

## POLICY OBJECTIVE

This policy establishes clear guidelines and protocols for Council in the management of its regulatory activities. It provides guidelines on:

- Responding to reports alleging unlawful activity;
- Assessing whether reports alleging unlawful activity require investigation;
- Deciding on whether enforcement action is warranted;
- Options for dealing with confirmed cases of unlawful activity;
- Taking legal action; and
- Implementing shared enforcement responsibilities.

## SCOPE

This policy applies to all compliance and enforcement activities undertaken by Council. Council is not limited by this policy in its use of discretion in undertaking its enforcement and compliance functions.

## LEGISLATIVE REQUIREMENTS

This policy provides a basis for proceeding with compliance and enforcement actions under various NSW legislation under which Council operates.

## POLICY STATEMENT

### Enforcement Principles

Council undertakes its compliance and enforcement activities aligned to the enforcement principles outlined in the NSW Ombudsman's *Enforcement Guidelines for Council's* (December 2015) being:

Principle	Action/s
1. Accountable and transparent	<ul style="list-style-type: none"> <li>▪ Acting in the best interests of public health and safety and the environment;</li> <li>▪ Ensuring accountability for decisions on whether to act;</li> <li>▪ Acting fairly and impartially and without bias or unlawful discrimination;</li> <li>▪ Providing information about compliance and enforcement priorities and reasons for decisions to improve understanding, certainty and promote trust by the regulated community;</li> <li>▪ Ensuring 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 Council officers in accordance with Council's Complaints Management Policy and procedures; and</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>
2. Consistent	<ul style="list-style-type: none"> <li>▪ Ensuring all compliance and enforcement action is implemented consistently; and</li> <li>▪ Encouraging reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter.</li> </ul>
3. 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> </ul>

	<ul style="list-style-type: none"> <li>▪ Making cost-effective decisions about enforcement action; and</li> <li>▪ Acting to address harm and deter future unlawful activity.</li> </ul>
4. Timely	<ul style="list-style-type: none"> <li>▪ Ensuring responses to reports alleging unlawful activity and decision making in relation to those is timely.</li> </ul>

## RESPONDING TO CONCERNS ABOUT UNLAWFUL ACTIVITY

### How Council Will Deal with Reports Alleging Unlawful Activity

Key objectives when dealing with reports alleging unlawful activity are:

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

Council will record, assess and respond to every report alleging unlawful activity unless the person raising the matter has indicated they do not wish to receive a response about Council's handling of the matter. Anonymous reports will be handled as detailed below. A preliminary assessment of all matters will be made to determine the priority for a response, and whether investigation or other action is required. If Council decides to investigate, it will give the person who reported the alleged unlawful activity feedback on the progress of the investigation, and any reasons for delay. This does not mean that information will be given about every aspect of the investigation or information that would compromise the integrity of the investigation.

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

### Confidentiality of People Who Report Allegations of Unlawful Activity

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

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

Council takes seriously any concerns an individual may have about their physical safety being endangered because of making a report but this may limit Council's ability to investigate the matter.

### **What Council Expects from People Who Report Allegations of Unlawful Activity**

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

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

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

### **What Parties Can Expect from Council**

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

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

### **Complaints about Council's Enforcement Actions**

Council will act on any complaints about the conduct of its employees in accordance with Council's Complaints Management Policy and the Code of Conduct. 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 appeal processes.

### **Anonymous Reports**

Anonymous reports will be recorded and assessed in accordance with the above requirements. However, because it is not possible to seek clarification or additional information about a matter, it may be more difficult to evaluate the allegations and therefore these reports are less likely to warrant investigation.

### **Unlawful Activity Outside Business Hours**

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

### **Neighbour Disputes**

Council can receive reports from parties involved in neighbour disputes seeking Council involvement. These reports can raise several matters, some of which will require Council involvement and some of which will be personal to the parties (and are considered to be civil matters). These reports will be assessed to determine whether there is evidence of any unlawful activity requiring action by Council. Council will explain which aspects of a report it 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 to external information and mediation resources.

Sometimes Council can be provided further information about a matter which changes its decision about whether it will become involved. Relevant parties will be advised about the reasons why Council has changed its position on a matter but it will not change a decision purely as a response to the conduct of an individual such as persistent demands or threats.

### **INVESTIGATING ALLEGED UNLAWFUL ACTIVITY**

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

Council will respond to complaints about unlawful activities in a timely manner and complainants will be given appropriate feedback on the progress of their complaint. Council will prioritise notifications of potential non-compliance based on risk to public safety, human health and environment. The risk category will determine priorities for allocation of Council resources to investigate matters and will determine response times to complainants. The risk categories are:

#### **Priority 1**

Urgent and life threatening matters should be actioned as soon as possible following receipt of the complaint, either on the day received or the day immediately following. Examples include:

- Unsafe buildings or unsafe building works;
- Collapsed buildings;
- Fire damaged buildings or fire safety breaches;
- Serious pollution incidents;
- Food poisoning incidents;
- Abandoned vehicles posing immediate safety hazard;
- Dog attacks;
- Injured or dead companion animals, livestock or wildlife in a public place
- Livestock on roads;
- Dangerous/aggressive dog complaints;
- Roaming dogs;
- Swimming pool fencing; and/or
- Other serious incidents where the environment or public health and safety is at immediate risk.

#### **Priority 2**

General compliance matters within 7 working days. Examples include:

- Significant unauthorised and non complying land use;
- Significant unauthorised and non complying construction/demolition works;
- Works not carried out in accordance with development consent;

- General noise matters affecting several persons;
- Standard complaints about food premises;
- Poultry nuisance;
- Abandoned vehicle not posing immediate safety hazard;
- Dog barking (complaints from 2 or more premises);
- General parking issues;
- Wandering/stray cats;
- Unhealthy premises (rubbish, stored materials etc);
- Illegal signage public place; and
- Illegal dumping.

### **Priority 3**

Minor matters will be actioned within 14 working days. Examples include:

- Minor non-compliance of development consents;
- Minor non-compliances such as overgrown land; and
- Minor matters where there is no immediate adverse health or safety impacts.

If there is insufficient information to undertake a preliminary assessment, further information will be sought from the person who made the report or an inspection undertaken. Council may consult its records and other internal business units to understand the relevant history and context of a matter.

### **Circumstances Where No Action Will Be Taken**

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

- Council does not have jurisdiction to investigate or is not the appropriate authority to act on the issues raised. Where there is another appropriate authority or course of action, Council may bring the matter to the attention of that authority or provide information and contact details to the complainant;
- The report relates substantially to a matter previously determined by Council and no new or compelling information is presented which would cause it to change its earlier decision. In this case, Council will acknowledge the report and advise that no further action will be taken (other than where the person has previously been advised they would receive no further response);
- The allegations relate to a lawful activity;
- The report is not supported with evidence or appears to have no substance; or
- Council determines that investigation or other action would have an unreasonable impact on resources and/or is unlikely to achieve an outcome to justify the expenditure of resources.

### **Relevant Factors Guiding Decisions as to Whether to Act**

The objective of the process used when investigating incidents of alleged unlawful activity is to:

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

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

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

Council considers the above factors in making a determination but is not limited in their use of discretion by these considerations and may decide to investigate based on these and other factors. Any decision not to investigate an allegation of unlawful activity will be recorded and the reasons for that decision clearly stated.

#### **TAKING ENFORCEMENT ACTION**

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

Considerations about the alleged offence and impact:

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

Considerations about the alleged offender:

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

Considerations about the impact of any enforcement action:

- The need to deter any future unlawful activity;
- Whether an educative approach would be more appropriate than a coercive approach in resolving the matter;
- The prospect of success if the proposed enforcement action was challenged in court;
- The costs and benefits of taking formal enforcement action as opposed to taking informal or no action;

- What action would be proportionate and reasonable in response to the unlawful activity; and
- Whether Council is prevented from acting based on earlier advice given, i.e. whether an estoppel situation has been created.

Considerations about the potential for remedy:

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

### **Legal or Technical Issues**

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

### **Requirements of Council Officers Considering Enforcement Action**

Prior to taking enforcement action, Council will consider the above considerations and the evidence gathered during their investigation. Council will act impartially, be mindful of their obligations under the Code of Conduct and not be involved in any matter in which they have a personal interest. Enforcement action will not be taken purely as a response to the conduct of an individual such as persistent demands or threats.

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

### **OPTIONS FOR DEALING WITH CONFIRMED CASES OF UNLAWFUL ACTIVITIES**

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

At all times, Council's key concerns are:

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

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

<b>Level of Risk</b>	<b>Enforcement Options</b>
Very low	<ul style="list-style-type: none"> <li>▪ Take no action based on a lack of evidence or some other appropriate reason.</li> <li>▪ Provision of information/advice on how to be compliant.</li> </ul>

Low	<ul style="list-style-type: none"> <li>▪ Negotiating with the person to obtain voluntary undertakings or an agreement to address the issue of concern.</li> <li>▪ Issuing a warning or a formal caution.</li> </ul>
Medium	<ul style="list-style-type: none"> <li>▪ Issuing a letter requiring work to be done or activity to cease in lieu of more formal action.</li> <li>▪ Issuing a notice of intention to serve an order or notice under relevant legislation, and then serving an order or notice if appropriate.</li> </ul>
High	<ul style="list-style-type: none"> <li>▪ Issuing a penalty notice.</li> <li>▪ Carrying out the works specified in an order at the cost of the person served the order.</li> </ul>
Very high	<ul style="list-style-type: none"> <li>▪ Seeking an injunction through the courts to prevent future or continuing unlawful activity.</li> <li>▪ Commence legal proceedings for an offence against the relevant Act or Regulation.</li> </ul>

#### Following Up Enforcement Action

All enforcement action will be reviewed and monitored to ensure compliance with any undertakings given by the subject of enforcement action or advice, directions or orders issued by Council. Reports alleging continuing unlawful activity will be assessed and further action taken if necessary.

If the unlawful activity has ceased or the work has been rectified, the matter will be followed up to ensure compliance outcomes are met. Should initial enforcement action be found to have been ineffective, Council will consider other enforcement options.

#### **TAKING LEGAL ACTION**

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

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

#### **Whether There Is Sufficient Evidence to Establish A Case to The Required Standard of Proof**

Council will only take legal action once it has been established that there is admissible, substantial and reliable evidence to the required standard of proof. The basic requirement of any criminal prosecution is that the available evidence establishes a prima facie case. The prosecutor is required to prove the elements of the offence beyond reasonable doubt. In civil enforcement proceedings, Council will require sufficient evidence to satisfy the court that an actual or threatened breach has occurred on the balance of probabilities.

#### **Whether There Is A Reasonable Prospect of Success Before A Court**

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



### **Whether the Public Interest Requires Legal Action Be Pursued**

The principal consideration in deciding whether to commence legal proceedings is whether to do so is in the public interest. In making this determination, the same factors to be considered when taking enforcement action apply (see 'Taking Enforcement Action' above). The following considerations relate to the decision to commence legal proceedings and will assist Council in making this determination:

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

### **Time within which to commence proceedings**

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

### **SHARED ENFORCEMENT RESPONSIBILITIES**

Some reports will raise matters involving shared regulatory responsibilities between Council and other authorities such as the Environment Protection Authority, the NSW Police Force, Liquor and Gaming NSW, NSW Fair Trading, NSW Food Authority and NSW Crown Lands.

Council recognises that collaboration and cooperation between authorities to address issues of shared regulatory responsibility is the best approach and Council will liaise with relevant authorities to establish:

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

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

### **ASSOCIATED POLICIES AND PROCEDURES**

- Code of Conduct
- Delegation Register
- Body Worn Camera Policy
- Records Management Policy

### **DEFINITIONS**

**Complaint** - is an expression of dissatisfaction made about Council services, Officers or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.

For the purposes of this policy, a complaint does not include:

- A report alleging unlawful activity (see definition below)

- A request for information about a Council policy or procedure
- A request for an explanation of actions taken by Council; and/or
- A request for internal review of a Council decision.

**Enforcement** - Actions taken in response to serious or deliberate contraventions of laws.

**Regulation** - Using a variety of tools and strategies to influence and change behaviour to achieve the objectives of an Act, Regulation or other statutory instrument administered by Council.

**Report alleging unlawful activity** - An expression of concern or a request for service in relation to alleged unlawful activity, where a response or resolution is explicitly or implicitly expected or legally required.

**Unlawful activity** - Any activity or work that has been or is being carried out contrary to the below and/or failure to take required action to be compliant with:

- terms or conditions of a development consent, approval, permit or licence
- an environmental planning instrument that regulates the activities or work that can be carried out on land
- a legislative provision regulating an activity or work
- a required development consent, approval, permission or licence.

## POLICY VERSION CONTROL

<b>Title</b>	<b>Enforcement Policy</b>			
<b>ECM Doc Set ID</b>				
<b>Date Adopted</b>				
<b>Council Minute No.</b>				
<b>Review Date</b>	<b>June 2024</b>			
<b>Responsible Officer</b>	<b>Manager Environmental Services</b>			
<b>Version Number</b>	<b>Modified By</b>	<b>Modifications Made</b>	<b>Date modified and Approved by Council</b>	<b>Council Minute Number</b>
1	MES	Review in accordance with NSW Ombudsman's Enforcement Guidelines for Council's (December 2015)		