdraw the PIN.

Council is to notify both the applicant and the SDRO in writing of the outcome of the review within 42 days of receipt of the application (or 56 days if additional information has been requested).

- 1. If the PIN is withdrawn

If after a review, the PIN is withdrawn, then:

- a. any amount paid under the notice is to be refunded; and
- b. any penalty reminder notice is also deemed to have been withdrawn; and
- c. Council may, if it considers it appropriate to do so, give an official caution as if it were an appropriate officer.

If Council withdraws a PIN on its own motion after the amount under the PIN (or a penalty reminder notice in respect of the offence to which the PIN relates) has been paid, no person is liable to any further proceedings for the alleged offence.





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2. If the PIN is confirmed

A penalty reminder notice is automatically issued for all PINs, even if they are being internally reviewed. If after review the PIN is confirmed, the person must be advised of the new due date for payment of the penalty. This advice replaces any previous penalty reminder notice for that offence (and it is not necessary for a second reminder notice to be issued).

3. Withdrawal of PINs issued to Council staff or vehicles

Withdrawal of PINs issued to Council staff or vehicles will be considered in accordance with the above procedures. No special consideration or separate procedure may be applied under these circumstances.

### 4.27 Consultation with other regulatory agencies

Regulatory action taken by another authority does not preclude Council from taking compliance action in response to a unauthorised activity of legislation. However, where an offence is identified which another regulatory agency or local Council may also be addressing, Council will consult with the responsible authority to facilitate a coordinated and constructive compliance approach.

### 4.28 Authorised officers, delegated authority and lawful powers of entry

Council views the power to enter private property very seriously and will ensure that the exercise of these functions will be strictly in accordance with the legislation.

Council shall provide the General Manager, who in turn shall provide staff, with sufficient delegations to initiate and proceed with appropriate levels of enforcement action.

Powers to enter premises and carry out investigations are separately defined by specific pieces of legislation. The most commonly used authorities are:

1. LGA
2. POEO
3. EP&A
4. Companion Animals Act 1998
5. Crown Land Management Act 2016
6. Road Rules 2014
7. Impounding Act 1993
8. Roads Act 1993
9. Rural Fires Act 1997
10. Swimming Pools Act 1992
11. Food Act 2003
12. Public Health Act 2010

All Council staff or authorised contractors who carry out inspections on private land for regulatory purposes will:

1. have delegation to enter premises and carry out investigations as specified in Council's delegations;
2. be authorised by Council where this is required under specific legislation to permit inspections on private property;



3. carry photographic identification demonstrating appropriate authorisation to enter premises and private lands under each specific Act; and
4. carry documentation or certificates of authority where required by the legislation being implemented.

#### 4.29 Procedural fairness and natural justice

There is an overriding duty on the Council to act fairly and ensure the principles of procedural fairness and natural justice are adhered to. In this regard Council will;

1. Provide information on the substance of the CRM to the alleged offender. This may not occur until an appropriate stage in the investigation;
2. Provide an opportunity for the alleged offender to put their case. This will not be necessary if there is a serious risk to personal or public safety or risk of serious environmental harm;
3. Consider any submission put forward by the parties to the matter;
4. Make reasonable inquiries or investigations before making a decision;
5. Ensure no person decides a case in which they have an interest; and
6. Otherwise act fairly and without bias.

#### 4.30 Relief by way of lodgement of a development application

Where unauthorised development is detected and enforcement action is contemplated or has commenced Council may use its discretion to suspend enforcement action whilst a development application to correct the unauthorised development is lodged and determined. This discretion may extend to the unauthorised activity continuing during the course of the development assessment process.

Application of the abovementioned discretion must be assessed in accordance with factors set out in 4.16 hence.

In circumstances where Council decides to commence or continue with enforcement action whilst a development application has been lodged, the aggrieved party may seek relief from the court under section 9.46(3) of the Environmental Planning and Assessment Act 1979.

#### 4.31 Undertakings

An undertaking is a written commitment to Council by an alleged offender declaring that the person will do or will not do certain things. Undertakings are sometimes used as a method of settling a compliance or enforcement dispute with Council.

#### 4.32 Search Warrants

A Council officer's power to enter premises may significantly vary depending on the legislation by which the officer is relying upon. However, it is a general principle of law that an officer cannot enter residential premises without notice or by invitation.

On occasions Council officers may be refused entry onto premises or any part of premises despite lawful powers of entry being exercised. In those circumstances the only other form of lawful entry may be by the execution of a search warrant. Council takes search warrants



very seriously and an officer seeking a warrant must have special delegation from the general manager to obtain a warrant.

A search warrant may also be used for the purpose of entering premises without notice to collect evidence for certain types of unauthorised activities that may inflict serious harm to the environment or public health and safety such as unauthorised back packer premises.

## 5. Legislative and strategic context

### New South Wales Ombudsman

The NSW Ombudsman's Enforcement Guidelines for Councils published December 2015 guides this Policy.

## 6. Sustainability

### 6.1. Social

A significant amount of government regulation is directed to the prevention or minimisation of harm, whether it is harm to health, welfare, safety, property or to the environment.

In western democracies it is often said that governments govern by consent. In this context councils can be considered to be an arm of government which regulates by consent and on behalf of ratepayers:

1. for the collective good, the welfare of the community or the public interest
2. to prevent or to minimise harm
3. to promote social policies (eg to preserve or protect the environment)
4. to manage risks
5. to uphold social order.

Councils can be seen as guardians of public trust. For example, the community can trust that the food they buy at food outlets inspected by their local council will not poison them, they will not encounter stray dogs that will bite them, there will be enough parking spaces, etc.

The objects section of an Act will often list the specific nature of the harm that is being addressed and explicitly state the regulatory purposes of the legislation. Councils should ascertain the regulatory outcomes to be achieved from the object clauses of the legislation wherever available and incorporate the objectives of the various regulatory schemes they administer in any compliance policy or plan.

### 6.2. Environmental

In deciding whether to take enforcement action under this policy environmental sustainability will be a major consideration, particularly in regards to objectives of the following legislation:



Policy: Enforcement 2020

- Environmental Planning and Assessment Act 1979
- Local Government Act 1993
- Protection of the Environment Operations Act 1997
- Food Act 2003
- Companion Animals Act 1998

### 6.3. Economic

In deciding whether to take enforcement action under this policy the efficient use of Council resources must always be considered.

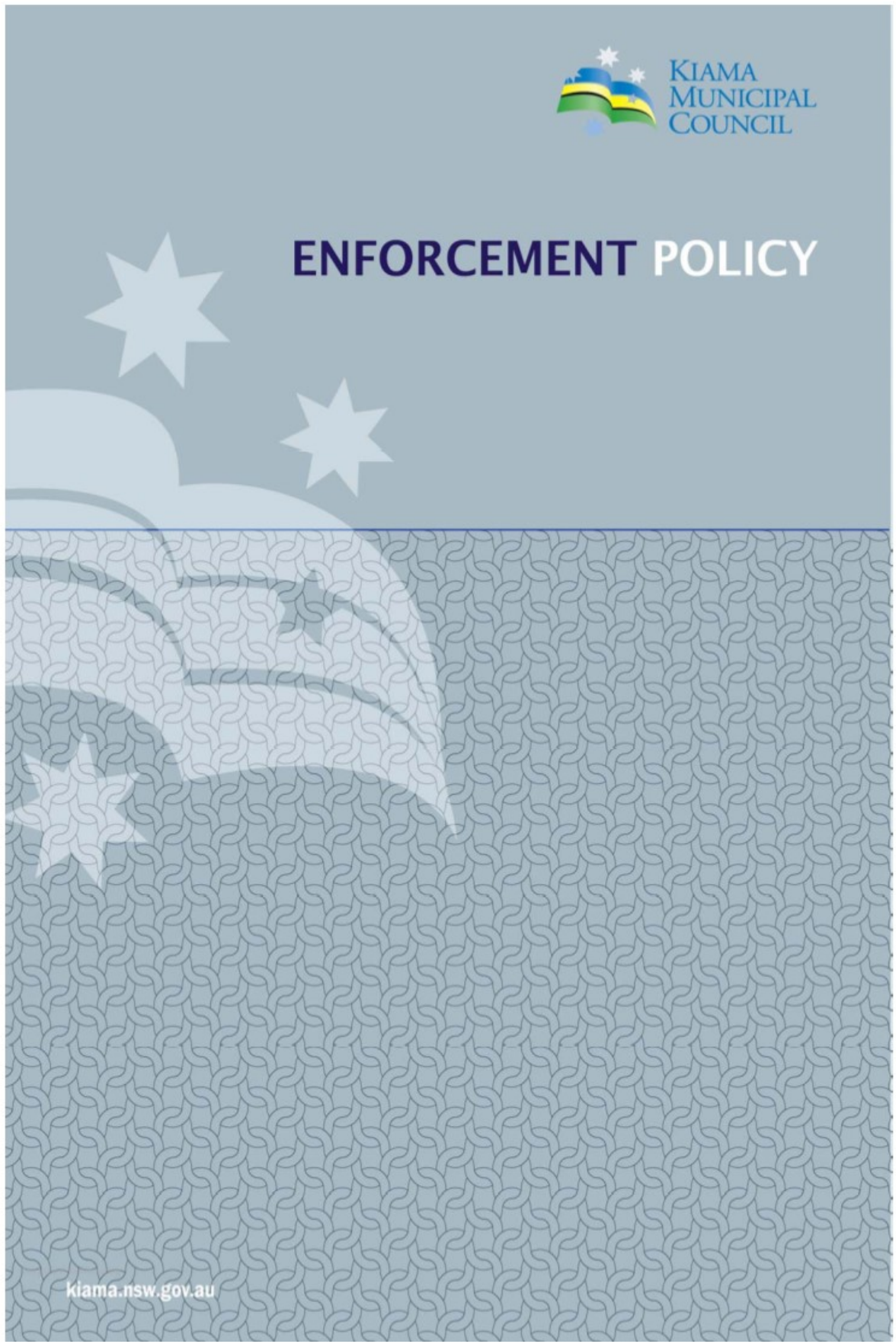
### 6.4. Governance

Council needs to be accountable for the efficiency and effectiveness of their compliance and enforcement activities as well as any unreasonable failures to take appropriate action. This means that activities need to be open to scrutiny. Council is answerable for its decisions on why they took action or decided not to act. This should be transparent to the general public, people who report alleged unauthorised activity, alleged offenders and other stakeholders.

To achieve accountability and transparency council should:

1. publish compliance/enforcement policies
2. document and make publicly available their compliance priorities and strategies
3. explain decisions made in particular circumstances by the giving of comprehensive and meaningful reasons, particularly when there has been a departure from adopted policy or standard practice
4. have a mechanism for consultation and feedback from industry and other stakeholders on their compliance activities
5. identify and explain the principal risks against which they are acting in all the major regulated areas
6. develop and publish clear standards for performance
7. measure and publish performance results against the standards
8. have a complaint resolution mechanism to deal with any concerns about the conduct of compliance officers and decisions made
9. have a publicly available complaint policy
10. have clear procedures for internal and external review of decisions where applicable.

Providing information about the approach, priorities and reasons for decisions improves understanding and certainty and promotes trust by the community.



Item 6.1

Attachment 2

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## **1. INTRODUCTION**

### **1.1 The Policy**

This policy is called "Kiama Municipal Council's Enforcement Policy".

### **1.2 Commencement**

This Policy was adopted by Council on 17 May 2011 and commences on 25 May 2011.

### **1.3 Purpose**

The purpose of this policy is to assist Council staff to act promptly, consistently and effectively in response to allegations of unlawful activity primarily associated with, but not limited to, development and building matters.

### **1.4 Policy Statement**

Council is strongly opposed to unlawful activity at any time or under any circumstances. Council's officers will initiate enforcement action in accordance with this policy document.

### **1.5 Policy Objective**

The aim of this policy is to establish clear guidelines for the exercise of the discretion the Council and its officers must use in dealing with unlawful activity, taking into account all relevant information including the available evidence, cost to the community, the circumstances of the individual case and public policy and precedent considerations.

The policy:

- Provides a legal and administrative framework to assist Council and its officers in making decisions in its enforcement functions;
- Specifies the criteria which the Council and its officers will take into consideration when deciding:
  - (a) if enforcement action is necessary; and
  - (b) the most appropriate type of action.
- Provides information to the public about the Council's role and policy on enforcement; and
- Ensures that the enforcement process is conducted with maximum speed and minimal delay.

## 1.6 Policy Principles

Council is committed to:

- Acting in the interest of protecting community health, safety and or the environment;
- Acting consistently, fairly, impartially and transparently;
- Preventing discrimination on the basis of race, religion, sex, national origin, political association or other personal reason/s;
- Ensuring the proposed enforcement action is in keeping with the relative severity of the offence/s;
- Ensuring enforcement action is taken against the right person for the correct offence;
- Ensuring that any actual or potential conflict of interest situations are managed in a fair, consistent and impartial manner;
- Disclosing all evidence relevant to the alleged offence/s;
- Assisting the Court by providing all necessary information whether or not that information is in favour of the Council case, in accordance with a prosecutor's general duties.

## 1.7 Application

This policy applies to the investigation and enforcement of unlawful activity or failure to comply with terms or conditions of approvals, licences, orders, notices, directions, Council policies or breaches of legislation administered by Council. While it is primarily directed at the regulation of development activity, this policy also applies to all functions, policies and legislation administered by Council including but not limited to pollution control, food regulation, parking and animal control, tree preservation and prohibited activities applicable to property and land.

## 1.8 Definitions

The following defined terms are used in the policy:

*CAN* - means a court attendance notice issued and filed in accordance with the Criminal Procedure Act 1986. A CAN may be used to commence summary proceedings in the local court. A CAN specifies the offence and its essential particulars as well as the address of the court where the matter is to be heard. If a person does not attend court on the day specified in a CAN, a warrant may be issued for the arrest of the person or the matter may be dealt with in the absence of the person.

*Council* - means Kiama Municipal Council and staff holding relevant delegations.

*Defendant* - means the accused person against whom criminal proceedings are brought.

*EPAA* - means the Environmental Planning and Assessment Act



1979.LGA - means the Local Government Act 1993.

*Legislation* – any legislation as administered by Council and its delegated officers.

*PIN* - means penalty infringement notice. Sometimes referred to as an 'on-the spot' fine. PINs may only be issued for prescribed offences and the value of the fine is also prescribed by legislation.

*POEO* - means the Protection of the Environment Operations Act 1997.

*Policy of Council* – means this policy and any other policies as adopted by Council.

*Respondent* - means the party against whom civil proceedings are brought in Land & Environment Court proceedings.

*unlawful activity* - means any activity or work that has been or is being carried out:

- contrary to a legislative provision regulating a particular activity or work;
- contrary to legislation as administered by Council.
- contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land;
- without a required development consent, approval, permit or licence; and/or
- contrary to the terms or conditions of a development consent, approval, permit, licence, notices, orders or directions as issued by Council.

## **2. BACKGROUND**

Council becomes aware of unlawful activities in a variety of ways, from the proactive actions of Council staff to the receipt of complaints or requests from members of the public.

When Council is appointed the Principal Certifying Authority for development and building works, Council staff will identify breaches of consent and unauthorised building work and uses. In our environmental protection or public health roles, we may discover pollution incidents and unhealthy premises that require enforcement action. Furthermore, Rangers and Parking Enforcement Officers, Building Surveyors, Environmental Health Officers or other authorised officers of the Council issue PINs or take other legal action on Council's behalf on matters including, but not limited to, parking, companion animals, pollution control, food regulation and building site offences.

Council officers who are not involved directly in enforcement matters will also commonly identify potential unlawful activities and report them for investigation and action pursuant to this policy.

Nevertheless, while Council is proactive in the detection of unlawful activities, not all offences are readily discernible and early detection can only be achieved with support and direct advice from our community.

#### 2.1 Submitting Complaints or Requests

Complaints or requests alleging unlawful activity can be submitted to Council either in writing or verbally. In either case the allegation will be recorded in Council's Customer Action Request system and will be allocated a unique reference number. The request will be referred to the relevant officer to commence any necessary investigation.

The name, address and contact details of the person submitting the complaint will also be recorded. This information is critical as Council may need to rely on evidence from the complainant to prove any alleged offence and commence enforcement action. Council will advise any complainants of the action, if any, taken or the reasons why no action was taken in the circumstances.

Council will take all reasonable measures to protect the privacy of the person submitting the complaint and generally information on this person will not be released. However, Council may be required to disclose this information in a variety of circumstances including the following;

- Access to the information is permitted under legislation, including the Government Information (Public Access) Act 2009;
- Access to the information is permitted under another Council policy; Legal proceedings are commenced and the information is disclosed in evidence served; and
- The nature of the allegation otherwise makes it a necessity.

Also, in some circumstances it may be possible to ascertain the identity of the person submitting the complaint by the nature of the allegation.

#### 2.2 Procedural Fairness and Natural Justice

There is an overriding duty on the Council to act fairly and ensure the principles of procedural fairness and natural justice are adhered to. In this regard Council will:

- Provide information on the substance of the complaint to the alleged offender. This may not occur until an appropriate stage in the investigation;
- Comply with any statutory requirements including any specific timeframes as specified by legislation;
- Provide an opportunity for the alleged offender to put their case. This will not be necessary if there is a serious risk to personal or public safety or risk of serious environmental harm;
- Consider any submission put forward by the parties to the matter;
- Make reasonable inquiries or investigations before making a decision;

- Ensure no person decides a case in which they have an interest; and
- Otherwise act fairly and without bias.

### 2.3 Options for Dealing with Unlawful Activity

Council has discretion in deciding whether to take enforcement action on the basis of the available evidence and the circumstances of the individual case. At the conclusion of an investigation, Council may have one or more of the following options:

- Take no action;
- Counsel the alleged offender;
- Issue a formal letter notice or verbal warning;
- Commence criminal proceedings; and/or
- Commence civil proceedings.
- Issue PIN or PINs;
- Issue a Notice, Order or Direction

#### 2.3.1 Criminal Proceedings

Criminal proceedings are punitive. The sentence which a court may impose if an offence is proven is usually a fine.

The amount of a fine imposed by a court will be based on the need for specific deterrence and the rehabilitation of the offender, the need for general deterrence of similar offences by other members of the community and any aggravating or mitigating circumstances.

The types of criminal proceedings available to Council include:

- Issuing a PIN subject to appeal;
- Prosecuting the offence in the Local Court by issuing a CAN; and
- Prosecuting the offence in the Land & Environment Court in its summary jurisdiction (Class 5)

In criminal proceedings an offence must be proved 'beyond a reasonable doubt'.

PINs for offences currently (as at April 2011) vary from \$100 up to \$3,000 under the EPAA and Environmental Planning and Assessment Regulation 2000 depending on whether the offender is an individual or a corporation and the nature of the unlawful activity. Under the POEO, a corporation could be fined up to \$5,000 by PIN. The offender can either pay the fine stated on a PIN or elect to have the matter heard before a court.

Where prosecution action is taken rather than remedying the offence by a PIN, the maximum penalty is usually considerably higher. For example, the maximum penalty for an offence under the EPAA is the amount specified or, if no penalty is specified for the particular offence, 10,000 penalty units and a further daily penalty not exceeding 1,000 penalty units. At present 1 penalty unit equals \$110. However, if the offence is prosecuted in the Local Court the maximum monetary penalty the court can impose is 1,000 penalty units, or the maximum penalty specified for the offence, whichever is the lesser.

In criminal proceedings for offences against the EPAA there is often no provision which enables the Court to order the offender to remedy the breach or restrain the unlawful activity. These powers are available to the court in some other kinds of cases, for example, offences against the EPAA involving the destruction of or damage to a tree or vegetation or in appropriate cases where an offence is committed against the POEO or the regulations under that Act.

A person cannot be convicted of an offence against the EPAA or the regulations where:

- the matter is the subject of civil proceedings under Section 123 of the EPAA and those proceedings have not been concluded; or
- an Order of the Court has been made to remedy or restrain the breach. (Section 127(7) of the EPPA)

These restrictions, and the practice of the court, usually favour civil proceedings being taken where it is necessary to remedy or restrain an unlawful activity.

Criminal proceedings for an offence against the EPAA must be commenced within two (2) years of the offence being committed or within two (2) years from the date when evidence of the offence first came to the attention of an authorised officer. (Section 127(5), (5A), (5B) & (5C) of the EPPA)

### 2.3.2 Civil Proceedings

The objective of civil proceedings is to rectify the consequences of, or restrain an unlawful activity, by requiring the offender to do or refrain from doing something. Civil proceedings include the following:

- Notices and orders issued by Council pursuant to various legislation;
- Class 4 proceedings before the Land & Environment Court, seeking an order of the Court to remedy or strain a breach of the EPAA (Section 123), the LGA (Section 673), the POEO (Sections 252 & 253), or any other Act, if the breach is causing or is likely to cause harm to the environment; and

- Interlocutory relief for matters causing, or with the 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.

For civil proceedings to be successful Council must prove the breach on the balance of probabilities. This is a less onerous burden of proof than is required in a criminal prosecution. However, even if the breach is established, the court has discretion not to make any order. Council must therefore be in a position to lead evidence that persuades the court that an order to remedy or restrain the breach should be made.

Civil proceedings can be held over to provide the person responsible for the unlawful activity with an opportunity to lodge any required application and have it determined or otherwise to cease or remedy the breach voluntarily.

### 2.3.3 Criminal or Civil?

Deciding whether to commence criminal or civil proceedings depends on the outcome that is being sought. If Council were willing, retrospectively, to accept the results of the unlawful activity or if the unlawful activity cannot be undone or is not ongoing and Council wishes to punish the offender, criminal proceedings may be preferred subject to the considerations detailed below.

Conversely, if Council is not willing to accept the unlawful activity (and particularly for alleged offences against the EPAA where the court may not have any jurisdiction to make an ancillary order requiring rectification of the unlawful activity), it is often more appropriate for Council to commence civil proceedings.

If Council decides not to commence proceedings under the EPAA, LGA or POEO, any person may commence their own proceedings for an order to remedy or restrain a relevant breach. (Section 123 of the EPAA; Section 674 of the LGA; Section 253 of the POEO)

## 3. WHEN WILL COUNCIL COMMENCE ENFORCEMENT ACTION?

Council will decide whether to take enforcement action after it has considered, among other things, the following matters:

### 3.1 The Nature and Seriousness of the Breach

Council will have regard to the impact the unlawful activity is causing on amenity or harm to the environment. If action is required, Council will consider what is reasonable in the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the breach.

### 3.2 Balancing of Public Interest and Cost to Council

Council will weigh up the public interest or benefits that will be served against the cost to the Council, and the community, of taking enforcement action.

In considering the 'public interest' Council will have regard to whether the unlawful activity:

- will impact on a significant number of people;
- will impact on disadvantaged or marginalised groups;
- is indicative of a systemic flaw;
- is individual in nature but often occurs;
- has attracted sustained public attention and no alternative resolution is proposed or likely; and
- flouts Council's authority.

Council will also consider whether more effective means of rectifying an unlawful activity are available before formal legal proceedings are initiated. This may include one or a combination of the following:

- Reporting a breach to a professional association; and
- Use of statutory powers such as:
  - granting consent to a relevant application;
  - making an order under the EPAA, LGA or POEO; or
  - issuing a building certificate under the EPAA.

### 3.3 The available methods of enforcement

If formal proceedings are considered to be the best option, the decision on which court to bring proceedings in will be informed by considerations such as the following:

- Likely cost of proceedings;
- Prospects of recovery of those costs from the respondent or defendant;
- Remedies available;
- Available methods of enforcement; and
- Circumstances of each case.

### 3.4 The circumstances of each case

The Council will in all prosecution and enforcement matters consider the following:

- Whether the unlawful activity has caused a breach which is technical in nature and does not cause harm to amenity or to the environment;

- Whether the unlawful activity is ongoing. If it has ceased, Council must consider the length of time that has expired;
- Whether there are impact(s) caused by the unlawful activity on the natural or built environment and on health, safety and amenity and the seriousness of the impacts;
- Whether development consent or other approval would have been granted by Council if the appropriate application had been submitted prior to the unlawful activity being undertaken;
- Whether the person(s) who committed the breach has shown contrition and, where possible, has remedied the unlawful activity;
- Whether the person(s) who committed the breach has made submissions to the Council that provide reasonable grounds for the Council to conclude that the person was under a genuine mistaken belief as to a relevant factual or legal matter;
- Whether the person(s) who committed the breach has shown deliberate or wilful conduct in their actions;
- Whether the person(s) who committed the breach should have been aware of their obligations because they have:
  - particular knowledge eg: a builder or company that regularly carries out work and is generally aware of the relevant Council or other requirements;
  - received a previous warning; or
  - been subject to previous formal legal action.
- Whether the unlawful activity was unavoidable; and
- Such other matters that may appear to be relevant to the individual case.

#### **4. DECIDING ON THE METHOD OF ENFORCEMENT**

When deciding on the method of enforcement, it is necessary to consider the principles explained above in Section 2.3 - 'Options for Dealing with Unlawful Activity' and the outcome being sought.

##### **4.1 PINs**

PINs will be issued for offences of a minor nature, where it is considered a small monetary penalty may prevent a recurrence of the unlawful activity or stop the unlawful activity from continuing. The issuing of a PIN will only occur where a decision has been made not to commence other criminal proceedings and if the Council has obtained, or could obtain sufficient evidence in admissible form to prove the offence beyond reasonable doubt in any subsequent criminal proceedings. A PIN can only be issued where it is beyond reasonable doubt to the issuer that the defendant has committed the relevant offence.

PINs should be issued as soon as possible after the conclusion of an investigation. PINs may be used in conjunction with other enforcement action, as permitted by the applicable legislation.

#### 4.2 Consents, Orders, Notices, Directions and Building Certificates

Consideration will be given to whether a breach can be rectified by a consent or building certificate or whether enforcement can occur by way of an order, notice, direction under the EPAA, LGA, POEO, Food Act or some similar means.

The Orders provisions of the EPAA, LGA, POEO are described as “self-help” provisions that provide Council with a formal cost effective mechanism to direct land owners and occupiers to do or refrain from doing something. They generally operate on the ‘principles of natural justice’ and, where appropriate, should be used prior to the commencement of civil proceedings in the Land & Environment Court.

Enforcement action of this nature may occur in conjunction with criminal proceedings, where it is considered appropriate and necessary for punitive action to also be taken, having regard to the restrictions provided under Section 127(7) of the EPAA.

#### 4.3 Land & Environment Court Proceedings

Council will give preference to civil proceedings in the Land & Environment Court over criminal prosecution in either the Local Court or the Land & Environment Court where Council requires the offender to do or refrain from doing something, such as comply with a development consent or demolish unauthorised works. Generally civil proceedings in the Land & Environment Court will be preceded by formal notices and/or orders, unless the circumstances warrant the immediate commencement of court proceedings.

The following matters will be considered in determining whether to commence civil or criminal proceedings in the Land & Environment Court:

- Is there a liable respondent;
- Does Council have sufficient evidence to prove its case either on the ‘balance of probabilities’ (civil) or ‘beyond a reasonable doubt’ (criminal);
- Does Council require an order from the court restraining the respondent from doing something or ordering the respondent to remedy the breach;
- Is an interlocutory injunction required because the unlawful activity is causing serious, or has the potential to cause, serious environmental harm;
- Is the matter urgent;
- The severity of the alleged offence;
- Is the respondent a repeat offender;
- The cost of proceedings;
- Does the development breach height limits; and
- Does the development breach non-standard conditions of consent.



#### 4.4 Local Court Proceedings

The following matters will be considered in determining whether to commence criminal proceedings in the Local Court:

- *Is there a liable defendant;*
- *Is a monetary penalty all that is required;*
- *Does Council have sufficient evidence to prove its case 'beyond a reasonable doubt';*
- *Are works proceeding - consider CAN to commence proceedings quickly;*
- *The severity of the offence;*
- *Is the defendant a repeat offender; and*
- *The cost of proceedings*

#### 5. RECOVERY OF LEGAL COSTS

The Council's policy for recovery of its costs in the Land and Environment Court is:

- That the Council will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the court;
- The Council will seek to recover the penalty imposed by the court where such penalty is imposed; and
- The Council will adopt the recommendations of its solicitors to accept a lesser amount than the full legal costs incurred by the Council if, in the circumstances, the acceptance of such an offer will result in the Council not incurring further and unnecessary legal costs.

The Council's policy for recovery of costs in the Local Court is:

- That the Council will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the court; and
- The Council will seek to recover the penalty imposed by the court where such penalty is imposed.

#### 6. COMMUNITY AWARENESS

The Council will carry out a community awareness campaign about enforcement by providing information on its website.

**7. ACKNOWLEDGEMENTS**

This policy is based on the 'Model Policy' developed by the NSW Ombudsman and the following documents were used in its preparation;

1. Enforcement Guidelines for Councils - 1st Edition, NSW Ombudsman (2002)
2. Enforcement Policy - Hurstville City Council (May 2008)
3. Enforcement Policy - Woollahra Municipal Council (January 2007)
4. *Compliance and Enforcement Policy* – Singleton Council (December 2008)
5. Enforcement Policy – Wollongong City Council (June 2009)

**7 GENERAL BUSINESS**

**8 CLOSURE**