



Title: Enforcement & Prosecutions Policy

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Related legislation

- Local Government Act 1993 & Regulations
- Environmental Planning and Assessment Act 1979 & Regulations
- Food Act 2003, Regulations & NSW Food Safety Standards
- Protection of the Environment Operations Act 1997 & Regulations
- Waste Avoidance & Resource Recovery Act 2001 & Regulations
- Noxious Weeds Act 1993
- Public Health Act 1991 & Regulations
- Companion Animals Act 1998 & Regulations
- Roads Act 1993 & Regulations
- Road Transport (Safety & Traffic Management) Act 1999, Regulations and Australian Roads Rules
- Impounding Act 1993 & Regulations
- Recreational Vehicles Act 1983
- Swimming Pools Act 1992
- Liquor Act 1982 & Regulations
- Fisheries Management Act 1994 & Regulations
- Tree (Disputes Between Neighbours) Act 2006 & Regulations

Related guidelines

- Enforcement Guidelines for NSW Councils – NSW Ombudsman – June 2002
- NSW Department of Planning Practice Note – Exercising of Discretion – April 2002

Related policies

- Delegation of Authority
- Complaints Management Policy
- Standard Operating Procedures
- Parking Policy

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1. Purpose

The purpose of this policy is to establish clear guidelines for the exercise of the discretion to be used in dealing with unlawful activity, taking into account all relevant information including available evidence, cost to the community, the circumstances of the individual case, public policy and precedent considerations.

Background

The policy;

- Provides a legal and administrative framework to assist Council in making decisions in relation to its enforcement functions;
- Specifies the criteria that will be taken into consideration when deciding:
 - (a) if enforcement action is necessary or desirable; and
 - (b) the most appropriate type of action.
- Provides information about Council's role and policy on enforcement; and
- Makes provision for the enforcement process to be conducted with maximum speed and effectiveness.

The City of Canterbury acknowledges it has a responsibility under the Local Government Act's Charter provisions, contained in Section 8 to ensure that the exercise of its regulatory power is carried out:

- with consistency and without bias, and
- with the purpose to properly manage , protect , restore, enhance and conserve the environment of the area for which it's responsible, and
- in a manner that is consistent with and promotes the principles of ecologically sustainable development, and
- with regard to the longer term cumulative impact of decisions made in the course of carrying out the function, and
- in accordance with Council's Code of Conduct.

Rationale

Council has an important role to investigate unlawful activities within the area of its jurisdiction. In applying the legislation within its jurisdiction, Council seeks to promote the public interest and to ensure that Council's duties are performed in a transparent, efficient, fair and consistent manner having regard to individual circumstances and their associated outcomes.

The New South Wales Ombudsmen has produced several publications to assist Councils. The objectives of these documents have been incorporated in this Policy. The two publications are:

- "An Enforcement Guideline for Council June 2002".
- A fact sheet discussing the meaning of "Public Interest".

The achievement of an outcome that promotes the public interest in relation to health and safety often requires staff to balance conflicting points of view and interests. Frequently, promoting the public interest extends beyond satisfying the interests of a single organisation or individual.

Within Council's City Plan, Council has policies that promote:

- Health and Safety
- Protection of the Environment
- Economic prosperity
- Protection of Council Assets
- Ensuring Council meets its Duty of Care
- Community Development.

While it is not gratifying for an organisation or individual to take enforcement action, Council must administer its powers under various pieces of legislation to ensure all legislative aims and objectives from a local, state and federal government's perspective are achieved.

2. Objectives

The objective of this policy is to establish clear guidelines for the exercise of discretion available in dealing with the carrying out of regulatory action by Council, including customer service requests regarding unlawful activities. It provides guidelines on:

- How to assess notifications of unlawful activity and associated investigation.
- Options for dealing with unlawful activity.
- How it is decided whether enforcement action is warranted.
- Balancing the best interests of the whole community, not just individuals when making decisions.

3. Scope

The policy applies to all compliance and enforcement action where Council has regulatory responsibility under NSW legislation, including but not necessarily limited to:

- Roads, footpaths and parking*
- Pollution control
- Control of animals
- Unauthorised development (including non-compliance with consent conditions)
- Public health and safety issues
- Food safety
- Fire safety
- Tree preservation
- Activities and activity applications and approvals.

* Note: A separate, more detailed "Parking Enforcement Policy" applies.

4. Definitions

The following defined terms are used in the Policy:

CAN	Means a 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. If a person does not attend the court on the day specified in the CAN, a warrant may be issued for the arrest of the person or the matter may be dealt with ex-parte in the absence of the person.
Defendant	Means the accused person against whom the criminal proceedings

	are brought.
EPAA	Means the Environmental Planning & Assessment Act 1979
LGA	Means the Local Government Act 1993
PIN	Means penalty infringement notice. Sometimes referred to as an “On the Spot Fine”. PIN’s may only be issued for prescribed offences and the value of the fine is also prescribed.
POEO	Means the Protection of the Environment Operations Act 1997
L&E	Means the Land & Environment Court
Respondent	Means the party against whom civil proceedings are brought in Land & Environment Court proceedings
Unlawful Activity.	Means any activity or work that has been or is being carried out: <ul style="list-style-type: none">▪ Contrary to a legislative provision regulating a particular activity or work.▪ Contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land.▪ Without a required development consent, approval, permit or licence.▪ Contrary to the terms or conditions of a development consent, approval, permit or licence.
CAA	Means the Companion Animals Act
ARR	Means Australian Road Rules.

5. Principles

Council becomes aware of unlawful activities in a variety of ways, ranging from the independent observations and actions of Council staff to the receipt of complaints or requests from members of the public.

5.1 Submitting complaints or requests

Complaints or requests alleging unlawful activity can be submitted to Council either in writing or verbally. In either case, the allegation will be recorded in Council’s customer request management system. The request will be referred to the relevant Council Officer to commence any necessary investigation.

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

Council will take all reasonable measures to protect the privacy of the person submitting the complaint and generally information that identifies, or could tend to identify this person will not be released. However, Council may be required to disclose this information in a variety of circumstances including the following;

- Access to the information is permitted under legislation, including the Government Information (Public Access) Act 2009 (GIPAA) or the LGA;
- Access to the information is permitted under another Council policy;

- Legal proceedings are commenced and the information is disclosed in evidence presented; and
- The nature of the allegation otherwise makes it a necessity.

In some circumstances, it may also be possible to ascertain the identity of the person submitting the complaint by the nature of the allegation.

It is Council's policy that all complainants are kept advised of the progress of their complaint or request during its investigation and are given complete information on the final outcome of any investigation. This advice is generally given in writing, but may be verbal.

5.2 Procedural fairness and natural justice

There is an overriding duty on the Council to act fairly and ensure the principles of procedural fairness and natural justice are adhered to.

In this regard Council will;

- Provide information on the substance of the complaint to the alleged offender. This may occur early on in the investigation or not occur until an appropriate later stage in the investigation has been reached;
- Provide an opportunity for the alleged offender to put their case. This will not be necessary if there is an obvious and serious risk to personal or public safety or risk of obvious and serious environmental harm;
- Consider any submission put forward by the parties to the matter;
- Make reasonable inquiries or investigations before making a decision;
- Ensure no person decides a case in which they have an interest, conflict; and
- Otherwise act fairly and without bias.

5.3 Options for dealing with unlawful activity

Council has discretion in deciding whether to take enforcement action on the basis of the available evidence and the circumstances of the individual case. At the conclusion of an investigation, Council may have one or more of the following options;

- Take no action; or
- Counsel the alleged offender; and/or
- Issue a formal letter of warning; or
- Commence criminal proceedings; and/or
- Commence civil proceedings.

Annexure 1 describes criminal and civil proceedings and the relevant legislation that governs each.

5.4 Criminal or Civil?

Criminal proceedings are punitive. The sentence which a court may impose if an offence is proven is usually a fine. The amount of a fine imposed by a court will be based on the need for specific deterrence and the rehabilitation of the offender, the need for general deterrence of similar offences by other members of the community and any aggravating or mitigating circumstances.

The objective of civil proceedings is to rectify the consequences of, or restrain an unlawful activity, by requiring the offender to do or refrain from doing something.

Deciding whether to commence criminal or civil proceedings depends on the outcome that is being sought. If Council was willing, retrospectively, to accept the results of the unlawful activity or if the unlawful activity can not be undone or is not ongoing and Council believes punishment of the offender is appropriate, criminal proceedings may be preferred subject to the considerations detailed below.

Conversely, if Council is not willing to accept the unlawful activity (and particularly for alleged offences against the EPAA where the court may not have any jurisdiction to make an ancillary order requiring rectification of the unlawful activity), it is often more appropriate for Council to commence civil proceedings. If Council decides not to commence proceedings under the EPAA, LGA or POEO, any person may commence their own proceedings for an order to remedy or restrain a relevant breach.

(Section 123 of the EPAA; Section 674 of the LGA; Section 253 of the POEO)

6. Responsibilities

The responsibility for implementing this policy rests with relevant Council Officers, including:

- General Manager
- Divisional Directors
- Manager Regulatory Services
- Manager Development Assessment
- Manager Governance & Administration
- Manager Assets & Planning
- Other Officers including:
 - Environmental Health Officers
 - Building Surveyors
 - Compliance Officers
 - Rangers
 - Community Patrol Officers
 - Development Assessment Officers
 - Tree Preservation Officer
 - Investigation Officers.
 - Consultants and contractors engaged by Council.

7. Procedures

7.1 Investigation of Alleged Offences and Breaches

Regulatory matters are generally initially identified via general observations made and inspections carried out by Council officers or via customer action requests or complaints received.

Details of customer action requests or complaints received by Council are required to be documented in Data Works and except in the case of urgent matters, customer action requests or complaints relating to privately owned premises are required to be provided in writing wherever possible.

All complaints of alleged unlawful activities will be investigated by a relevant Council officer, except where:

- Advice has been previously provided to relevant parties and no further investigation is necessary,

- The matter has already been investigated and resolved to the satisfaction of Council or its authorised delegate,
- Council is not the appropriate authority or has no jurisdiction to take regulatory action in relation to the particular matter (i.e. Matters under the jurisdiction of a State Authority such as Work Cover NSW or the NSW Department of Environment & Conservation, internal matters in private Strata buildings or matters being appropriately dealt with by private certifiers dealing with Complying Development or Construction Certificates),
- The activity is considered by Council or its authorised delegate to be lawful without the need for further investigation,
- The complaint is considered by Council or its authorised delegate to be premature (relating to some as yet unfinished aspect of a lawful development or activity), too late or trivial, frivolous or vexatious,
- Council or its authorised delegate has determined that investigation and/or regulatory action is not warranted (i.e. The extent of investigation requested would have an unreasonable adverse impact upon Council resources or their optimal effective allocation or the investigation or taking of regulatory action would be unreasonable and/or not in the public interest.)

Council must consider a range of factors when determining whether the particular matter will warrant further investigation, but if a decision is made not to investigate or act upon a complaint or matter, the decision must be recorded with clear reasons as to why such a decision was taken. The complainant must then be advised of the decision and the reasons for not taking further action.

7.2 Options and Enforcement

Following an investigation, there are a range of possible options available for Council to deal with a particular matter, depending on the nature of the matter or offence, relevant legislative provisions, circumstances of the case and the outcome desired.

Enforcement options may include:

- Take no further action due to the lack of evidence of the offence or breach
- Take no further action having regard to the minor nature of the offence or breach and/or the circumstances of the case
- Counsel the person investigated to educate them on the relevant Council or regulatory requirements and/or negotiating to get undertakings from the person that address the matters of concern
- Referral to another agency with appropriate jurisdiction
- Referring parties to the Community Justice Centre (CJC) for mediation (i.e. in instances where it is considered that mediation would be more appropriate to resolve a particular matter rather than enforcement)
- Issue a warning and advise the person that any further breaches may result in possible regulatory action or penalties
- Direct the person, or issue a letter requiring the person, to; cease specified activities; carry out specified works; provide specified information, documentation or certification; or obtain necessary approvals, within a specified timeframe with the threat of more formal legal action in the event of the informal timeframe not being met.
- Consult and negotiate with the parties and/or obtain undertakings, to achieve a reasonable outcome and resolution of a particular matter

- Issue a formal Notice of Intention to serve an Order under relevant legislation, which allows the person to make representations to Council, prior to determining any appropriate action
- Issue a formal Order or Notice under relevant legislation, requiring specified work to be undertaken or to provide specified documentation, certification or the like
- Issue a Penalty Infringement Notice (on-the-spot fine) for the offence or breach
- Implement legal proceedings for the offence or breach (i.e. Local Court or Land and Environment Court)
- Implement proceedings for a Court Order or Injunction (i.e. to remedy or restrain a breach of relevant legislative provisions)
- Carry out the works specified in a Council Order under relevant legislation, at the expense of the person served with the Order.

Council has discretion in determining whether or not enforcement action should be taken in relation to a particular matter having regard to evidence available; the nature, extent and impact of the offence or breach; the circumstances of the case and the public interest.

7.3 Determining Appropriate Action and Enforcement

A range of matters are required to be taken into consideration when determining the appropriate course of action and any enforcement of a regulatory matter, including:

- The nature and extent of the offence or breach;
- The impact or potential impact of the offence or breach upon the natural or built environment;
- The impact or potential impact of the offence or breach upon the public health, safety, convenience and amenity of the locality and community
- Whether or not the breach is of a technical, inconsequential or minor nature
- Whether or not Council is legally estopped from taking action
- The time period that has lapsed since the date of the offence or breach
- Whether or not the breach has been remedied or rectified
- Whether or not an informal warning or provision of education would be appropriate in the circumstances
- Whether or not the particular matter satisfies relevant regulations, standards and requirements (i.e. Building Code of Australia)
- Whether or not the person has demonstrated contrition
- Whether or not the person has been proactive in the resolution of the matter and assisted with any Council requirements and instructions
- Whether or not a relevant development consent has been obtained or sought for the particular matter (i.e. variation to a consent)
- Whether or not any previous warnings, instructions or advice was provided which has not been followed
- Whether or not it is likely that consent would have been issued for the particular matter if consent had been sought
- Whether or not any relevant requirements of Council have been or will be satisfied to address or minimise any potential impacts of the particular matter
- Whether or not it was likely that the person was aware or should have been aware of the relevant regulatory provisions and requirements
- Whether or not the person has demonstrated genuine mitigating circumstances or hardship

- Whether or not the action would be reasonable and proportionate in the particular case
- Whether or not the Council has sufficient admissible evidence to prove each element of the offence or breach
- The likely chances of success if the enforcement action was challenged in Court
- The costs and benefits of taking enforcement action or implementing proceedings (i.e. cost of proceedings, allocation of extensive resources compared to the likely outcome)
- The circumstances of the particular case
- The public interest.

Further details on the matters to be taken into consideration when deciding whether or not to take enforcement action are set out in **Annexure 2**.

Examples of the key options available and possible courses of action for a number of regulatory scenarios are set out in **Annexure 3**.

7.4 Legislative Provisions and Requirements

Specific provisions are contained within each piece of legislation relating to the appointment of Authorised Officers, Powers of Entry, Inspections & Investigations, Search Warrants, Issuing of Notices & Orders, Issuing Penalty Infringement Notices, Legal Proceedings, Appeals, Court Orders, Penalties, Compensation and other associated activities.

Specific provisions are also contained in most pieces of legislation to restrict an Authorised Officers access to residential premises, unless permission has been expressly obtained or the inspection relates to a current approval, or Council has obtained a Search Warrant from the Court. Council officers are required to be duly authorised and carry out their regulatory functions fully in accordance with these provisions.

7.5 Offences

Specific provisions for offences are contained within relevant legislation.

Offences include:

- Failure to comply with a particular legislative or regulatory provision (i.e. a provision of the Environmental Planning & Assessment Act, Local Government Act, Roads Act, Companion Animals Act, Protection of the Environment Operations Act, Food Act etc)
- Failure to obtain the required development consent or a construction certificate for development and building works (where required)
- Carrying out development or other activity contrary to relevant legislative requirements, development consent or other approval (i.e. carrying out development contrary to a condition of consent, failure to obtain an activity approval, or undertake an activity otherwise than in accordance with an approval)
- Failure to comply with the terms of a Council Order or Notice
- Parking a vehicle or driving a vehicle contrary to the Road Transport Regulation - Australian Roads Rules
- Failure to provide specified documentation or certification to Council (i.e. annual fire safety statement).

Annexure 4 describes the process Council must follow in respect to Orders, the rights of parties to respond and penalty notices.

7.6 Penalty Notices

Penalty notices are generally most appropriate where:

- the breach is minor,
- the facts are incontrovertible,
- the breach is a one-off situation that can be remedied easily, and
- the issue of a penalty notice is likely to be a practical and viable deterrent.

It may not be appropriate to issue penalty notices where:

- the breach is on-going,
- the penalty prescribed in the penalty notice would be clearly inadequate for the severity of the offence,
- the extent of impact or the harm to the environment or locality cannot be assessed immediately,
- the evidence available may be insufficient and the matter may be unlikely to succeed in the event of a Court hearing,
- a significant period of time has elapsed since the alleged breach,
- negotiations to find a resolution to the problem which is the subject of the breach are being conducted,
- a direction has been issued to perform specified work (i.e. via a Notice of Intention to serve an Order) within a timeframe and the time limit for such performance has not expired,
- multiple breaches have occurred.

Penalty Notices are generally most suitable for immediate and straightforward offences or breaches, to uphold the objectives of the relevant regulatory requirements and to act as a deterrent against further similar breaches, including:

- Parking offences
- Roads and traffic offences
- Waste and littering offences
- Failure to comply with public notices
- Companion animal offences
- Public safety offences
- Low impact pollution incidents
- Minor fire safety offences
- Low impact development or activity control offences
- Essential services certification offences
- Minor offences under the Tree Preservation Order.

To better provide that Council manages the penalty infringement process and enforcement action in a consistent, transparent, accountable and unbiased manner, any requests or representations seeking reconsideration or waiving of a penalty infringement notice are required to be made directly to the NSW Office of State Revenue.

Requests to waive penalty infringement notices are to be made directly to the Office of State Revenue and not to Council by members of the public Council staff or Councillors.

Any requests for reconsideration from the NSW Office of State Revenue shall only be considered on the basis of:

- evidence that an error has been made in the issuing of the penalty notice, or
- the extent the evidence or circumstances may affect the successful defence of the infringement in the event of a Court hearing or appeal, or
- legal advice has been obtained and it is considered appropriate to do so having regard to relevant legal advice.

7.7 Follow-up of regulatory action

Council's investigating officers will follow up enforcement matters to determine compliance with Council's directions, Notices and Orders, to an acceptable level. If Council's Notices and Orders are not reasonably complied with, consideration will be given to taking further regulatory action, legal proceedings or imposing penalties.

7.8 Education and Awareness

Council aims to take a proactive approach in preventing unauthorised development and other activities or breaches, including the provision of information to the public and applicants about planning and building requirements, conditions and regulatory requirements to be satisfied.

Council also aims to provide information to raise awareness and educate the community about compliance, enforcement and regulatory requirements.

Council recognises that in certain circumstances advice, negotiation and mediation may achieve compliance or a reasonable solution for the parties without the need to take enforcement action.

7.9 Recovery of Legal Costs

The Council's policy for recovery of its costs in the Land and Environment Court is:

- Council will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the court;
- Council will seek to recover the penalty imposed by the court where such penalty is imposed; and
- Council will adopt the recommendations of its solicitors to accept a lesser amount than the full legal costs incurred by the Council if, in the circumstances, the acceptance of such an offer will result in the Council not incurring further legal costs.

The Council's policy for recovery of costs in the Local Court is:

- Council will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the court; and
- Council will seek to recover the penalty imposed by the court where such penalty is imposed.

7.10 Procedures for inspections

It is an essential function for council Officers to undertake inspections in response to complaints/allegations of issues concerning non compliance or to follow up that requested work/improvements have been undertaken and completed. Officers shall at each inspection record all relevant details in their official notebook either during or

immediately after the inspection is completed. Upon returning to the office all details of the inspection are to be updated into Dataworks. Any issues arising from an inspection are to be reported immediately to the relevant Team Leader or Manager. It is also essential that each customer is updated during an active investigation and at completion advised of the outcome in writing as per council's Complaint Management Policy.

Currently the general standard requires that council Officers work independently whilst in the field carrying out the core duties and functions of their respective role. However Council recognises that in certain situations it would be deemed inappropriate and of high risk to expect an Officer to investigate certain matters/premises by themselves. Before commencing any action in relation to a potentially high risk matter, staff are to contact their relevant Team Leader or Manager and advise them of the reason requiring their attendance to the subject premises. At this time arrangements will be made for an another Officer to accompany them during the required inspection.

High risk matters/premises may include but are not limited to,

- Illegal Brothels
- Illegal Gaming houses
- Illegal Massage parlours
- Any premises in which a bribe, gift or some form inducement has been previously offered and reported by council staff
- Any premises in which council staff have been verbally abused or threatened
- Any premises in which a council officer has been physically assaulted (Note: Police assistance/presence must be requested if re inspection needs to occur)
- Any premises in which allegations been made regarding council staff conduct

It is essential that staff remain diligent in regards to reporting any situation which they believe may potentially place Council or themselves at risk.

ANNEXURE 1 – DESCRIPTION OF CRIMINAL AND CIVIL PROCEEDINGS

Criminal Proceedings

Criminal proceedings are punitive. The sentence which a court may impose if an offence is proven is usually a fine. The amount of a fine imposed by a court will be based on the need for specific deterrence and the rehabilitation of the offender, the need for general deterrence of similar offences by other members of the community and any aggravating or mitigating circumstances.

The types of criminal proceedings available to Council include;

- Issuing a PIN;
- Prosecuting the offence in the Local Court by issuing a CAN; and
- Prosecuting the offence in the Land & Environment Court in its summary jurisdiction (Class 5)

In criminal proceedings an offence must be proved 'beyond a reasonable doubt'.

PINs for offences currently vary from under \$100 up to \$2,000 under the EPAA and Environmental Planning and Assessment Regulation 2000 depending on whether the offender is an individual or a corporation and the nature of the unlawful activity. Under the POEO, a corporation could be fined up to \$5,000 by PIN. The offender can either pay the fine stated on a PIN or elect to have the matter heard before a court.

Where prosecution action is taken rather than the issuing of a PIN, the maximum penalty is usually considerably higher. For example, the maximum penalty for an offence under the EPAA is the amount specified or, if no penalty is specified for the particular offence, 10,000 penalty units and a further daily penalty not exceeding 1,000 penalty units. At present 1 penalty unit equals \$110.

However, if the offence is prosecuted in the Local Court the maximum monetary penalty the court can impose is 1,000 penalty units, or the maximum penalty specified for the offence, whichever is the lesser.

In criminal proceedings for offences against the EPAA there is often no provision which enables the Court to order the offender to remedy the breach or restrain the unlawful activity. These powers are available to the court in some other kinds of cases, for example, offences against the EPAA involving the destruction of or damage to a tree or vegetation or in appropriate cases where an offence is committed against the POEO or the regulations under that Act.

A person can not be convicted of an offence against the EPAA or the regulations where;

- the matter is the subject of civil proceedings under Section 123 of the EPAA and those proceedings have not been concluded; or
- an Order of the Court has been made to remedy or restrain the breach.
(Section 127(7) of the EPAA)

These restrictions, and the practice of the court, usually favour civil proceedings being taken where it is necessary to remedy or restrain an unlawful activity. Criminal proceedings for an offence against the EPAA must be commenced within two (2) years of

the offence being committed or within two (2) years from the date when evidence of the offence first came to the attention of an authorised officer.

(Section 127(5), (5A), (5B) & (5C) of the EPAA)

Civil Proceedings

The objective of civil proceedings is to rectify the consequences of, or restrain an unlawful activity, by requiring the offender to do or refrain from doing something.

Civil proceedings include the following:

- Notices and orders issued by Council pursuant to various legislation;
- Class 4 proceedings before the Land & Environment Court, seeking an order of the Court to remedy or restrain a breach of the EPAA (Section 123), the LGA (Section 673), the POEO (Sections 252 & 253), or any other Act, if the breach is causing or is likely to cause harm to the environment; and
- Interlocutory relief for matters causing, or with the reasonable potential to cause, serious environmental harm. In such proceedings it is likely the Council would be required to provide an undertaking as to damages.

For civil proceedings to be successful Council must prove the breach on the balance of probabilities. This is a less onerous burden of proof than is required in a criminal prosecution.

However, even if the breach is established, the court has discretion not to make any order. Council must therefore be in a position to lead evidence that persuades the court that an order to remedy or restrain the breach should be made.

Civil proceedings can be held over to provide the person responsible for the unlawful activity with an opportunity to lodge any required application and have it determined or otherwise to cease or remedy the breach voluntarily.

ANNEXURE 2

**EXAMPLES OF MATTERS TAKEN INTO CONSIDERATION WHEN
DETERMINING APPROPRIATE REGULATORY ACTION AND
ENFORCEMENT.**

Considerations	Comments/Examples
1. Does Council have sufficient evidence to prove the alleged offence?	To be able to implement any enforcement action, Council is required to possess sufficient evidence of the alleged offence (which can be substantiated in Court if required), including evidence of the person responsible for the offence to be successful in the event of a hearing or appeal.
2. Is the offence or breach of a technical nature or inconsequential nature?	<p>Consideration is to be given to the nature, extent and severity of the offence or breach and any material impacts upon the health, safety and amenity of the environment and community.</p> <p>Consideration should be given to the likely costs and benefits of any enforcement action where breaches are solely of a minor technical nature or resulting in no material impacts upon any other party or the environment.</p>
3. How long has the unlawful activity or breach been occurring and is enforcement action statute barred?	<p>The legislation may provide time limits in which to commence proceedings or take enforcement action.</p> <p>In addition, consideration should be given to the time which the offence or breach occurred and the “reasonableness” of taking enforcement action if a significant time has lapsed since the time of the offence or breach.</p>
4. Is the matter subject to estoppel?	Estoppel is a legal rule which prevents a person from later denying something which may have previously been relied upon by another person. For example Council may not be able to take action if Council has contributed in some way to the person acting upon reasonable expectation that no action would be taken or if a matter had previously been brought to Council’s attention and no action was taken at the time.
5. Has the offence or breach affected the natural or built environment and/or amenity of the area?	Consideration should be given to the nature and extent of any actual or potential impact that the breach has or may have upon the natural or built environment, or upon the amenity of the locality and community.
6. Has the offence or breach affected or potentially affected the health, safety and well-being of the residents or community?	Offences or breaches which affect, or potentially affect, the health, safety and well-being of the residents or community would generally warrant affirmative and effective enforcement and remedial action.

Considerations	Comments/Examples
<p>7. Can the matter be resolved by seeking and obtaining the relevant approval from Council (i.e. Development Consent or a S96 modification to an existing consent)?</p>	<p>If the legislation enables the particular matter to be resolved by obtaining the relevant approval (i.e. Development Consent or a S96 modification to an existing consent), it may be appropriate to allow a reasonable period for the person to seek the necessary consent/s from Council, prior to taking any enforcement action, such as the service of possible orders to demolish unauthorized work or commencement of legal proceedings.</p> <p>Consideration should also be given to all other relevant factors, in particular, any current impacts upon the community and environment, which require the matter to be remedied expeditiously.</p> <p>If appropriate, having regard to the circumstances of the case, Council may still be able to issue a penalty infringement notice or commence legal proceedings for the initial offence or breach to achieve a financial penalty.</p>
<p>8. Has the relevant approval (i.e. Development Consent or S96 amendment to the existing consent) already been obtained from Council in relation to the particular breach or offence?</p>	<p>If Development Consent (or S96 amendment to the existing consent) has been obtained from Council in relation to the particular matter, Council would not be able to issue further Notices or Orders in relation to the subject matter.</p> <p>Council may (if it has not already done so), issue a penalty infringement notice/s or implement legal proceedings for the initial; offence or breach, following consideration of the circumstances of the case and the nature and severity of the offence.</p> <p>However, if consent has been obtained from Council in relation to a previous breach (i.e. a S96 application) and the matter was of a minor nature, with minimal impact, consideration would need to be given to the likelihood of success and the likely outcome of any possible enforcement action or legal proceedings for the initial offence.</p>
<p>9. Could the non-compliance or breach be easily remedied by the person responsible?</p>	<p>Generally, where appropriate, Council will attempt to ensure compliance by informal means, however, there is a need to consider and balance the public interest in enforcing the law. Consideration is also to be given to whether or not it is possible to remedy a breach and at what cost.</p> <p>In some cases, upon being advised of the regulatory requirements or breach, the responsible person may be proactive and remedy the matter, rather than being subject to possible enforcement action.</p>

Considerations	Comments/Examples
<p>10. Has the breach or unauthorised activity detrimentally affected a heritage item or the heritage significance of the area?</p>	<p>Where applicable, relevant Council officers will be consulted in assessing the detriment to the natural or built environment and possible remedies.</p>
<p>11. Does the unauthorised work or activity comply with relevant standards?</p>	<p>Consideration should be given to compliance with relevant criteria and Standards (i.e. Building Code of Australia and fire safety requirements) and the extent and suitability of evidence provided to confirm compliance.</p> <p>If relevant criteria and Standards are not satisfied, appropriate and affirmative enforcement action may be warranted.</p>
<p>12. What is the intent and importance of the regulatory requirements?</p>	<p>Regulatory requirements which aim to ensure the health, safety and well-being of the community are considered to be of paramount importance and any offences or breaches of this nature would generally warrant affirmative and effective enforcement action.</p>
<p>13. Would the enforcement action be in the public interest?</p>	<p>Public interest considerations include:</p> <ul style="list-style-type: none"> • Does the breach or unlawful activity affect the public interest (i.e. affect a number of people or the community generally), or does the breach primarily affect a private interest? • Would enforcement action be in the public interest or would it primarily benefit only a private interest? • Are there any circumstances of hardship applicable? • Would enforcement action by Council impact unreasonably on certain parties or population groups (i.e. disadvantaged or elderly residents)? • What other remedies are available to address the matter? For example, if a breach primarily affects a 'private interest', the affected party should seek alternative remedies, such as civil action or mediation (i.e. disputes regarding trespass, alleged damage to premises, encroachments or storm water issues).
<p>14 Does the person or corporation exhibit contrition for the breach or offence?</p>	<p>In some cases, it will be appropriate to have regard to the behaviour of the offender and their willingness to remedy the breach or prevent a recurrence of the problem.</p>
<p>15 Have any previous warnings, instructions or advice been provided to the person, which have not been followed?</p>	<p>If the investigation reveals that previous instructions, advice or a warning has been provided in relation to the particular matter, which has not been followed or complied with, a more formal enforcement approach is generally appropriate for any offences which have occurred.</p>

Considerations	Comments/Examples
<p>16 Is it likely that the person would generally have been aware, of the relevant regulatory provisions, requirements or offence?</p>	<p>When deciding whether to take an educative approach or enforcement approach, consideration should be given to the following matters:</p> <ul style="list-style-type: none"> • The reasonable likelihood that the person may have known or should have known the relevant requirements or rules, • Level of contrition shown by the responsible person, • Whether the parties have previously been advised of the regulatory requirements or provisions, • Whether or not any previous warnings or instructions have been provided, • The apparent level of intent shown by the responsible person.
<p>17 Is the cost of enforcing likely to be excessive having regard to the nature and impact of the offence?</p>	<p>Consideration should be given to the relative costs and benefits of taking formal action as opposed to taking informal action or an educative approach. Council's action should be commensurate with the seriousness of the breach and any impacts or potential impacts on other parties and the environment.</p>
<p>18 Is the particular requirement (i.e. condition of development consent) which has not been complied with, unreasonable, ambiguous or <i>ultra vires</i>?</p>	<p>A condition that is unreasonable, ambiguous or <i>ultra vires</i> may be unenforceable and may preclude Council from taking enforcement action or issuing Orders or the like.</p>
<p>19 Does the legislation provide for representations or submissions to be made in this matter.</p>	<p>Certain legislation contains provisions for the person responsible to make representations to Council prior to Council taking certain enforcement action (i.e. service of an order to do certain things), which must be considered on their merits.</p> <p>However, in most cases, the provisions do not provide for representations to be sought or made prior to taking enforcement action for the initial offence or breach of the legislation or regulations (i.e. failure to obtain an approval or comply with a particular requirement).</p>
<p>20 What are the chances of success if challenged?</p>	<p>Council should take into consideration what the likelihood is of a successful appeal or court challenge against the proposed enforcement action.</p> <p>It may not be appropriate to take enforcement action (i.e. service of an order or commencement of legal proceedings) if the chances of success, in the event of any appeal or hearing, are unlikely.</p>
<p>21 Is the proposed course of action reasonable and</p>	<p>The proposed course of action for a particular breach or offence should be reasonable and proportional to the nature</p>

Considerations	Comments/Examples
proportionate?	and extent of the breach or offence and the circumstances of the case. The costs and benefits of particular enforcement action must also be considered and compared against other possible solutions or action.
22 Has consideration been given to other relevant factors and the circumstances of the case?	To ensure that Council's enforcement action is appropriate, effective, reasonable and successful, particularly in the event of an appeal or Court hearing, consideration should be given to any other relevant factors and the circumstances of the particular case.

ANNEXURE 3

EXAMPLES OF KEY OPTIONS AND POSSIBLE COURSES OF ACTION

Offence/ Scenario	Act/ Reg.	Details of the Case	Warning/ Education	PIN	Notice &/or Order	Legal Action	L&E Class 4
Traffic/ Parking	ARR or LGA	Parking of vehicle in breach of ARR or LGA		✓			
Traffic/ Parking	ARR	Parking of vehicle on footpath or nature strip		✓			
Traffic/ Parking	ARR	Parking of vehicle in driveway or cause obstruction		✓			
Pollution of storm water drain	POEO Act	Soil, sand and other building waste entered stormwater system		✓	✓		
Potential for pollution	POEO Act	Location of stockpile of sand may cause pollution incident (i.e. in rain)	✓ (owner/builder)	✓			
Minor building works - owner	EPAA	Construction of pergola awning by owner – where there is no material impact on other parties and locality – No BCA issues.	✓	However, PINs may be issued if impact on other parties is demonstrated			
Site Manage- ment	LGA & EPAA	Articles located on footpath without approval – possible safety hazard.		✓	✓		
Building work outside of hours	EPAA	Carrying out of building works outside of hours permitted in DA – Lic Bldr		✓	✓		
Minor Building Works – Lic Bldr	EPAA	Construction of minor alterations or additions to rear of existing dwelling BCA issues to be resolved.		✓	✓		
Major building works	EPAA	Substantial alterations and additions to the existing building – planning and BCA issues. (examples include granny flat, dual occupancies, significant additions to houses)			✓	✓	✓
Variation to DA - minor	EPAA	Minor variation to DA (i.e. relocation of window/door) S96 obtained.		✓			
Unauthorised use – major	EPAA	Unauthorised use of premises as a brothel or taxi depot			✓	✓	✓
Fire Safety - Minor	EPAA	Failure to submit an annual fire safety statement after due date.		✓	✓		
Fire Safety – Major	EPAA	Fire safety upgrading of existing multi storey development.			✓	✓	✓
Tree Preservation Order - Minor	EPAA	Tree covered by TPO lopped without approval – minor impact on tree/ amenity of locality.	✓ (owner/builder)	✓	✓		

Offence/ Scenario	Act/ Reg.	Details of the Case	Warning/ Education	PIN	Notice &/or Order	Legal Action	L&E Class 4
Tree Preservation Order - Major	EPAA	Tree covered by TPO removed without approval – significant impact on amenity of site/locality.				✓	
Plant (Crane hoist) placed on street without a permit.	LGA	Large crane placed on street hoisting material over footway without a current permit		✓			
Goods placed on footway outside a shop without permit/ not in accordance with permit	LGA	Shop owner places displays on footpath outside his shop without first obtaining approval.	✓	✓			
Nuisance Dog Order	CAA	Failure to comply with a nuisance Dog Order (i.e. possible danger to other people, unrestrained or barking dog		✓			
Dog off leash in a public place.	CAA	Dog allowed to run in park not designated an off leash park without a lead or not under affective control.	✓	✓			
Offences under the Food Act	FA	Unsatisfactory food premises (depending on the extent of the unsatisfactory conditions)	✓	✓	✓	✓	
Offences under the Local Government Act	LGA	Where terms of an Order are not complied with in relation to matters such as clean up notices and over grown vegetation (there may be cause in some circumstances for Council to carry our remedial work and recover costs of doing so)	✓	✓	✓		

Notes:

- In some cases, the particular breach may be remedied or resolved prior to proceeding to the service of Notices, Orders or legal proceedings i.e. via negotiation or by promptly obtaining relevant approvals.
- Prior to determining an appropriate course of action, consideration is required to be given to the circumstances of the case and the courses of action contained in the above table may not be suitable or sufficient in all cases.

ANNEXURE 4 - NOTICES

Notices of Intention to Serve an Order

Most of the legislation administered by Councils contains provisions requiring Council to issue a Notice of Intention prior to the service of a formal Order (except in the case of an emergency). The Notice of Intention must contain specific information and it, in effect, provides the person served with the notice with the opportunity to make representations to Council, to demonstrate why Council should not issue a formal Order or commence proceedings or take other regulatory action.

Representations may be made by or on behalf of the recipient of the Notice of Intention and any representations are required to be made in writing, to ensure proper recording and consideration.

Any representations made within the specified timeframe are required to be considered by Council prior to determining the appropriate course of action.

Statistically, in the majority of cases, matters are often addressed or resolved to an acceptable level during the Notice of Intention and Representations stages and it may not be necessary to serve a formal Order (i.e. development consent has been obtained in relation to a previously unauthorised use of a premises or by the person carrying out certain works or ceasing offending behaviour).

Orders

Council may issue an Order (or Notice in some legislation) directing a person to carry out specified works or to provide specified information, documentation or the like, within a specified timeframe.

The legislation contains specific provisions relating to the service of Orders, which must be strictly followed. Council is also only able to issue an Order directing a person to do the matters specified in the legislation.

It is an offence to fail to comply with an Order and the relevant legislation generally contains provisions for the implementation of legal proceedings, penalties and in some cases, the issuing of penalty infringements for the offence.

Appeals against an Order

The relevant legislation contains provisions for a person to lodge a formal Appeal against an Order in the Land & Environment Court within a specified timeframe.

Appeals are required to be considered on the merits of the case and the legality and scope of the Order. Matters relating to any initial offence (i.e. the undertaking of unauthorised work) are not relevant matters for consideration by the Court, as separate provisions are available for criminal sanctions in relation to any initial offence.

Therefore, detailed consideration must be given to the possible service of any Orders and the likely outcome in the event of an appeal.

For example, a Notice of Intention and/or a Penalty Infringement Notice may be issued in relation to a particular breach (i.e. an unauthorised structure). However, following consideration of representations, provision of information and certain works being

undertaken, it may not be appropriate to proceed to serve an Order, having considered the impacts upon the locality, compliance with relevant planning instruments and regulatory standards, etc, as the likelihood of success in Court may be minimal.

Penalty Notices

Many of the Acts of Parliament that Council administers provide the ability for Council officers to issue Penalty Notices for certain offences. The penalty notice system was introduced to provide a more effective and efficient means to deal with those offences that are generally not serious enough to warrant the time and public resource allocation involved in instituting Court proceedings.

A Penalty Notice is served because it is apparent that an offence has been committed, but payment of the fine does not result in the recording of a criminal conviction against the recipient. Non-payment of the fine is not dealt with by way of criminal sanctions, but is recoverable as a civil debt. However, a person may elect to have the matter heard in proceedings in the criminal jurisdiction of the Local Court.

Penalty notices may be issued by designated authorised officers under the relevant legislation. In many instances, authorised officers are not only Council officers, but include officers from other agencies such as the Police and DEC.