

SECTION 1 - INTRODUCTION

BACKGROUND

Fairfield City Council (Council) is an enforcement authority under a large range of legislation that requires Council staff to make decisions about appropriate compliance and enforcement action when non-compliance is identified.

PURPOSE

1. Ensure that Council's regulatory functions are exercised consistently and without bias, in accordance with its obligations under Section 8 of the Local Government Act 1993;
2. Assist those employed by Council in responding promptly, consistently, and effectively in relation to allegations of unlawful activity whilst ensuring the principles of natural justice are respected;
3. Provide information for all internal and external stakeholders about Council's position in relation to the enforcement of compliance with legislation, including the circumstances which will be considered when assessing different enforcement options; and
4. Ensure that Council best exercises its discretion as to the appropriate allocation of resources when determining whether to take enforcement action consistent with the public interest, its policy objectives and current regulatory issues.

SCOPE

Building Control and Compliance staff that deal with written or verbal requests or complaints alleging unlawful activity and those staff members who are involved in the enforcement of relevant legislation are responsible for implementing this Policy.

DEFINITIONS

Word/Term	Definition
ARA	Appropriate Regulatory Authority as defined by the POEO Act or as otherwise determined by Council.
<i>Authorised Officer</i>	Staff member of Council authorised under legislation and by internal delegations to carry out compliance action on behalf of Council.
<i>Investigation Officer</i>	A person appointed as an investigation officer under Section 9.14 of the Environmental Planning and Assessment Act by a council (a council investigation officer).
CAN	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.
<i>Caution</i>	A 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. (Less serious than a reprimand).
<i>Class 4 proceedings</i> (Land and Environment Court)	Proceedings are of two types: • <i>civil enforcement</i>, usually by government authorities, of planning or environmental laws to remedy or restrain breaches; or • <i>judicial review</i> of administrative decisions and conduct under planning or environmental laws.
<i>Class 5 proceedings</i> (Land and Environment Court)	Proceedings involve summary criminal enforcement proceedings, usually by government authorities prosecuting offences against planning or environmental laws.
<i>Complainant</i>	In the context of this policy means a person lodging a request.
<i>Complaint</i>	A person's statement of dissatisfaction with a particular regulatory matter. This may be expressed to Council by either verbal or written means.
<i>Council</i>	Fairfield City Council.
<i>Defendant</i>	The accused person against whom criminal proceedings are brought.
<i>EPA Act</i>	Environmental Planning and Assessment Act 1979.
<i>Estoppel</i>	A legal rule that prevents a person from later denying something that another person may have previously relied on or acted upon. Councils must be aware of this where the conduct of the council could lead people to act in reliance on council's actions or inactions that have led to a reasonable expectation that council is not concerned about the conduct in question. For example: • Has the council previously notified the owner/occupant/individual that the council would not be acting? • Has the matter previously been brought to the attention of the council, yet no action was taken? • Has the council contributed to an owner/occupier/individual acting upon a reasonable expectation that no action would be taken?
<i>Fines Act</i>	Fines Act 1996.

<i>GIPA</i>	Government Information (Public Access) Act 2009.
<i>ICAC</i>	Independent Commission Against Corruption established under the Independent Commission Against Corruption Act 1988 and Independent Commission Against Corruption (Commissioner) Act 1994.
<i>Informant</i>	The person who brings about criminal proceedings.
<i>LG Act</i>	Local Government Act 1993.
<i>Principal Certifier</i>	In relation to building or subdivision work this refers to the certifier appointed as the principal certifier for the building work under section 6.6 (1) or for the subdivision work under section 6.12 (1) of the Environmental Planning and Assessment Act.
<i>Procedural Fairness</i>	The procedures used by a decision-maker, rather than the actual outcome reached. It requires a fair and proper procedure be used when deciding. 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.
<i>POEO Act</i>	Protection of the Environment Operations Act 1997 (POEO Act) is the key piece of environment protection legislation administered by the EPA. The object of the Act is to achieve the protection, restoration and enhancement of the quality of the NSW environment.
<i>Reprimand</i>	A rebuke or censure given instead of a penalty to somebody who has done something unauthorised or illegal, advising that enforcement action will follow if it is repeated. (More serious than a caution.
<i>Request</i>	A person's request to Council to investigate an alleged breach.
<i>Revenue NSW</i>	Formerly known as State Debt Recovery Office.
<i>Roads Act</i>	Roads Act 1993.
<i>Statute Barred</i>	Proceedings are prohibited from being commenced because of a statutory time limited within which such proceedings must be commenced.
<i>Technical breach</i>	A minor divergence from the terms of an Act, Regulation, Order, Development Consent or other document or direction, but is not a

	failure to comply with an order or direction of any Court which may be contempt of court upon such a judgement.
<i>Unlawful activity</i>	Any activity or work that has been or is being carried out: • Contrary to the terms and conditions of a development consent, approval, permit or licence; • Contrary to an environmental planning instrument that regulates the activities or work that can be carried out on land; • Contrary to a legislative provision regulating a particular activity or work; • Without a required development consent, approval, permit or licence; • Contrary to legislation in relation to which Council is the appropriate regulatory authority; and • Includes any activity, place or structure that is a risk to public health and safety but excludes any parking or traffic offences, which are dealt with in accordance with the Australian Road Rules.

LEGISLATIVE CONTEXT

Name	Location
Environmental Planning and Assessment Act 1979	https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1979-203
Environmental Planning and Assessment Regulation 2021	https://legislation.nsw.gov.au/view/html/inforce/current/sl-2021-0759
Local Government Act 1993 and Regulations	https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1993-030
Roads Act 1993	https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1993-033
Swimming Pools Act 1992	https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1992-049
Fines Act 1996	https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1996-099

Boarding Houses Act 2012	https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2012-074
Protection of the Environment Operations Act 1997	https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1997-156
Office of Director of Public Prosecutions (NSW) – Prosecution Guidelines	https://www.odpp.nsw.gov.au/prosecution-guidelines-0
NSW Ombudsman - Enforcement Guidelines for Councils	https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/enforcement-guidelines-for-councils
Attorney-General - Guidelines for Cautions'	https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_publications/lpclrd_guidelines.aspx#Caution_Guidelines_a

STAKEHOLDERS

The Mayor, Councillors, Staff and the Public.

SECTION 2 - POLICY

OBJECTIVE AND GOALS

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

POLICY STATEMENT

Responsibility

All complaints alleging unlawful activity should be logged in Council's electronic records system as soon as possible upon receipt and directed to a responsible officer in the appropriate Division. Details of all instances of unlawful activity identified by staff in the course of their duties should be recorded in the appropriate electronic record keeping system. Council staff responsible for the investigation of a matter is responsible for keeping a full and complete record of their actions, including reasons for all decisions made in relation to an investigation.

Council staff dealing with the investigation of unlawful activity are also responsible for ensuring that any other unlawful activity, particularly as it relates to life or fire safety,

identified during their investigation is immediately brought to the attention of the appropriate area. For example, an investigation of an alleged unlawful use of premises should include consideration and review to determine whether appropriate documentation is being submitted regarding the fire safety of those premises, with appropriate action being taken if necessary.

Responding to Unlawful Activity

Council will make every effort to ensure that all Customer Service Requests about alleged unlawful activity are recorded and actioned in a timely manner. Confidentiality of information will be dealt with in accordance with Council's Privacy Management Plan and all relevant legislation including the Privacy and Personal Information Protection Act 1998 and the Government Information (Public Access) Act 2009.

Framework for Prioritising CRMs

High

- Public safety/property issues (e.g. fire safety, unstable building)
- Unauthorised demolition
- Unauthorised residential uses
- Unauthorised works or uses with major amenity impacts.

Medium

- Unauthorised use (commercial/industrial)
- Unauthorised work
- Non-compliance with DA

Low

- Old unauthorised works
- Minor unauthorised building works e.g. air-conditioning units, fences.
- Stormwater

Investigating Unlawful Activity

All matters regarding alleged unlawful activity will be reviewed to determine whether the matter requires investigation. Where a complaint is made, staff will obtain adequate information in relation to the complainant's concerns (and may make follow up enquiries with them where required). Further enquiries or investigations will not be undertaken where an initial review by a staff member identifies that:

- The matter has already been investigated and resolved, or it has been determined that no further action will be taken in the absence of new information;
- Council has no jurisdiction in relation to the matter, i.e. Council is not the appropriate regulatory authority (ARA). In relation to such matters, it may be appropriate for Council to bring the matter to the attention of the appropriate regulatory authority. For example, a report may be made to SafeWork NSW in relation to workplace safety

issues on building sites or reports to the Department of Climate Change, Energy, the Environment and Water. in relation to environmental offences; or

- The activity is identified as being lawful without the need for an investigation (for example, where an approval exists for an activity, and it is clear the activity is being carried out consistently with that approval).

When considering whether a complaint warrants inquiry or investigation Council is to consider a range of factors including:

- Is the complaint premature? Does it relate to an unfinished aspect of work still in progress?
- Based on the information available, is the activity permissible without any consent or approval?
- If the activity is permissible, is there a consent or approval in place and have all conditions been complied with?
- Has a development application, building identification certificate application or other appropriate application been lodged in relation to the activity?
- Is the complaint trivial, frivolous, or vexatious?
- What is the extent of delay between events referred to by the complaint and their notification to Council and reasons given for such delay?
- Is the activity having a significant detrimental effect on the environment or does it constitute a risk to public health, safety, and amenity?
- Have there been previous complaints about the subject premises or this person or organisation?
- Does the complaint have special significance in relation to existing enforcement priorities?
- Given the circumstances of the complaint, are there significant resource implications in relation to any investigation and any subsequent enforcement action?
- Overall, is it in the public interest to investigate the complaint?

Where a decision is made not to investigate a complaint for one or more of the reasons listed above, this decision should be recorded along with the reasons for that decision. The Complainant will be advised of the decision and the reasons for making that decision unless such notification is impossible i.e. anonymous Complainant.

Complaints where Council is not the Principal Certifier

Where a complaint alleging either building or subdivision works are not progressing in accordance with a development consent or complying development certificate, you must establish whom the Principal Certifier appointed for the project is. Where it is found that the Council is not the Principal Certifier, the complainant is to be advised of this in the first instance by either telephone or other written method. The details of the Principal Certifier are to be provided to the complainant and the process outlined by the Department of Fair Trading on complaint management by a private Principal Certifier explained. Council, where appropriate can contact the Principal Certifier and advise them of the complaint being mindful to protect the identity of the complainant. Should Council consider it appropriate in

the circumstances of the investigation, a complaint will be lodged with Fair Trading regarding the conduct of the Private Certifier.

Taking Enforcement Action

When determining whether to take enforcement action and the level of enforcement action that is appropriate, in relation to a particular case of verified unlawful activity, staff should consider all the circumstances of the case including:

- The seriousness of the breach, including whether the breach is merely technical or “trivial” in nature;
- When the unlawful activity was carried out and for how long, including whether the breach is continuing;
- The harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity;
- The need for general and specific deterrence;
- Whether the breach can be easily remedied;
- Any circumstances of hardship affecting the complainant or the person who is the subject of the complaint;
- Any mitigating or aggravating circumstances;
- Any prior warnings that have been issued to the person or previous enforcement action taken against the person;
- The degree of responsibility of the alleged offender;
- Whether an educative approach would be more appropriate than a coercive approach;
- The costs and benefits of taking formal enforcement action as opposed to taking informal or no action;
- The prospects of success if the proposed enforcement action were challenged in court;
- What action would be proportionate and reasonable;
- What would be in the public interest; and
- Any precedent that may be set by not taking enforcement action.

Prior to taking enforcement action, staff should always turn their mind to the criteria outlined above in undertaking an objective consideration of the evidence that has been gathered during their investigation.

Staff must never allow their actions to be used purely to pursue the agendas of external parties or interest groups.

Enforcement action should never be undertaken by staff purely as a means of appeasing a virulent complainant in circumstances where the application of the criteria in this policy would otherwise indicate that enforcement action should not be taken.

Where there is sufficient evidence to issue a penalty notice, the staff member may instead elect to issue a formal caution if such an approach is considered appropriate under the Caution Guidelines issued by the NSW Attorney General under the *Fines Act 1996* (the “Caution Guidelines”).

In addition to this, Council may adopt guidelines that determine specific circumstances where an activity that may otherwise be unlawful will not be the subject of enforcement action. Any Council policy or guideline that does not specifically state otherwise should be read in conjunction with this Compliance and Enforcement Policy.

Options for Dealing with Unlawful Activity

Where an investigation confirms an instance of unlawful activity there are several approaches that Council may take in accordance with the appropriate authorisations and legislation. Those options include, but are not limited to:

- Taking no action based on a lack of evidence or because it is appropriate regarding the matters set out above. Where no action is taken the reasons for that decision should be documented and any complainant will be advised of the decision;
- Warning or counselling the person who is the subject of the investigation to educate them as to the relevant legal requirements (for example, by issuing an inspection report or warning letter outlining the identified unlawful activity and advising of required remedial action where appropriate);
- Obtaining written undertakings from the appropriate person that steps will be taken to address the concerns (for example, the lodging of a development application within a reasonable period);
- Serving a notice of proposed order, followed by an order where appropriate, under relevant legislation requiring works to be done or for a use to cease or to otherwise address the unlawful activity. This may include acting under the relevant sections of the Local Government Act, the Environmental Planning & Assessment Act or the Protection of the Environment Operations Act;
- Issuing a Compliance Cost Notice (usually in conjunction with an order) that enables recovery of costs associated with investigating unlawful activity and achieving compliance under some legislation.
- Issuing a formal caution in relation to a penalty notice offence under Section 19A of the Fines Act 1996 and in accordance with the Caution Guidelines;
- Issuing a penalty notice, where available; and
- Carrying out the works specified in an order under the Local Government Act or Environmental Planning and Assessment Act at the cost of the person served with the order. In this regard, it is preferable to have a Court order allowing Council authority to carry out the required works.

Council has the option of commencing legal proceedings in certain circumstances where the unlawful activity is of sufficient seriousness to warrant such action. Legal proceedings will be commenced in accordance with the principles outlined in this Policy.

The options outlined above are not mutually exclusive. The approach adopted will depend entirely on the individual circumstance of the matter, with public safety being always the key concern. Where appropriate, Council staff may take an escalating approach to resolving the matter. For example, staff may issue of a warning letter which, if not successful in resolving the issue, may be followed by statutory notices and orders and, if compliance cannot otherwise be achieved, potential enforcement proceedings in Court. Where a staff member

is contemplating giving a caution instead of a penalty notice, they must have regard to the Caution Guidelines.

All enforcement action will be monitored to ensure that steps are being taken within appropriate timeframes for the matter.

Complainants will be kept up to date as to decisions that are made in relation to compliance action where possible.

Options for Legal Proceedings

Where an investigation has been undertaken, and unlawful activity has been identified there are several approaches which Council may take. A decision as to the appropriate compliance action will ordinarily have been made by an authorised officer in accordance with this policy prior to the matter being referred for the consideration of legal proceedings. Except in cases of urgency or in circumstances where proceedings are considered the best way to obtain compliance, legal proceedings will be commenced only after other forms of compliance action have been taken and the unlawful activity is continuing.

Legal proceedings that Council may commence in relation to enforcement action include, but are not limited to:

- Commencing proceedings in the Land and Environment Court to remedy or restrain a breach of legislation, including enforcement action seeking compliance with a statutory order or the commencement of injunctive proceedings where necessary;
- Issuing a Court Attendance Notice alleging that an offence has been committed against nominated legislation for determination in the Local Court;
- Commencing proceedings for the prosecution of a criminal offence in Class 5 of the Land and Environment Court's jurisdiction; and
- Carrying out the works specified in an order under the Local Government Act 1993 or Environmental Planning and Assessment Act 1979 at the cost of the person served with the order, with proceedings being commenced to recover those costs where appropriate.

Legal Proceedings

Where matters are referred to the appropriate Coordinator or Manager for the consideration of enforcement action, they will assess whether a recommendation should be made to commence legal action. The officers will evaluate, considering the public interest and Council's policies and priorities, whether legal action should be initiated.

Council will commence legal proceedings in accordance with the delegations of the appropriate Coordinator or Manager and other appropriately delegated officers.

The Decision to Commence

Prior to recommending the commencement of proceedings, the solicitor responsible for a matter must be satisfied that the available evidence establishes a case to the required standard of proof.

Where a criminal prosecution is contemplated, the evidence should disclose, at the least, the existence of a *prima facie* case and having regard to the need to achieve the criminal standard of proof – that is that the elements of the offence be proved beyond reasonable doubt.

For civil enforcement proceedings there should be sufficient evidence to indicate that Council will be able to establish the elements of the case on the balance of probabilities. In recommending that civil enforcement proceedings be commenced in relation to a particular matter, the solicitor must form an opinion that there are reasonable prospects of success should the matter proceed to a defended hearing. Proceedings should not be commenced where there are no reasonable prospects of success.

A solicitor's recommendation for the commencement of proceedings requires consideration of the relative seriousness of the matter, including any life or fire safety factors or environmental harm involved. The recommendation to commence must contain a consideration of all factors relevant to Council's prospects of success, bearing in mind the primary importance of ensuring the safety of the community and the environment.

The dominant factor in the exercise of Council's discretion to commence proceedings is the public interest, including Council's duty to ensure the safety of its residents and visitors. The decision should be considered in the context of all the enforcement options available to Council to ensure that the approach taken is that which is most likely to achieve the desired outcome and is consistent with the factors listed below. Court proceedings should be commenced only where this is the appropriate strategic response, and it is in the public interest to do so. The factors to be considered in making this determination may include:

- The seriousness of the breach, including the harm or potential harm to the environment, public health, safety, or amenity caused by the breach;
- The availability or efficacy of any alternatives to legal proceedings (including any other means by which the breach can be remedied);
- Whether the offender has been dealt with previously by non- prosecutorial means;
- Whether the breach is a second or continuing offence;
- Whether the issue of Court orders is necessary to prevent a recurrence of the offence;
- The number of complaints about the unlawful activity, the number of complainants and whether complaints have been received from the emergency services or other public authorities;
- The prevalence of the type of unlawful activity and the need for deterrence, both specific and general, as well as the extent of Council's resources diverted to achieving compliance;
- The age, physical or mental health or any special illness of the alleged offender and any other mitigating circumstances in Council's knowledge;
- The potential length and expense of court proceedings;
- Any potential counter-productive outcomes of taking proceedings;
- The likely outcome in the event of conviction, regarding the sentencing options available to the court; and
- Whether the consequences of criminal conviction would be unduly, harsh or oppressive in the circumstances.

Council will not undertake enforcement action and court proceedings for any improper purpose. A decision on whether to take legal proceedings will not be influenced by:

- Any form of unlawful discrimination, such as race, religious beliefs, and gender;
- Personal empathy or dislike towards the offender; or
- Political affiliations or any other associations of any of the persons involved in the matter including the offender, the complainant and any staff member involved in making decisions relating to the matter.

The Appropriate Party

It will often be the case that enforcement action or legal proceedings could be commenced against more than one person in relation to the same incident. In most cases it may not be appropriate for enforcement action to be taken or legal proceedings to be commenced, against every person who may be liable for the unlawful activity.

When determining the appropriate person to be the subject of proceedings the investigating officer, and the solicitor where appropriate should consider the following:

- Who is primarily responsible for the acts or omissions giving rise to the alleged offence or the circumstances giving rise to the unlawful activity?
- What was the role of the party against whom it is proposed to commence proceedings?
- The effectiveness of any Court orders which may be made against the proposed defendant or respondent; and
- Whether there is any evidence that the proposed defendant was the person who undertook (or directed) the unlawful activity and formed the relevant intent.

Corporations may also be liable for unlawful activity. When an offence is committed by employees, agents, or officers of a corporation in the course of their employment, proceedings will ordinarily be commenced against the corporation. However, where the evidence discloses that the unlawful activity occurred because the employee, agent or officer embarked on the activity of their own volition outside the scope of their employment, proceedings may be instituted against the employee, agent, or officer and not against the corporation.

Some legislation provides that employees of corporations are also liable for offences committed by their employers in their absence in certain circumstances and in these cases, proceedings may be commenced against both parties. It is also important to consider whether there can be effective implementation of a compliance program against the corporation.

In determining whether proceedings should be commenced against an employee of a corporation or business, factors include:

- Whether the employee knew or should have known that the activity in question was unlawful;
- The seniority of the employee and the scope of their employment duties;
- Whether liability is imposed on the employee in the circumstances under the relevant legislation; and

- Whether the employee had, given their seniority and employment duties, taken reasonable steps to draw the attention of the employer or other relevant persons to the unlawful activity.

Penalty Notices

Penalty Infringement Notices (PIN's) are a way of imposing a fine on a person or persons who an authorised officer believes is guilty of an offence without commencing criminal proceedings against them. Generally, PIN's are appropriate where:

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

Authorised officers can issue PIN's in accordance with their statutory responsibilities and delegations, this policy and any guidelines or operating procedures put in place by the manager of the relevant unit.

Penalty Infringement Notices are not appropriate where the breach is ongoing or where the prescribed penalty is not adequate to address the severity of the offence. For example, repeated issuing of PIN's is not appropriate where there have been ongoing instances of unauthorised activity such as out of hours trading. Council staff should also consider whether it is appropriate to issue a formal caution as an alternative to issuing a PIN in appropriate circumstances and in accordance with the 'Guidelines for Cautions' issued by the Attorney-General under the *Fines Act 1996*.

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

In circumstances where it is proposed to issue a PIN based on information provided only by a complainant (i.e. a person who is not a Council staff member) the matter should undergo a full assessment by an appropriate Coordinator or Manager prior to the issue of the PIN. The evidence must include a statutory declaration signed by the proposed witness and confirmation that the witness is prepared to give evidence in court if necessary.

Wherever possible it should also include objective evidence demonstrating the offence, for example, photographs. Council staff should be particularly cautious when issuing Penalty Infringement Notices based only on evidence provided by a complainant. Where the appropriate Coordinator or Manager is uncertain as to whether the issue of a Penalty Infringement Notice is warranted, the matter should be referred to Council's legal representatives for advice.

Recipients of Penalty Infringement Notices can elect to have the matter dealt with in court. More information as to how court-elected penalty notices are dealt with can be found on the Revenue NSW website. (<http://www.revenue.nsw.gov.au/fines>).

Who Must Be Served?

The Penalty Infringement Notice must be served on the person or persons who appear to have committed the offence. The person served must be an individual or an incorporated body (such as a company or body corporate).

Legislation allows service of a Penalty Infringement Notice on all owners of private property as is the case for example on a residential property where both husband and wife are joint owners. You must determine that a *prima facie* case exists on all relevant owners/directors prior to issuing them with a PIN. Just because they are joint owners is not legally sufficient to issue all owners with a PIN.

The difficulty faced when issuing Penalty Infringement Notices is attributing cause for the offence when two owners exist. Accordingly, a PIN for each of the owners is issued. Once advice is provided by one of the parties that they caused the offence and arrangements are made for payment of the fine, Council can withdraw the fine to the other party.

Official Caution

A caution is an enforcement tool available under the provisions of the Fines Act 1996. A caution can be used when a Penalty Infringement Notice could be issued for the breach but the investigations officer elects to issue a formal caution instead based on an analysis of the circumstances. This may include instances where a company has an excellent track record, the breach results in no harm, the impact on the integrity of the planning system is low, or where an incident is promptly rectified by the responsible party, or when a simple action can bring about compliance. The seriousness of the breach would need to be on the low end of the scale of harm to the community or the environment and the offender has had good performance to date. This written caution would outline that further breaches can lead to escalating enforcement action, such as issuing a Penalty Infringement Notice.

Official cautions are to be issued in accordance with the Caution Guidelines under the Fines Act 1996 issued by the NSW Attorney General.

Criminal Proceedings

Criminal proceedings are most appropriate where:

- There is serious culpability or aggravating factors present; or
- Where the unlawful activity is not of an ongoing nature such that civil enforcement proceedings seeking Court orders requiring that the person cease the unlawful activity are considered necessary.

Criminal proceedings can be commenced in the Local Court (via Court Attendance Notice) or in the Land and Environment Court (Class 5 proceedings). Criminal proceedings cannot be commenced in relation to an offence where a Penalty Infringement Notice has been issued and finalised in relation to the same offence. Criminal proceedings in the Local Court or the Land and Environment Court can be issued following approval by the Coordinator Compliance or Manager Building Control and Compliance.

When determining in which jurisdiction criminal proceedings should be commenced, staff will assess the objective seriousness of the alleged offence, the public interest, the

appropriate sentence range, and any benefit from a rapid resolution of the matter in the Local Court. Criminal proceedings under the Environmental Planning and Assessment Act 1979 should not be commenced where civil enforcement proceedings for a breach of an Order or a breach of an Act are underway or where the Court has made orders pursuant to such proceedings.

Charges – Criminal Proceedings

Where criminal proceedings are commenced, the charges laid should adequately reflect the nature and extent of the unlawful activity disclosed by the evidence. The key aim should be to provide the court with the basis on which to impose an appropriate penalty.

In some circumstances where charges are laid, as part of the discussions between the defence and the prosecuting officers prior to the hearing, the defendant may indicate a willingness to plead guilty to some, but not all, of the charges. In these circumstances it may be appropriate for Council to agree to proceed with some but not all the charges.

Any submissions made on behalf of the defendant to plead guilty to some of the charges will be appropriately assessed, considering the benefits including the significant cost and time benefits in the matter not proceeding to defended hearing. Any proposal of this nature should only be agreed to if it can be demonstrated that the remaining charges adequately reflect the nature of the conduct of the defendant and those charges will provide the basis for an appropriate sentence in all circumstances of the case. A decision to agree to a plea of guilty in these circumstances must be approved by the Group Manager.

Representations – Criminal Proceedings

Defendants in criminal proceedings are entitled to make representations to prosecuting authorities in relation to matters before the Court. All representations will be considered, and a recommendation made as to whether proceedings should continue in the circumstances. The Defendant is to be notified in writing of the outcome of their representations before the next occasion the matter comes before the court wherever practicable.

Civil Enforcement Proceedings

Civil enforcement proceedings are most appropriate in situations where Council's objective is to secure an undertaking that an ongoing unlawful activity will cease or that works be undertaken to remedy an unsatisfactory situation.

Civil enforcement proceedings are commenced in Class 4 of the Land and Environment Court. Such proceedings will, in most cases, be taken to enforce a statutory Order already issued by Council that has not been complied with. Proceedings may be commenced without prior action where there has been a direct breach of legislation that is of sufficient seriousness, for example where there is a significant risk to public health, safety or amenity, or the offences have been carried out by a repeat offender.

In most circumstances where Council is considering civil enforcement proceedings, a letter of demand will be sent to warn the person against whom legal proceedings are anticipated, both that proceedings will be commenced unless the unlawful activity is addressed within a specified period and that Council will seek orders to recover its costs of any such

proceedings. Council may commence proceedings without a letter of demand in circumstances where there is a serious risk to health or safety such that urgent action is required or if Council is otherwise satisfied that the unlawful activity will not be addressed without court orders and there is strategic benefit in commencing proceedings without sending a letter of demand.

Civil enforcement proceedings can be taken in relation to ongoing breaches of the legislation, regardless of whether criminal proceedings have previously been taken in relation to the issue. In taking civil enforcement proceedings, Council will ordinarily be seeking that the Court issue orders requiring the respondent to the proceedings to do, or cease from doing, certain things. Council will also seek orders that the costs incurred in bringing the proceedings be borne by the respondent. In certain circumstances, Council may seek orders from the Court enabling it to go onto private property and undertake certain works itself. Such orders will only be obtained where there is no other means of achieving the desired public benefit.

Where proceedings are commenced, Council will continue to attempt to resolve the issue as quickly as possible, which includes attempting to resolve proceedings efficiently and with minimal costs incurred.

The Coordinator Compliance or Manager Building Control and Compliance can authorise the commencement of Class 4 proceedings. In certain circumstances where an injunction is sought Council may be required to give an undertaking as to damages. Such an undertaking can only be given by the Manager Building Control and Compliance in consultation with the Group Manager on behalf of Council.

Contempt Proceedings

Where a Court order is not complied with, the respondent can be charged with contempt of court. Where a person is found guilty of contempt the consequences can be significant and may involve the possibility of imprisonment or sequestration of property.

In all circumstances where orders of the Court have not been complied with Council will consider whether it is appropriate to take contempt proceedings. Unless there has been a significant change in the circumstances that founded the decision to initiate the Class 4 proceedings, Council is likely to commence contempt proceedings.

Contempt proceedings require evidentiary proof at a standard higher than the “balance of probabilities” standard required for civil enforcement proceedings and is closer to the standard of “beyond reasonable doubt” for criminal proceedings. Where a solicitor is recommending the commencement of contempt proceedings, they should be confident that the evidence will meet the higher standard of proof.

Contempt proceedings may only be commenced with the approval of the appropriate Coordinator and Manager where appropriate. As contempt proceedings may result in imprisonment careful consideration must be given to all the public interest factors involved and the possible sentencing recommendations that will be put to the Court.

Report Broader Matters to Council

Council officers may take prospect of success advice from the Council's solicitor and/or counsel.

Where a decision to take compliance or enforcement action may impact upon Council policy, undermine, or abandon a strongly held position or result in extreme costs with an inherent risk of the proceedings failing, based on prospects of success advice, Council officer may elect to report the matter to Council.

The decision to proceed with such proceedings will then be subject to a resolution of Council having a full understanding of all elements of the compliance and enforcement matter.

Service Standards

Taking and recording customer request

All customer requests and complaints are recorded by Council in accordance with the State Records Act 1998.

All persons who make an action request about alleged unlawful activity will be acknowledged in writing (where return details are available) within 48 hours of the allocation of the complaint to an investigation officer.

Assessment

A request for compliance and enforcement action will be assessed in accordance with this policy and in particular considering "Framework for Prioritising CRM's" contained in Section 2 of this Policy, and the person making the request will be advised of how the matter will proceed within a reasonable time commensurate on the priority of the complaint.

Investigation

Where the assessment has determined to formally investigate the request and any allegations made by the request, the investigation will (workloads allowing) proceed within 2 days of that determination where practical.

Determination of Appropriate Enforcement Action

Council will determine the most appropriate enforcement option(s) having regard to the nature and seriousness of the breach and the public interest.

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.

Case Management

We will always:

- avoid litigation, wherever possible (but not at the expense of deterring breaches)
- not commence any litigation where it is statute barred or estoppel exists,
- ensure that we weigh up the public interest or benefits that will be served against the cost to the Council, and the community, of taking compliance and enforcement action,
- act with complete propriety, fairly and in accordance with the highest professional standards,
- not cause unnecessary delay in the handling of litigation,
- act consistently in the handling of litigation,
- not take advantage of a person who lacks the resources to litigate,
- not relying on technical issues unless the interests of the Council would be prejudiced by the failure to comply with a particular requirement,
- not undertake or pursue proceedings or appeals unless the Council believes that it has reasonable prospects for success, and it is justified in the public interest, and
- seek to limit legal costs to Council and the other party.

This does not prevent:

- enforcing costs orders or seeking to recover costs;
- relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;
- pleading limitation periods;
- seeking security for costs;
- opposing unreasonable or oppressive claims or processes;
- requiring opposing litigants to comply with procedural obligations; or
- moving to strike out untenable claims or proceedings.

Review of Compliance and Enforcement Decisions

Where a compliance or enforcement decision is to be reviewed, a more senior officer of Council than the officer who made the decision will undertake the review. Where a compliance or enforcement decision of the City Manager is to be reviewed it will be reviewed by the Council.

Verbal and Anonymous Complaints

Verbal Requests

Verbal Requests will only be accepted where there is an immediate risk or disturbance and includes the following categories:

- Swimming pool safety.
- Fire safety of buildings.
- Matters of a serious threat to public health or safety that requires urgent attention.
- Dangerous/unsafe buildings.
- Unauthorised earthworks or filling that is in progress.

Anonymous Requests/Complaints

Anonymous requests for investigations are frequently found to be unsubstantiated and result in resources being wasted. Contact names, addresses and phone numbers are important to confirm information or, if necessary, obtain additional information to allow investigations to be properly conducted.

Anonymous requests for disputes and grievances following investigation have frequently been found to be because of a neighbourhood dispute or involve issues that Council should not be a party to. Management will determine if the complaint is to be investigated if there is sufficient relevant information received to investigate the complaint.

Anonymous requests will only be accepted in the following categories:

- Swimming pool safety.
- Matters of a serious threat to public health or safety.
- Dangerous/unsafe buildings with immediate threat to life.

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

Specific Procedure for Dealing with Trivial, Frivolous or Vexatious Complaints

A trivial, frivolous or vexatious complaint is when:

- The person making a complaint is not satisfied with the action taken or service provided despite the service or complaint procedure being properly implemented and fully exhausted. This is characterised by:
 - Unwilling to accept evidence relied on or agree with the determination.
 - Denying having received an adequate response answering the questions raised.
 - Continuing to demand the complaint be revisited.
 - Focusing on trivial issues or procedural steps to assert the determination is invalidated.
- The person makes unreasonable demands that significantly and unreasonably diverts Council's resources away from other functions or creates an inequitable allocation of resources to other customers. Such demands may result from the amount of information requested, the nature or scale of services sought or the number of approaches seeking information, assistance, or service.
- If during the preliminary assessment a complaint is identified as being a trivial, frivolous or vexatious complaint the Coordinator Compliance is to write to the customer restating Council's position on the matter and advising that if the customer continues to contact

Council regarding the matter Council may require all further communication from the customer on the matter be put in writing.

d) Advise that if Council continue to receive correspondence on the matter Council will only place the matter on file for records purposes and not respond beyond an acknowledgement unless:

- The customer provides significant new information relating to their complaint or concern;
- The correspondence raises serious issues associated with impacts to life, property or the environment; or
- The customer raises new issues which in the Coordinator Compliance's opinion, warrant fresh action or investigation.

A letter will be sent to the complainant informing the person that any complaints lodged by them that are of the same nature as those previously investigated, i.e. raising any matters that have been previously investigated, may result in Council not responding to them and their concerns being received and noted with no further action being taken. Those complaints will be reviewed by the Coordinator Compliance or Manager Building Control and Compliance and actioned accordingly.

Delegations

The delegations to officers relevant to this Policy are included in Council's Delegation Register.

SECTION 3 - GOVERNANCE

RESPONSIBILITY

Policy Owner	Co-ordinator Compliance, Building Control & Compliance
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RISK

There is a reputational risk to Council, and any staff member of Council authorised under legislation to carry out compliance action, relating to the conduct of Council's regulatory response should a breach of the law be alleged.

Council is the responsible regulatory authority under several Acts and Regulations. There are expectations set by external authorities on how Council and its regulatory staff are to conduct themselves.

This Compliance and Enforcement Policy sets in place a structure for Council and staff to follow, as well as clearly identifying processes and expectations to relevant stakeholders.

The Policy also sets out prioritisation of matters using a risk-based approach to allow available resources to be focussed on those matters where significant adverse outcomes for the community or environment may eventuate or it is in the public interest.

VERSION CONTROL AND CHANGE HISTORY

Version Number	Approval Date	Approved by	Amendment
Original	14 April 2015	Outcomes Committee	
002	12 October 2021	Outcomes Committee	General update
003	XXX 2025	Outcomes Committee	General update

The management of Council reserves the right to cease, modify or vary this Policy and will do so in accordance with Council's established consultation processes.

REVIEW DATE

Council reserves the right the right to cease, modify or vary this Policy and will do so in accordance with Council's established consultation processes.

This Policy will be reviewed every 4 years from the date of Council approval.

AUTHORISATION

This Policy was adopted by the Council resolution on XXX 2025, Item XX Outcomes Committee.