

BACKGROUND

This Policy applies to the investigation and enforcement of complaints about unlawful activity or failure to comply with the terms or conditions of approvals, consents, notices or orders. It outlines how to assess whether complaints of unlawful activity require investigation, options for dealing with unlawful activities and regulatory breaches, matters for consideration and facilitates a proportional approach to compliance management.

It is based on the NSW Ombudsman “Enforcement Guidelines for Councils” and “Model Policy” (2015).

OBJECTIVE

The objectives of this Policy are:

- 1 To establish clear guidelines and protocols for Council staff in the management of Council's regulatory activities.
- 2 To provide a framework to facilitate a responsive and risk based approach to proactive and reactive compliance and enforcement matters.
- 3 To improve compliance management and reduce the impact of unlawful activity on the community and our environment.

The Policy also provides advice and guidance on the role of the Private Certifiers and the role of Councillors in enforcement.

POLICY REVIEW AND VARIATION

- 1 Council is to have opportunity to review and adopt, at least once during its Term, each Council Policy.
- 2 A resolution of Council is required to adopt any variations to this Policy, with the exception of minor administrative changes, such as updates to legislative references, which may be endorsed by the Executive Management Committee (EMC). Endorsement of administrative changes made to this Policy by EMC does not alter the requirement for it to be reviewed and adopted by each Term of Council.

POLICY STATEMENT

The Policy applies a risk based approach to compliance management to ensure resources are focussed on those matters posing the biggest risk to the community and environment. This approach is applied to both proactive compliance activities and also in response to reports alleging unlawful activity (reactive compliance). Council will undertake enforcement action where appropriate in accordance with this Policy document.

1 INTRODUCTION

Council's regulatory responsibilities are applicable to threatened or *actual unlawful activity*, as well as a *failure to take action* (in order to be compliant with certain legal requirements). For simplicity, this Policy refers to both an act and/or an omission by an alleged offender as ‘unlawful activity’.

2 PURPOSE AND SCOPE

This Policy provides information for all internal and external stakeholders and interested parties about Council's position on compliance and enforcement matters in Wollongong City.

The purpose of this Policy is to provide structure for consistency and transparency in decision making, and to facilitate a proportional approach to compliance and enforcement. It is also intended to assist Council staff to act promptly, effectively and consistently in response to allegations of unlawful activity.

This Policy outlines matters to be considered at the various stages of the enforcement process from the receipt and investigation of reports alleging unlawful activity, through to what enforcement option Council will consider and whether to commence criminal or civil proceedings.

In certain circumstances Council will have shared enforcement responsibilities with other regulatory authorities. Advice and guidance is also provided on the role of Council in building and construction compliance matters where there is a Private Certifier, and the role of Councillors in enforcement.

Responsible Council staff are not limited by this Policy in their use of discretion and exercise of official functions. The full circumstances and facts of each case need to be considered and a decision made on the merits.

3 DEFINITIONS

The following are the definitions of key terms in this Policy:

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 in order 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 particular land
- a legislative provision regulating a particular activity or work
- a required development consent, approval, permission or licence.

4 COMPLIANCE AND ENFORCEMENT PRINCIPLES

The following are the principles that underpin Council actions relating to compliance and enforcement.

Principle	Action
Accountable and transparent	<ul style="list-style-type: none"> • Acting in the best interests of public health and safety and in the best interests of the environment • Ensuring accountability for decisions to take or not take action • Acting fairly and impartially and without bias or unlawful discrimination • Providing information about compliance and enforcement priorities and reasons for decisions to improve understanding and certainty and promote trust by the regulated community • Ensuring meaningful reasons for decisions are given to all relevant parties, particularly when there is a departure from this Policy
Consistent	<ul style="list-style-type: none"> • Ensuring compliance and enforcement action is implemented consistently • Encouraging customer reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter
Proportional	<ul style="list-style-type: none"> • Ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach • Making cost effective decisions about enforcement action • Taking action to address harm and deter future unlawful activity
Timely	<ul style="list-style-type: none"> • Ensuring responses to reports alleging unlawful activity and decision making in relation to those is timely.

5 RISK BASED REGULATION

Our community has become more expectant of living in a healthy and liveable city where we value and protect our environment. It is understandable that a direct correlation of this expectation is that the number of laws and regulations have increased expanding the scope of necessary enforcement. From time to time reports alleging unlawful activity will exceed available resources.

Risk based regulation works on the basis that the type of compliance action chosen will be dependent on an evaluation of the degree of risk, and the impact of the non-compliance on Council's ability to achieve its objectives. It is a way to target resources where they are most needed and where they will produce the most effective impact.

Council is committed to developing and implementing both proactive and reactive strategies to achieve effective and efficient risk based compliance enforcement programs. To this end, Council uses intelligence gained from its customer management systems to determine the most appropriate strategy.

Proactive compliance monitoring assists Council in meeting its statutory requirements, respond to common complaints and maintain a positive monitoring presence. The aim of proactive strategies is to reduce the amount of reactive incidents requiring a Council response.

Education and awareness raising activities are both proactive approaches to preventing breaches of the law and can be very cost effective in achieving compliance. Providing information to the public through media releases, Council's website, workshops with target groups and brochures together with incentives e.g. financial/awards, are all strategies Council will explore to determine the best fit for the areas of focus.

Reactive compliance enforcement incorporates a risk based approach which categorises the request into low, medium and high having regard to Council's Risk Category Matrix. In that regard reference should be made to the Appendix 1 Risk Category Matrix.

Periodic reviews of Council's Risk Category Matrix will be undertaken using intelligence collated from its case management systems as well as other sources to ascertain whether systemic or more serious patterns are emerging which warrant re-categorising the risk levels of unlawful activities.

6 RESPONSIBILITY

Council receives information about alleged unlawful activity from members of the public, contact from other Government Agencies and information gathered by its Officers during proactive inspections.

Only Council staff with appropriate delegations from the General Manager can undertake investigations or compliance and enforcement action in relation to this Policy.

Council staff are required to:

- treat all relevant parties with courtesy and respect
- communicate with all relevant parties and provide feedback on the progress of an investigation and any reasons for delay without compromising the integrity of the investigation
- make full and proper records in relation to the assessment and investigation of reports alleging unlawful activity, including reasons for any decisions
- inform all relevant parties of reasons for decisions
- provide as much information as possible to all relevant parties about the outcomes of investigations to show that adequate and appropriate action was taken and/or is proposed to be taken in response to a report of alleged unlawful activity
- provide information to all relevant parties about any avenues to seek an internal or external review of a decision

All reports alleging unlawful activity are to be entered into Council's customer request system and actioned within the appropriate risk based time frame by the appropriate business unit.

7 SUBMITTING REPORTS OF UNLAWFUL ACTIVITY

Reports alleging unlawful activity will be recorded in Council's customer request systems and will be allocated a unique reference number. The report will be referred to the relevant Council Officer to commence any necessary action.

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

As outlined in Council's Customer Service Policy, Council generally seeks to keep confidential, personal information identifying a complainant. However, Council may be required to disclose this information in a variety of circumstances including the following:

- When access to the information is permitted under another Council Policy (consistent with legislation)
- Legal proceedings are commenced and the information is disclosed in evidence served
- When access to the information is permitted under Legislation, including the Government Information (Public Access) Act 2009 or the Local Government Act 1993.
- the disclosure is required to comply with the principles of procedural fairness
- the disclosure is necessary to investigate the matter.

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

7.1 *What Council expects from people who report allegations of unlawful activity:*

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

- providing a clear description of the problem (and the resolution sought, if relevant)
- providing a clear description/account of the impact that the alleged activity is having
- giving all available and relevant information to Council, including any new information about the alleged activity that may become known to the person following the making of their report
- not giving any information that is intentionally misleading or wrong
- cooperating with Council's inquiries and giving timely responses to questions and requests for information
- treating Council's staff with courtesy and respect

7.2 *Anonymous Reports*

Anonymous reports will be recorded and assessed. However, because it is not possible to seek clarification or additional information about a matter, it is more difficult to evaluate the allegations and therefore only high risk matters that are reported anonymously are likely to be tasked for investigation.

8 RESPONDING TO CONCERNS ABOUT UNLAWFUL ACTIVITY

Council will record every report alleging unlawful activity.

Not all reports will, can or need to be investigated. A preliminary assessment of all matters will be made to determine the priority for a response, and whether investigation or other action is required.

An investigation of alleged unlawful activity may take a significant amount of time to complete, particularly where the issues are complex. If Council decides to investigate, staff will give the person who reported the alleged unlawful activity regular feedback on the progress of the investigation, and any reasons for delay. This does not mean that the individual can expect to be given details about every aspect of the investigation or information that would compromise the integrity of the investigation.

Decisions about what action should be taken by Council are made at the Council's discretion. This means the objective is that reports alleging unlawful activity will be resolved to the satisfaction of Council, not necessarily the person raising the matter. Council will generally try to resolve matters as quickly and informally as possible so as to avoid the need to take formal action.

Council staff will endeavour to manage the expectations of people who report alleged unlawful activity, and in particular explain that in the absence of sufficient evidence of unlawful activity, Council may be unable to take further action. Council does not have unlimited resources and powers to deal with reports alleging unlawful activity.

9 INVESTIGATING ALLEGED UNLAWFUL ACTIVITY

A preliminary assessment of all requests will be made to determine whether investigation or other action is required. Council will prioritise matters based on the Compliance and Enforcement Principles (Section 4).

If there is insufficient information in the report to undertake a preliminary assessment, the customer will be advised and the matter not tasked for investigation.

9.1 *Circumstances where no action will be taken:*

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

- the report is not supported with evidence or appears to have no substance.
- Council does not have jurisdiction to investigate or is not the appropriate authority to take action on the issues raised. Where there is another appropriate authority or course of action, Council may bring the matter to the attention of the authority or provide information and contact details to the individual. For example NSW WorkCover for workplace safety matters, the NSW Environment Protection Authority (EPA) for possible environmental offences and Community Justice Centres NSW for personal disputes.
- the report relates substantially to a matter previously determined by Council and no new or compelling information is presented which would cause Council to change its earlier decision. In this case, staff will acknowledge the report and advise that no further action will be taken as no new information had been provided (other than where the person has previously been advised they would receive no further response).
- the allegations relate to a lawful activity (eg where there is an existing approval or the activity is permissible without Council approval or consent being required).
- the relevant Manager, Director or the General Manager determines that investigation or other action would have an unreasonable impact on resources and/or is unlikely to achieve an outcome sufficient to justify the expenditure of resources.

9.2 *Relevant factors guiding decisions as to whether to take action:*

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

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

The above are factors for Council to consider and weigh in making a determination. Council staff are not limited in their use of discretion by these considerations and may decide to investigate based on these and other factors.

The objective of the processes Council staff use 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
- determine any necessary action to mitigate the possibility of reoccurrence of similar incident.

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

10 DECIDING WHETHER OR NOT TO TAKE 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 general considerations will assist Council staff in determining the most appropriate response in the public interest:

10.1 *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

- the time period that has lapsed since the date of the unlawful activity.

10.2 Considerations about the alleged offender:

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

10.3 Considerations about the impact of any enforcement action:

- the need to deter any future unlawful activity
- whether an educative approach would be more appropriate than a coercive approach in resolving the matter
- the prospect of success if the proposed enforcement action was challenged in Court
- the costs and benefits of taking formal enforcement action as opposed to taking informal or no action
- what action would be proportionate and reasonable in response to the unlawful activity
- whether Council is prevented from taking action based on earlier advice given, ie whether an estoppel situation has been created.

10.4 Considerations about the potential for remedy:

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

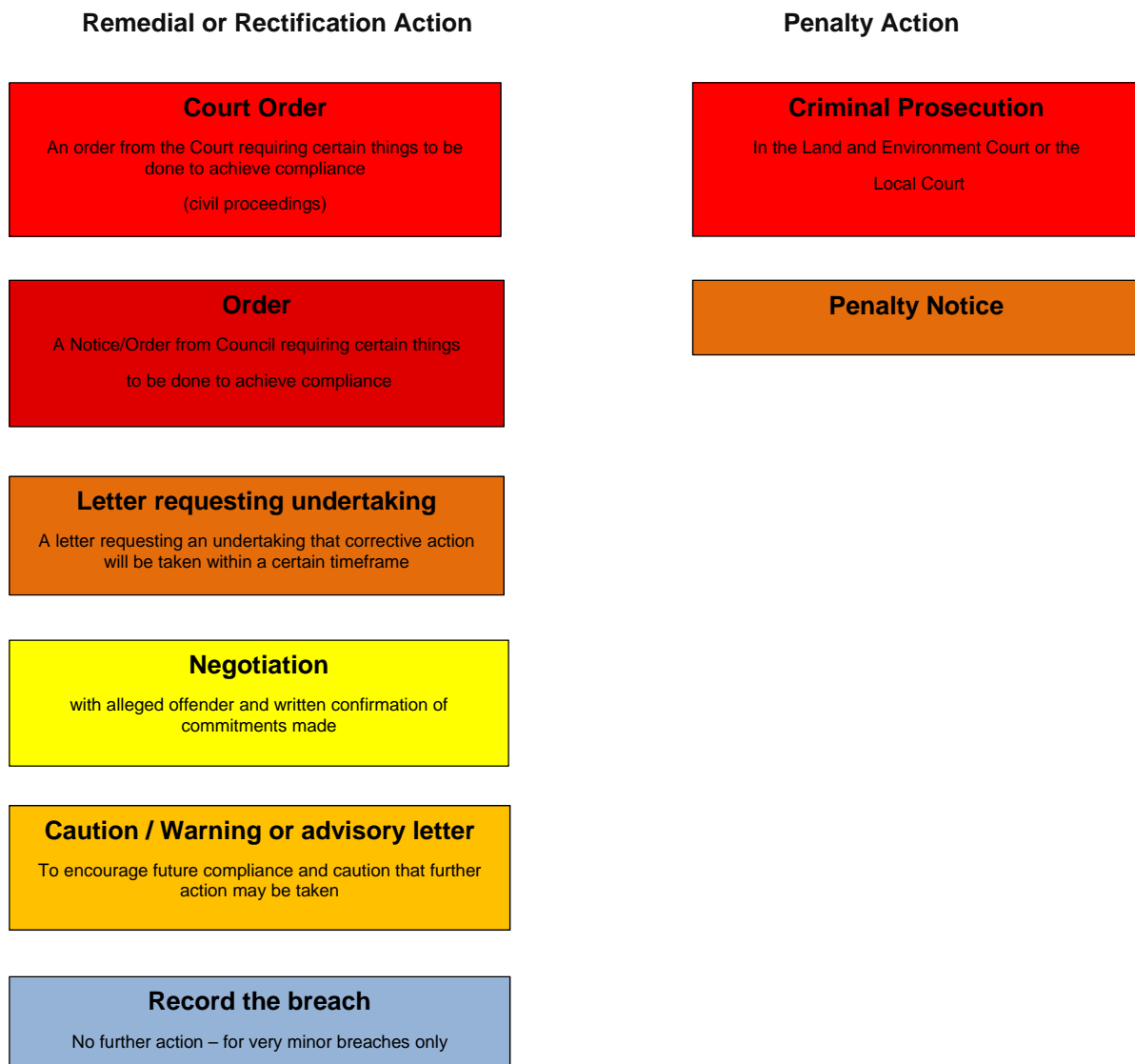
11 OPTIONS FOR DEALING WITH CONFIRMED CASES OF UNLAWFUL ACTIVITY

Council will use the most effective, informal option to deal with unlawful activity where ever possible unless there is little likelihood of compliance with such options. Council staff will use discretion to determine the most appropriate response to confirmed cases of unlawful activity and may take more than one approach.

Any enforcement action taken by Council will depend on the full circumstances and facts of each case, with any decision being made on the merits.

There are a range of enforcement actions available as shown below in Figure 1.

Enforcement options are not necessarily mutually exclusive: for example, in some circumstances it may be appropriate to simultaneously issue an Order and a Penalty Notice. It is also important to note that the following is a guide only and each case must be assessed on the particular facts.

Figure 1: Enforcement actions available to Council

Note that it may be appropriate to use more than one enforcement option in some cases. If initial enforcement action does not achieve a satisfactory outcome, it may be necessary to proceed to a higher level of enforcement response. For example, if a warning letter or notice of intention does not achieve the desired response, it may be appropriate to give an Order; or if an Order is not complied with, it may be appropriate to bring enforcement or prosecution proceedings.

Following up enforcement action

All enforcement action will be reviewed and monitored to ensure compliance with any undertakings given by the subject of enforcement action or advice, directions or orders issued by Council. Reports alleging continuing unlawful activity will be assessed and further action taken if necessary. If the unlawful activity has ceased or the work has been rectified, the matter will be resubmitted for follow up action to ensure compliance outcomes are met. Should initial enforcement action be found to have been ineffective, Council staff will consider other enforcement options.

12 TAKING LEGAL ACTION

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

- whether there is sufficient evidence to establish a case to the required standard of proof,
- whether there is a reasonable prospect of success before a Court,
- whether the public interest warrants legal action being pursued.

Whether there is sufficient evidence to establish a case to the required standard of proof

Council considers the decision to take legal action a serious matter, and as such will only initiate and continue proceedings once it has been established that there is admissible, substantial and reliable evidence to the required standard of proof.

The basic requirement of any **criminal** prosecution is that the available evidence establishes a prima facie case. The prosecutor is required to prove the elements of the offence beyond reasonable doubt.

In **civil** enforcement proceedings, Council will require sufficient evidence to satisfy the Court that an actual or threatened breach has occurred on the balance of probabilities.

Whether there is a reasonable prospect of success before a Court

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

Whether the public interest requires legal action to 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.

The following considerations relate more specifically to the decision to commence legal proceedings and will assist Council and its delegated staff in making this determination:

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

Time within which to commence proceedings

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

13 SHARED ENFORCEMENT RESPONSIBILITIES

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

Council recognises that collaboration and cooperation between authorities to address issues of shared regulatory responsibility is the best approach. To this end, where there are shared legislative responsibilities, Council staff will work 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
- 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.

14 ROLE OF COUNCIL WHERE A PRIVATE CERTIFIER HAS BEEN NOMINATED AS THE PRINCIPAL CERTIFIER

Where the Private Certifier has been appointed as the Principal Certifier the Council recognises that the Private Certifier is the authority responsible for ensuring compliance with the conditions of development consent.

Private Certifiers have limited enforcement powers of which they can use to issue a notice of intention to issue an order to the owner or builder to comply with the conditions of consent or rectify any breaches. A copy of any Notice of Intention issued by a Private Certifier must be provided to Council for assessment as to whether Council will enforce the notice by issuing an Order.

Persons making complaints regarding a site where the PCA is private will be advised to contact the Private Certifier in the first instance. This will give the Private Certifier an opportunity to address the issues and take appropriate action.

Should the Private Certifier fail to use their enforcement powers to address the issue raised within a reasonable timeframe, Council will act to investigate the matter.

It must be noted that Council is not the regulator of Private Certifiers and any complaints about the conduct of Private Certifiers must be directed to the Building Professionals Board www.bpb.nsw.gov.au.

Council will endeavour to work with Private Certifiers to resolve any issues when they arise to achieve compliance with the development consent or complying development certificate. Council staff will take steps to ensure individuals are clear about which agency performs which role.

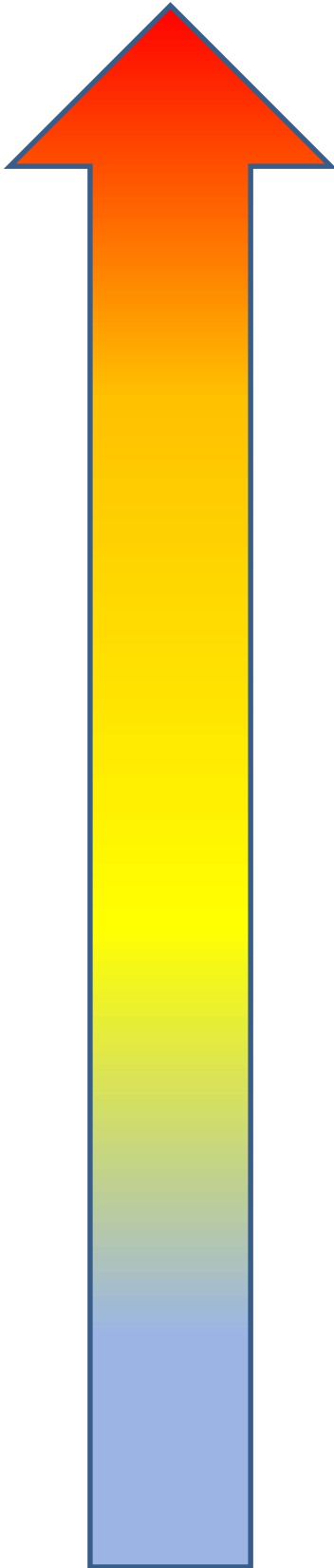
Refer to Council's Fact Sheet on Private Principal Certifiers for more information www.wollongong.nsw.gov.au/.

15 ROLE OF COUNCILLORS IN ENFORCEMENT

Compliance and enforcement matters are sensitive and easily susceptible to allegations of impropriety, bias or inconsistency. In order to manage those risks, and consistent with Councillors' Code of Conduct, Councillors do not attend on-site meetings with Council staff, the complainants, or persons the subject of investigation or enforcement action, or direct staff in relation to particular outcomes relating to investigations or enforcement options or actions.

Councillors can help individuals who raise concerns with them by referring them to the Regulation and Enforcement Division for the appropriate action to take place as outlined in this Policy.

APPENDIX 1

**RISK CATEGORY MATRIX***High Risk*

Including but not limited to:

- Large scale/significant pollution incidents
- Dog attacks, straying stock
- Large scale vegetation clearing
- Abandoned vehicles in unsafe locations
- Collapsed or unsafe building works adjacent to public areas
- Poor sediment control on building sites,

Medium Risk

Including but not limited to:

- Roaming dogs, dogs on beaches/ animal registration/general companion animal enquiries
- Abandoned motor vehicles
- Minor pollution incidents
- Breaches of tree preservation orders
- Swimming pool barrier fencing
- Domestic sewage surcharge
- Commercial & industrial air/noise complaints (criteria)
- Food premises complaints
- Public and environmental health premises complaints
- Significant unauthorised/non complying building works
- Building works where a Private Certifier appointed
- Land filling
- Rubbish dumping
- Parking
- Footpath obstructions
- Onsite sewage management systems
- Reserve encroachments
- Boarding houses

Low Risk

Including but not limited to:

- Barking dogs
- Domestic air noise complaints (power tools, air conditioners, pool pumps, amplified music)
- All other animal related enquiries
- Overgrown land (criteria)
- Home business/home occupation
- Minor unauthorised/non complying building works (criteria)
- Overland Stormwater flow (criteria)
- Smoke nuisance from domestic wood heaters, outdoor BBQ's, burning prohibited items
- Weed biosecurity
- Keeping of roosters, rooster noise, including poultry and fowl houses
- Unsightly premises
- Strata issues where Consumer's Tenancy & Trader's Tribunal is appropriate authority
- Dividing fences/boundary fence issues

The action undertaken by Council in response to a request will be proportionate the quantum of resources available at the time. For example, where the number of requests exceeds the amount of resources available, requests may be actioned using compliance through voluntary action (letters of cooperation). Conversely, when resources are available, more detailed investigations may be conducted.

SUMMARY SHEET

Responsible Division	Regulation & Enforcement
Date adopted by Council	3 April 2018
Date of previous adoptions	25 November 2013, (Administrative change on 25 January 2012 to include reference and link to NSW Ombudsman's Enforcement Guidelines for Councils 2002), Reaffirmed by Council on 28 November 2011, 23 June 2009
Date of next review	March 2021
Responsible Manager	Manager Regulation and Enforcement
Authorised by	Manager Regulation and Enforcement