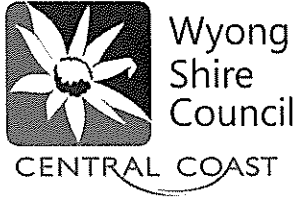


POLICY No: WSC118

POLICY FOR ENFORCEMENT

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A. POLICY SUMMARY

- A1 The aim of this policy is to establish fair, impartial and equitable guidelines for the exercise of discretion that Council must use in dealing with unlawful activities, taking into account all relevant information including the available evidence, cost to the community, the circumstances of the individual case, public policy and precedent considerations.

The policy provides a legal and administrative framework to assist Council in making decisions in its enforcement functions and ensures that the enforcement process is conducted in a timely and efficient manner.

The aim is to provide specific criteria which the Council will take into consideration when deciding options for dealing with unlawful activity, such as:

- a) if enforcement action is necessary
- b) the most appropriate type of action

Note: Section H3 outlines the options available when deciding whether to take enforcement action.

The policy also provides information to the public about the Council's role and policy on enforcement.

- A2 This policy applies to the investigation and enforcement of identified, unlawful activity or failure to comply with terms or conditions of approvals, licences and orders. The policy applies to development control, environmental protection, public health, regulation of parking and animal control.

B. POLICY BACKGROUND

- B1 The purpose is to provide an overarching policy for a suite of enforcement policies to assist Council staff to act promptly, consistently, effectively and in the public interest in response to enforcement matters. Council's staff respond to numerous complaints and allegations of unlawful activity associated with relevant legislative controls administered by Council. Council also undertakes proactive measures identifying illegal, unlawful and non-compliant activities through routine and programmed inspections.

Council has an obligation to investigate and properly record all complaints and the policy provides clear guidelines for an effective complaint handling system that allows staff to deal with complaints consistently and effectively, providing a clear and transparent decision making process.

Council is strongly opposed to unlawful activity at any time or under any circumstances. Council will initiate the appropriate enforcement action in accordance with this policy document. The types of enforcement activity may include; taking no formal action, issuing warnings, providing an educational role or instigating criminal or civil legal action.

C. DEFINITIONS

C1 **Council** means the Wyong Shire Council, its councillors and staff

C2 **The Act** means the *Local Government Act NSW 1993*.

C3 **Authorised Officer** means a Wyong Shire Council staff member with delegated authority to exercise the functions of the relevant legislation in order for them to carry out their duties and take necessary action.

All Council officers that carry out inspections on private land for regulatory purposes will:

- Have delegation to enter premises and carry out investigations as specified in Council's Instrument of Delegations and any sub delegations;
- Be authorised by Council, where this is required under specific legislation, to permit inspections on private property;
- Carry photographic identification demonstrating authorisation to enter premises and private lands under each specific Act; and
- Carry documentation or certificates of authority where required by the legislation being implemented.

C4 **Civil Proceedings** include:

- 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 an adverse impact on the environment or the community
- 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.

C5 **Court Attendance Notice (CAN)** means a court attendance notice issued and filed in accordance with the *Criminal Procedure Act 1986*. A CAN maybe 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.

C6 **Criminal Proceedings** include:

- Issuing a PIN
- Prosecuting the offence in the Local Court by issuing a CAN
- Prosecuting the offence in the Land & Environment Court or the Supreme Court (whichever is appropriate)

C7 **Defendant** means the accused person against whom criminal proceedings are brought.

C8 **EPAA** means the *Environmental Planning and Assessment Act 1979*.

C9 **GIPA** means *Government Information Public Access Act 2009*

C10 **LGA** means the *Local Government Act 1993*.

- C11 **Penalty Infringement Notice (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.
- C12 **POEO** means the Protection of the Environment Operations Act, 1997.
- C13 **Respondent** means the party against whom civil proceedings are brought in Land & Environment Court proceedings.
- C14 **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 an environmental planning instrument that regulates the activities or work that can be carried out on particular land;
 - without a required development consent, approval, permission, direction, permit or licence; and/or
 - contrary to the terms or conditions of a development consent, approval, permit or licence

D. POLICY STATEMENTS

Jurisdiction

- D1 This Policy covers all elected members of Council, all personnel employed by Council, any person or organisation contracted to or acting on behalf of Council, any person or organisation employed to work on Council premises or facilities and all activities of the Council.
- D2 This policy does not confer any delegated authority upon any person. All delegations to staff are issued by the General Manager.

E. POLICY IMPLEMENTATION - PROCEDURES

- E1 This policy should be read in conjunction with Council's adopted Code of Conduct.
- E2 It is the personal responsibility of all of Council's councillors, employees, and agents thereof to have knowledge of, and to ensure compliance with this policy.
- E3 **Associated documents**
- Council's adopted Code of Conduct

F. RELATIONSHIP TO LEGISLATION

The following acts and regulations are the legislation for regulatory matters. They include, but are not limited to:

- Companion Animals Act 1998 & Regulations
- Environmental Planning and Assessment Act 1979 & Regulations
- Food Act 2003 & Regulations
- Impounding Act 1993 & Regulations

- Local Government Act 1993 & Regulations
- Noxious Weeds Act 1993
- Protection Of the Environment Operations Act 1997 & Regulations
- Public Health Act 2010 & Regulations
- Recreational Vehicles Act 1983
- Roads Act 1993 & Regulations
- Roads Transport Act 2013, Regulations and Rules
- Rural Fires Act 1997
- Swimming Pool Act 1992 & Regulations
- Waste Avoidance and Resources Recovery Act 2001

G. RELATED STRATEGIES, PLANS OR POLICIES

- 1 Staff Delegations - Determinations regarding enforcement action will be made in accordance with this policy and relevant delegation criteria including all relevant acts and regulations as defined under delegation.
- 2 Standard Operating Procedures

H. INVESTIGATION

Council becomes aware of unlawful activities in a variety of ways. They include requests from members of the public, customers or dealing with matters as part of Council's general regulatory roles. These roles include:

- Certification of development and building works;
- Development compliance (where Council is not the nominated certifier);
- Environmental auditing;
- Public health regulation;
- Local Law Enforcement; and
- During regular enforcement programs (illegal dumping, parking control etc).

Council officers who are not involved directly in enforcement matters may also commonly identify potential unlawful activities and report them for investigation and action pursuant to this policy. Nevertheless, not all offences are readily discernible and early detection can only be achieved with support and direct advice from our community. As a result of identifying breaches, Council officers may initiate education, enforcement or legal action in accordance with this policy and their delegations.

H1 Submitting complaints or Service Requests

Complaints or service requests alleging unlawful activity can be submitted to Council in writing, verbally or electronically. In all cases, the allegation will be recorded in Council's electronic customer service request management system and will be allocated a unique reference number.

The request will be referred to the relevant Council 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 taken, if any, 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 GIPA or the LGA
- 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.

Council officers will not investigate complaints where determined by Management that:

- Council has no jurisdiction to investigate the complaint, i.e. dividing fences, private strata matters.
- The activity alleged to be unlawful is in fact determined to be lawful.
- The complaint is frivolous, vexatious or trivial in nature.
- Another agency is responsible for the investigation.

Anonymous complaints may be accepted however they will not generally be investigated in all cases. All complaints will be recorded in Council's Record System.

Management will determine if the complaint is to be investigated using the following criteria:

- There is sufficient relevant information received to investigate the complaint;
- The complaint relates to serious environmental harm, public safety or a life threatening matter;
- The potential risk to the complainant;
- Is the complaint frivolous or vexatious?
- Is it in the public interest?

If a decision is made not to investigate a complaint, this decision must be recorded along with the reasons for that decision.

Where possible, Council officers will notify the complainant of the outcome of Council's investigation.

H2 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.
- Provide an opportunity for the alleged offender to put their case. This will not be necessary if there is a serious and significant risk to personal or public safety, risk of serious environmental harm or for parking and road related matters;
- Consider any submission put forward by a potential defendant/alleged offender;
- Make reasonable inquiries or investigations before making a decision;

- Ensure no person decides a case in which they have an interest;
- Otherwise act fairly and without bias
- Act within statutory time frames

H3 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 will recommend the most appropriate course of action, which may include one or more of the following options:

- a) Take no action
- b) Counsel the alleged offender
- c) Issue a formal letter of warning
- d) Negotiate an undertaking to remedy the situation
- e) Issue a formal Notice and/or Order
- f) Commence civil proceedings to remedy or restrain unlawful activity
- g) Issue a PIN
- h) Commence criminal proceedings

Unless urgent action is required, a staged approach to obtain compliance will be applied to matters other than parking related offences. That is, in the first instance, offenders will be given the opportunity to discuss and remedy the breach before enforcement action is taken. The relevant complaint investigation procedures detail the method of negotiation/discussion to occur under this section.

Options (a) through to (d) may be all that is required for minor breaches where no serious impacts have occurred. However where they are ineffective, inappropriate and/or unsuccessful, alternate enforcement action may be warranted and include options (e) to (g).

Whilst these options recognise that Council officers may use discretion in the process, officers are obliged to act fairly and ensure the principles of procedural fairness and natural justice are adhered to.

I. ACTION

Council will decide whether to take enforcement action following an objective analysis of the relevant facts and law. In determining the enforcement action to be taken, consideration will be given to the following matters:

11 The nature and seriousness of the breach

Council will have regard to the impact the unlawful activity is causing on amenity, harm to the natural and built environment or the health and safety of the community. 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 and balances consideration of any benefits that arise from the breach.

12 Balancing of public interest and cost to Council

Council must consider the public interest and cost when considering whether to take enforcement actions. In considering the 'public interest' Council will have regard to whether the unlawful activity:

- will impact or has impacted on a significant number of people in a significant manner
- will impact or has impacted on disadvantaged or marginalised groups within the community
- is indicative of a systemic flaw
- is individual in nature but often occurs
- demonstrates a wilful disregard for the law, including any authority conferred on Council under such law

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 EP&A Act, LGA or POEO; or
 - Issuing a building certificate under the EP&A Act.
 - Bonds
 - Time limited consents

13 *Methods of enforcement*

If formal proceedings are considered to be the best option, the decision on when to commence proceedings will be determined by the following considerations:

- Likely cost of proceedings on both Council and the Respondent or Defendant;
- Prospects of recovery of those costs from the respondent or defendant;
- Other remedies available;
- Available methods of enforcement; and
- Circumstances of each case.
- Likelihood of success
- Length of time for proceedings to deliver a solution
- Will proceedings deliver a solution

14 *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 any significant harm to the public 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 the impact of the unlawful activity effects the natural or built environment, health, safety or amenity;
- 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 legal action.
- Whether the unlawful activity was unavoidable;
- The financial resources of the respondent
- Would an educative approach be more appropriate than a coercive approach?
- What are the costs and benefits of taking enforcement action as opposed to taking informal or no action?
- What are the chances of success if the proposed enforcement action was challenged in court?
- Is there draft legislation or policy that would make the unauthorised activity legal?
- What action would be reasonable and proportionate in the case?
- What would be in the public interest?
- The effect of potential proceedings on the health of the respondent

J. METHOD

When deciding on the method of enforcement, it is necessary to consider the principles explained above in Section I and the outcome being sought.

There are two main types of enforcement action, Criminal and Civil.

Criminal Proceedings;

- Issuing a PIN
- Prosecuting the offence in the Local Court by issuing a CAN; and Prosecuting the offence in the Land & Environment Court or the Supreme Court (as the case may be)

Civil Proceedings

- 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 restrain 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.

J1 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 appears 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 and may be used in conjunction with other enforcement action, as permitted by the applicable legislation.

J2 Consents, Notices, Orders and Building Certificates

Council recognises that a person who may have carried out unlawful works may apply for a Building Certificate under S149B of the EP&A Act to formalise the unlawful work. However, such applications should not be encouraged to justify unlawful works.

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 under the EPAA, LGA, POEO or some similar means.

The Orders provisions of the EPAA, LGA and POEO are described as "*self-help*" provisions that provide Council with a formal cost effective mechanism to direct landowners 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.

Irrespective of whether or not a Building Certificate is applied for, Council may take action against a person who carried out unlawful work. Such action may include the issue of a PIN or 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.

J3 Mediation / Settlement Procedures

Council may instigate, at any stage, mediation and settlement discussions and endeavor to resolve proceedings in as cost effective manner as possible.

J4 Land & Environment Court Proceedings

In most cases, 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 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 and 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 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 injunction required because the unlawful activity is causing, or has the potential to cause, serious environmental harm.

Policy - Enforcement

- Is the matter urgent?
- The severity of the offence
- Is the respondent a repeat offender?
- The cost of proceedings
- Does the development breach non-standard conditions of consent?

J5 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 reasonable doubt"?
- Are works proceeding - (is a Court Attendance Notice needed)?
- The severity of the offence
- Is the defendant a repeat offender
- The cost of proceedings.

K. COSTS

K1 Recovery of investigation cost

Council will recover cost where available through legislated means, such as administrative charges under the POEO for Clean-up Notices and cost recovery notices under the EP&A Act for investigation of complaints.

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.

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.

K2 Cost Minimisation

Council will, in conducting proceedings, seek to minimise the costs it incurs by the use of in-house lawyers and limited use of barristers where possible without affecting Council's prospects of success.

L. ADMINISTRATION

This policy is based on the 'Model Policy' developed by the NSW Ombudsman and shall be read in

conjunction with all relevant Council policies. The Enforcement Policy has been created as an overall guiding document for all enforcement matters within the Development and Building Department. The policies and procedures will form a suite of documents for all enforcement matters. As legislation changes and issues arise, policies and procedures will be developed to assist Council in managing the roles and responsibilities within the Development and Building Department.