



SHIRE COUNCIL
Blayney

Enforcement Policy

Policy	19Q
Officer Responsible	Director Planning & Environmental Services
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Strategic Policy

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Policy

OBJECTIVES

The intent of this policy is to establish clear guidelines and protocols for council staff in the management of council's regulatory activities.

It provides workable guidelines on:

- responding to reports alleging unlawful activity
- assessing whether reports alleging unlawful activity require investigation
- deciding on whether enforcement action is warranted
- options for dealing with confirmed cases of unlawful activity
- taking legal action
- implementing shared enforcement responsibilities.

The policy also provides advice and guidance on:
the role of the Principal Certifying Authority and
the role of councillors in enforcement.

PREFACE

Blayney Shire Council is involved in a broad range of regulatory activities. In recognition of the increase in the regulatory role of all Councils, the NSW Ombudsman in December 2015 published "Enforcement Guidelines for Councils" including a Model Compliance and Enforcement Policy. That model Compliance and Enforcement Policy forms the basis of this Blayney Shire Council Policy.

The Enforcement Policy reflects the need for a transparent decision making process of Council authorised officers to be carried out in an efficient, fair and consistent manner having regard to all the circumstances.

Council's regulatory responsibilities are applicable to 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'. This policy distinguishes between a 'report alleging unlawful activity' and a 'complaint'.

For the purposes of this policy, a report alleging unlawful activity is where an individual expresses concern in relation to alleged unlawful activity, or they request service from council about such matters. Council considers that a response or resolution to a report alleging unlawful activity is explicitly or implicitly expected by the individual or may be legally required.

A complaint is where an individual expresses dissatisfaction about council services, staff or the handling of a complaint. Therefore, a complaint may arise where an individual claims that council staff have failed to take action in relation to a report alleging unlawful activity. A complaint will be recorded separately and responded to in accordance with council's complaints management policy and procedures.

PURPOSE

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 choose and whether to commence criminal or civil proceedings.

In certain circumstances council will have shared enforcement responsibilities with other regulatory authorities. This policy sets out a collaborative and cooperative approach to such matters. 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.

ENFORCEMENT PRINCIPLES

The following are the principles that underpin council actions relating to compliance and enforcement:

Principle: Accountable and transparent

Action:

- 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
- acting on any complaints or concerns about the conduct of compliance officers in accordance with council's complaints management policy and procedures advising people and organisations subject to enforcement action of any avenues available to seek an internal or external review of a decision.

Principle: Consistent

Action:

- ensuring all compliance and enforcement action is implemented consistently
- encouraging reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter.

Principle: Proportional

Action:

- 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.

Principle: Timely

Action:

- ensuring responses to reports alleging unlawful activity and decision making in relation to those is timely.

APPLICATION

This policy applies to regulatory issues within council's area of responsibility including, but not limited to:

- development and building control
- pollution control
- environmental health
- public health and safety
- noxious weeds
- septic systems
- control over animals
- food safety
- fire safety
- tree preservation.

RESPONSIBILITY

All Council staff who deal with the proactive enforcement of relevant legislation in addition to written and verbal action requests or complaints alleging unlawful activity are responsible for implementing these policy guidelines. All notifications of alleged unlawful activity should be appropriately recorded by the Council Staff or Council.

Council staff will strive 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.

DEFINITIONS

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

Complaint -

A complaint is an expression of dissatisfaction made about council services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.

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

- a report alleging unlawful activity (see definition below)
- a request for information about a council policy or procedure
- a request for an explanation of actions taken by council
- a request for internal review of a council decision.

Enforcement -

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

Regulation -

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

Report alleging unlawful activity -

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

Unlawful activity -

Any activity or work that has been or is being carried out contrary to the below and/or failure to take required action 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.

INVESTIGATING ALLEGED UNLAWFUL ACTIVITIES

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

Circumstances where no action will be taken:

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

- council does not have jurisdiction to investigate or is not the appropriate authority to 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 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 report is not supported with evidence or appears to have no substance
- 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.
- The matter is determined to be a 'neighbor dispute' and is deemed to be a civil matter.
- The complaint is anonymous, and no urgent issues of public health or safety have been raised.

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.

RESPONDING TO COMPLAINTS

Every effort will be made to ensure that all Customer Service Requests or complaints about alleged unlawful activity are actioned within a reasonable timeframe.

Council will respond to every such report unless the person raising the matter has indicated they do not wish to receive a response about the council's handling of the matter, or the report is anonymous.

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

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

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

An investigation of alleged 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 timely 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.

They will also explain that council does not have unlimited resources and powers to deal with reports alleging unlawful activity. If council is unable to fully investigate or take action on a matter because it is restricted by any legal or resource limitations this will be explained to the individual.

CONFIDENTIALITY OF COMPLAINANTS

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

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

Council will take seriously any concerns an individual may have about their physical safety being endangered as a result of making a report. However, this may limit council's ability to investigate the matter.

OPTIONS FOR DEALING WITH CONFIRMED CASES OF UNLAWFUL ACTIVITIES

Council will try to use the quickest and most informal option to deal with unlawful activity wherever 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.

At all times, council's key concerns are:

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

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

Level of risk: very low

Enforcement options:

- take no action on the basis of a lack of evidence or some other appropriate reason
- provision of information/advice on how to be compliant

Level of risk: low

Enforcement options:

- negotiating with the person to obtain voluntary undertakings or an agreement to address the issues of concern
- issuing a warning or a formal caution

Level of risk: Medium

Enforcement options:

- issuing a letter requiring work to be done or activity to cease in lieu of more formal action
- issuing a notice of intention to serve an order or notice under relevant legislation, and then serving an order or notice if appropriate

Level of risk: High

Enforcement options:

- issuing a penalty notice
- carrying out the works specified in an order at the cost of the person served with the order

Level of risk: Very High

Enforcement options:

- seeking an injunction through the courts to prevent future or continuing unlawful activity
- commence legal proceedings for an offence against the relevant Act or Regulation.

The inclusion of Appendices A and B at the rear of the policy can be interpreted as a guide to indicate the relative level of seriousness of some offences and therefore, from a consistency viewpoint, to determine whether or not the Council may issue a warning prior to some level of formal action.

TAKING ENFORCEMENT ACTION

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

Considerations about the alleged offence and impact:

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

Considerations about the alleged offender:

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

Considerations about the impact of any enforcement action:

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

Considerations about the potential for remedy:

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

TAKING LEGAL ACTION

The council and its 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 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.

The Council will ensure that the principles of natural justice are adhered to prior to a decision being made. The following principles will be addressed and implemented by the Council:

- Whoever is the subject of concern must know all the allegations in relation to their action;
- All parties to the complaint must have the right to be heard;
- All relevant submissions and evidence must be considered;
- Matters which are not relevant must not be taken into account;
- The person who makes the complaint must not determine the matter;
- The decision-maker must be fair and just.

SHARED ENFORCEMENT RESPONSIBILITIES

Some reports will raise matters involving shared regulatory responsibilities between council and other authorities including the Environment Protection Authority, the NSW Police Force, the Office of Liquor, Gaming and Racing, 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 liaise with relevant authorities to establish:

- which authority will take the leading role on any joint investigation
- which activities each authority will carry out
- responsibilities for updating an individual where relevant
- 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.

ROLE OF COUNCIL WHERE THERE IS A PRIVATE CERTIFIER

Council retains its regulatory role and enforcement powers where a private certifier has been appointed the Principal Certifying Authority (PCA). However, if a private certifier is appointed the PCA, it is not council's responsibility to ensure building and construction compliance.

Private certifiers have limited enforcement powers as the PCA. They have the power 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.

Council and private certifiers will work together 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.

ROLE OF COUNCILLORS IN ENFORCEMENT

Decision making relating to the investigation of reports alleging unlawful activity and taking enforcement action is the responsibility of appropriately authorised council staff or the council itself. Whilst individual councillors do not have the right to direct council staff in their day-to-day activities they can help individuals who raise concerns with them by satisfying themselves that council's policies are being carried out correctly. The General Manager may present certain decisions to be ratified by the elected council if this is necessary or desirable, and the councillors may also have the right to call for a report about particular issues to a council meeting.

DELEGATIONS FOR ENFORCEMENT ACTION

Council staff delegations for taking action under this policy are included in council's Delegation Register.

It should be noted that for all offences requiring the instigation of legal proceedings at the level of or above that of district court jurisdiction, the matter shall be reported to Council, for action.

All Land and Environment Court legal proceedings are required to be presented to Council for action.

APPENDIX A

The following offences may result in a prior warning (verbal or written) being given to the offender(s) before any enforcement action in the form of the service of an order or notice or penalty infringement notice or court action is undertaken.

Annual Fire Safety Statement- non submission by owner
Advertising signs without approval or unsightly
Air pollution – smoky chimney
Barking / Roaming dog, unregistered dog
Development / Activity without consent or not in accordance with a condition/s of consent
Minor development or old unauthorised development
Minor breach of consent condition/s
Erosion & sediment control matters (owner/builder – Sediments Fences and similar offences, minor environmental offences)
Fire hazard of a less serious nature.
Food safety/hygiene matters of a less serious nature
Obstruction of Public Place / Road – (minor matters)
Residential swimming pool issue not serious (e.g. resuscitation chart not provided)
Revocation of an approval (e.g. footpath dining).

Noise pollution
Air conditioner*
Intruder alarm*
Musical instrument and sound equipment*
Power tools*
Motor vehicle on residential premises*
Use of refrigeration equipment fitted to motor vehicle*
Non compliance with an Order/Notice/Direction- work partly done or other mitigating circumstances
* Mandatory warning required by legislation

Note that the above list of offences is an indication only and any offences not listed will be considered on their individual merits.

APPENDIX B

The following offences may result in NO prior warning being given to the offender(s) before any enforcement action in the form of the service of an order or notice or penalty infringement notice or court action is undertaken

Dangerous Dog Order / Attacking Dog/ Restricted Dog
Dangerous building/ awning
Dangerous waterhole
Deposit litter from vehicle
Development not in accordance with consent / risk to health & safety/bush fire protection/ notice of Intention issued by PCA
Deposit litter / Dumped Rubbish
Development without consent – unsatisfactory explanation / no explanation
repeat offender / prohibited development / risk to health & safety or environment
Dilapidated building
Environmental damage of a significant nature
Erosion & sediment control matters
Fire hazard threatening an asset
Food safety matters of a serious nature
Failure to pay Clean Up / Prevention Notice fee
Failure to comply with order / notice / cease use of premises / failure to comply with order regarding development consent / demolish remove unlawful building / threatening life / public safety / environment / amenity protection/ fence land / keeping of birds and animals/ remove object from public place/ contravene noise control notice/ noise pollution
Land clearing of a significant nature
Littering
Noise abatement direction
Noise pollution generally after prescribed mandatory warning
Not comply with condition of development consent/approval to operate
Nuisance Dog Order
Obstruction of road / public place involving safety
Obstruction / intimidation/ assault of a Council officer
Open burning without approval or not in accordance with an approval or cause excessive smoke
Pollute Waters
Parking offences
Pollution Incident – Failure to notify
Remove and /or damage tree/s
Swimming Pool fencing / gates / open
Street Trading without consent / approval

Note that the above list of offences is an indication only and any offences not listed will be considered on their individual merits.

End of Policy

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