

## Compliance and Enforcement Policy

### 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.
- Assist Council staff in responding promptly, consistently and effectively to reports of alleged unauthorised activity.
- Ensure accountability in assessing whether reports alleging unauthorised activity require investigation and whether compliance or enforcement action is warranted.
- Provide pathways for dealing with confirmed cases of unauthorised activity.
- Ensure Council makes compliance or enforcement decisions in an unbiased, consistent, balanced and impartial manner.
- Facilitate the implementation of risk-based regulation to protect the environment, local economy and the community.
- Achieve outcomes that result in a positive change of behaviour of alleged offenders and the community.
- Ensure good governance under the AlburyCity Good Governance Framework.
- Contribute to establishing a sustainable footing for Council's compliance and enforcement functions.
- Ensure compliance with the NSW Ombudsman, *Enforcement Guidelines for Councils*.

### Scope

This policy provides information for all internal and external stakeholders and interested parties about council's position on compliance and enforcement matters.

A local government regulatory function is any function under an Act, Regulation or other statutory instrument, which empowers local government to create, impose, enforce or administer rules that control the actions of others.

This policy applies to AlburyCity staff who are engaged in the following functions:

- Planning – E.g. development controls, development consents, certification of complying developments and change of use approvals.
- Building and construction – E.g. certification and compliance with building standards and fire safety requirements.

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- Environmental protection – E.g. native vegetation, noxious weeds, waste management, noise control, underground petroleum storage systems, stormwater drainage, sewage and grey-water systems, contaminated land and solid fuel heaters.
- Public health and safety – E.g. food safety, mobile food vendors, skin penetration businesses, cooling towers, warm water systems and swimming pools.
- Parking and transport – E.g. road openings and closures, structures in or over roadways or footways, traffic management plans and controls, public car parks, and road access.
- Companion animal management – E.g. registration of dogs and cats, dangerous dogs, and surrendered animals.
- Liquor and restaurants – E.g. controls on licensed premises, and restaurants on footpaths.
- Public areas and issues – E.g. illegal camping, graffiti, hoardings, signs, waste bins, protection of public places, busking, street theatre, parks and playgrounds, public events, trees, and filming.
- Other activities – E.g. hairdressers, beauty salons, mortuaries, backpacker accommodation, boarding houses, camping grounds, and caravan parks.

## Definitions

<b>ARA</b>	Appropriate Regulatory Authority under the provisions of the Protection of the Environment Operations Act 1997.
<b>CAN</b>	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.
<b>Caution</b>	A formal electronic warning given instead of a penalty to somebody who has done something unauthorised or illegal, advising that enforcement action will follow if it is repeated.
<b>Complaint</b>	<p>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.</p> <p>For the purposes of this policy, a complaint does not include:</p> <ul style="list-style-type: none"> <li>• a report alleging unauthorised activity (see definition below),</li> <li>• a request for information about a council policy or procedure,</li> <li>• a request for an explanation of actions taken by council,</li> <li>• a request for internal review of a council decision.</li> </ul>
<b>Compliance</b>	Compliance is the outcome we seek when we consider taking enforcement action under this policy.
<b>Council</b>	Albury City Council or an employee of Albury Council.
<b>CRM</b>	Customer Request Management System. A computer based system for registering and tracking reports of alleged unauthorised activity.
<b>Defendant</b>	The accused person against whom criminal proceedings are brought.
<b>Enforcement</b>	Actions taken in response to serious or deliberate contraventions of laws.
<b>EP&amp;A</b>	Environmental Planning and Assessment Act 1979.
<b>Estoppel</b>	Legal rule of evidence which prevents a party from making an allegation or denial that contradicts what it had previously stated, or what has been legally established, as the truth.

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<b>Fines Act</b>	Fines Act 1996.
<b>GIPA</b>	<a href="#">The Government Information (Public Access) Act 2009.</a>
<b>ICAC</b>	Independent Commission Against Corruption.
<b>Informant</b>	The person whom brings about criminal proceedings.
<b>Issuing Agency</b>	Council.
<b>Issuing Officer</b>	A person (other than a police officer) authorised to issue a PIN for an offence.
<b>LGA</b>	Local Government Act 1993.
<b>Offence</b>	An offence under a NSW law for which a PIN may be issued.
<b>PIN</b>	Penalty Infringement Notice. Sometimes referred to as an `on-the-spot' fine or SEIN (self-enforcing infringement notice) and now commonly referred to as a 'Penalty Notice'. PINs may only be issued for prescribed offences and the value of the fine is also prescribed by legislation.
<b>Plaintiff</b>	The person whom brings about civil proceedings.
<b>POEO</b>	Protection of the Environment Operations Act 1997.
<b>Precautionary Principle</b>	Where the possibility exists of serious or irreversible harm, lack of scientific certainty should not preclude cautious action by decision-makers to prevent such harm.
<b>Procedural Fairness</b>	<p>Procedural fairness is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. It requires a fair and proper procedure be used when making a decision. Council considers it highly likely that a decision-maker who follows a fair procedure will reach a fair and correct decision.</p> <p>The term procedural fairness is thought to be preferable when talking about administrative decision-making because the term natural justice is associated with procedures used by courts of law. However, the terms have similar meaning and are commonly used interchangeably. For consistency, the term procedural fairness is used in this policy document</p>
<b>Regulation</b>	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.
<b>Report alleging unauthorised activity</b>	An expression of concern or a request for service in relation to alleged unauthorised activity, where a response or resolution is explicitly or implicitly expected or legally required.
<b>Respondent</b>	The party against whom civil proceedings are brought. The party against whom proceedings are brought in the Land & Environment Court proceedings.
<b>Technical Breach</b>	A minor divergence from the terms of an Act, Regulation, Order, Development Consent or other document or direction.
<b>Unauthorised Activity</b>	<p>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:</p> <ul style="list-style-type: none"> <li>• terms or conditions of a development consent, approval, permit or licence,</li> <li>• an environmental planning instrument that regulates the activities or work that can be carried out on particular land,</li> <li>• a legislative provision regulating a particular activity or work,</li> <li>• a required development consent, approval, permission or licence.</li> </ul>

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## References

NSW Ombudsman Enforcement Guidelines for Council's (December 2015)  
The Government Information (Public Access) Act 2009

## Content (Clauses 1 - 27)

### 1. Enforcement and Regulatory Functions

Enforcement can be seen simply as the pointy end of regulation. Broadly speaking, enforcement can be seen as any punitive measure taken against an individual or a business for breaching a law. Measures range from lower level options such as cautions to imprisonment at the top end of the scale.

It is now widely accepted that enforcement should focus not just on punishment, but equally on changing the non-compliant behaviour, remedying and addressing the problems caused by non-compliance and acting as a deterrent to future and general non-compliance. Therefore, enforcement is one among many options that can be chosen to achieve the overall objectives of a regulatory scheme.

Seeing enforcement and compliance in a broader context of councils' regulatory responsibilities enables councils to have an overarching objective and be deliberate about what compliance outcomes they want to achieve rather than just react to reported instances of non-compliance. If the goal is to change behaviours to achieve beneficial outcomes in the interests of the community and to address harm caused by non-compliance, then the options available to councils are many and can be tailored to individual circumstances.

Council's regulatory responsibilities are applicable to actual unauthorised 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 'unauthorised activity'.

This policy distinguishes between a 'report alleging unauthorised activity' and a 'complaint'. These terms are defined in this policy.

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 unauthorised activity.

This policy outlines matters to be considered at the various stages of the enforcement process from the receipt and investigation of reports alleging unauthorised activity, through to what enforcement option council may choose and whether to commence criminal or civil proceedings.

In *Ryde City Council v Echt* (2000) 107 LGERA 317 the Court of Appeal held that "a Council does not have a duty or responsibility to exercise a statutory power or take proceedings to enforce conditions of

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development consent". It is important for customers making reports of unauthorised activity to understand that Council is not compelled to take enforcement action on the premise that a law or rule merely exists.

Responsible council staff are not limited by this policy in their exercise of discretion and of official functions. The full circumstances and facts of each case need to be considered and a decision made on the merits. The NSW Ombudsman Enforcement Guidelines for Council's (December 2015) are to be used in support of this Policy.

## 2. Compliance and enforcement principles

Principle	Action
Accountable and transparent	<ul style="list-style-type: none"> <li>• acting in the best interests of public health and safety and in the best interests of the environment</li> <li>• ensuring accountability for decisions to take or not take action</li> <li>• acting fairly and impartially and without bias or discrimination</li> <li>• providing information about compliance and enforcement priorities and reasons for decisions to improve understanding and certainty and promote trust by the regulated community</li> <li>• ensuring meaningful reasons for decisions are given to all relevant parties, particularly when there is a departure from this policy</li> <li>• acting on any complaints or concerns about the conduct of compliance officers in accordance with council's complaints management policy and procedures</li> <li>• advising people and organisations subject to enforcement action of any avenues available to seek an internal or external review of a decision.</li> </ul>
Consistent	<ul style="list-style-type: none"> <li>• ensuring all compliance and enforcement action is implemented consistently</li> <li>• encouraging reports about possible unauthorised activity by acting reasonably in response to the circumstances and facts of each matter.</li> </ul>
Proportional	<ul style="list-style-type: none"> <li>• ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach</li> <li>• making cost-effective decisions about enforcement action</li> <li>• taking action to address harm and deter future unauthorised activity.</li> </ul>
Timely	<ul style="list-style-type: none"> <li>• ensuring responses to reports alleging unauthorised activity and decision making in relation to those is timely.</li> </ul>

Council becomes aware of unauthorised activity in a variety of ways, from the proactive actions of Council staff to the receipt of reports from members of the community and general public.

When Council is appointed the Certifying Authority for development and building works, Council staff may identify breaches of consent and unauthorised building work and uses.

In their environmental protection or public health roles, Council staff may discover pollution incidents and unhealthy premises that require enforcement action. Furthermore, enforcement, compliance and

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environmental health officers issue PINs for parking, animal control, pollution, environmental protection, unsafe food activities, breaches of the LGA, building site offences, and associated activities.

Council officers who are not involved directly in enforcement matters will also commonly identify potential unauthorised activity and report them for investigation and action pursuant to this policy.

Nevertheless, while Council is proactive in the detection of unauthorised activity, not all offences are readily discernible and early detection can only be achieved with support and direct advice from the community.

**3. Submitting Reports of Unauthorised Activity**

Reports of unauthorised activity can be submitted to Council either in writing or verbally. In either case, the report will be recorded in Council's Customer Request Management system (CRM) and will be allocated a unique reference number. The management and response times for CRM's are subject to Council's Customer Service Charter.

**4. Responding to reports about unauthorised activity**

In responding to confirmed reports of unauthorised activity Council staff are required to:

- 1. Treat all relevant parties with courtesy and respect.
- 2. Where appropriate communicate with relevant parties and provide feedback on the progress of an investigation and any reasons for delay without compromising the integrity of the investigation.
- 3. Make full and proper records in relation to the assessment and investigation of reports alleging unauthorised activity, including reasons for any decisions.
- 4. Where possible inform all relevant parties of reasons for decisions.
- 5. Provide as much information as possible to 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 unauthorised activity.
- 6. Provide information to all relevant parties about any avenues to seek an internal or external review of a decision.

**5. How reports alleging unauthorised activity will be dealt with by council**

Council will record and assess every report alleging unauthorised activity prior to determining whether an investigation is warranted. Council will respond to every such report unless the person raising the matter has indicated they do not wish to receive a response about council's handling of the matter, or the report is anonymous.

Council's objectives when dealing with reports alleging unauthorised activity are to:

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1. Maintain the collective good and welfare of the community.
2. Prevent or minimise harm to health, welfare, safety, property or the environment.
3. Consider the broader public interest having regard to council's priorities and any resource limitations.
4. Consider the report fairly and impartially.
5. Seek cooperation with the community.

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 unauthorised 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 unauthorised 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 unauthorised 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 unauthorised activity, and in particular explain that in the absence of sufficient evidence of unauthorised 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 unauthorised 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.

While there are certain statutory requirements that must be met in relation to complex matters council staff will ensure that all explanatory communications are made in plain English and explain any technical language the law requires to be used.

## **6. Confidentiality of people who report allegations of unauthorised activity**

People who report allegations of unauthorised activity should not expect that their identity 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:

1. The disclosure is necessary to investigate the matter.
2. Their identity has already been disclosed to the subject of their report directly or in a publicly available document.
3. The individual was consulted following receipt of a Government Information (Public Access) Act 2009 application and did not object to the disclosure.
4. The individual consents in writing to the disclosure of their identity.

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5. The disclosure is required to comply with principles of procedural fairness.
6. 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.

## **7. What council expects from people who report allegations of unauthorised activity**

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

1. Providing a clear description of the problem (and the resolution sought, if relevant).
2. 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.
3. Not giving any information that is intentionally misleading or wrong.
4. Cooperating with council's inquiries and giving timely responses to questions and requests for information.
5. Treating council's staff with courtesy and respect.
6. Allowing the investigation to be completed without prematurely taking the matter to other agencies unless referred to by council.
7. Not making demands of Council or its staff to do or say things that are unauthorised or unreasonable in the circumstances.

If these expectations of the individual are not met, Council may need to set limits or conditions on the continuation of the investigation or may need to restrict any further communications with the individual.

Inappropriate conduct by a person reporting unauthorised activity may limit Council's capacity to take enforcement action. Council often relies upon reports by members of the community in its implementation of enforcement action. In taking enforcement action it is critical for Council to obtain information from reliable witnesses. Given that most formal enforcement actions are appealable in court Council must be confident in its ability to defend a legal challenge. Council has obligations to use its resources in an efficient manner, and this includes legal expenditure.

The assessment of a witness's availability and reliability in any potential legal challenge is an essential part of Council meeting its legal and financial obligations.

Actions that may result in a person being assessed as an unreliable witness may include:

1. Offensive, abusive or threatening conduct towards Council staff, other witnesses or the alleged offender.
2. Failing to declare to Council formal disputes with the alleged offender, such as existing or previous litigation.

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3. Providing false or misleading information to Council.
4. Carrying out the same or similar alleged unauthorised activity as the accused.
5. Publically disclosing information that is confidential, false or misleading during the course of an investigation.
6. Taking unreasonable action that may threaten Council's integrity or Council's capacity to resolve an enforcement matter.

Council's capacity to take effective enforcement action may be compromised if a person reporting unauthorised activity becomes an unreliable witness. If this occurs Council has the discretion to conclude an investigation or withdraw enforcement action. In these circumstances Council will inform the person reporting the alleged unauthorised activity of alternative options available to resolve their concerns.

Alternative options may include, but are not limited to formal mediation or third party action in a relevant court of law.

Any unreasonable conduct may also be dealt with in accordance with the principles of the NSW Ombudsman's Managing Unreasonable Complainant Conduct Manual 2012 and any applicable council policy.

## **8. What parties can expect from council staff**

People who report alleged unauthorised activity, as well as individuals or businesses that are subject to Council investigation of alleged unauthorised activity can expect that council staff will:

1. Treat them with courtesy and respect.
2. Advise them of the outcome of the allegation reported, including a full explanation of the reasons why that outcome was considered to be reasonable in the circumstances.
3. Clearly explain decisions in plain English.
4. Provide information about any relevant internal and external appeal processes that may be available.
5. Carefully assess any new information provided by any party after a decision has been made and advise whether further action will be taken.

## **9. Complaints about council's enforcement actions**

Any complaints about council's handling of reports alleging unauthorised activity will be recorded separately and handled in accordance with Council's complaints management policy and procedures.

Where a person or organisation subject to enforcement action merely disputes Council's decision to take enforcement against them, they will be directed to make representations in accordance with any relevant internal and external appeal processes.

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Council staff will act on any complaints about the conduct of law enforcement officers in accordance with council’s complaints management policy and procedures and the code of conduct.

**10. Anonymous reports**

Anonymous reports will be recorded and assessed in accordance with the above requirements. However, because it is not possible to seek clarification or additional information about a matter, it may be more difficult to evaluate the allegations and therefore these reports are less likely to warrant investigation. An anonymous report will hamper the nature of any enforcement action Council may consider.

**11. Unauthorised activity outside business hours**

Unauthorised activity can occur outside business hours. In particular, council may receive reports about matters such as offensive noise and failure to comply with limitations on hours of operation during nights and weekends.

Due to resource and operational capability restraints on Council, investigations into alleged unauthorised activity outside business hours will be assessed on the basis of risk of harm to health, welfare, safety, property or the environment or it is otherwise in the public interest to take such action.

In circumstances where Council officers are not available during certain hours of the day, Council may ask members of the community to make observations of the alleged unauthorised activity. Witness statements from civilians are important and can greatly assist Council in its investigations. If a member of the community volunteers to Council to make observations they must do so within the limits of the law and not put themselves at risk.

**12. Neighbour disputes**

Council will at times receive reports from parties involved in neighbour disputes seeking Council’s involvement. When a dispute between two neighbours is a civil matter, Council will often have no authority to resolve the issue in dispute. Some reports will raise several matters, some may require Council’s involvement and some of which will be personal to the parties.

Council staff will assess such reports to determine whether there is evidence of any possible unauthorised activity requiring action by council. Care will be taken to explain which aspects of a report council can deal with and which cannot be dealt with and why. Where possible, individuals will be provided with information about how to resolve neighbour disputes including referral information resources such as LawAccess NSW and Community Justice Centres.

It may be that a minor unauthorised activity is entwined with a neighbour dispute and a resolution to that activity may be better resolved via civil means through LawAccess NSW and Community Justice Centres.

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It is possible that one party will provide further information about a matter which changes council's decision about whether it will become involved. In such circumstances, council staff will carefully consider the matter before taking action and document reasons for the new decision. Relevant parties will be advised about the reasons council has changed its position on a matter. Council staff will not change a decision about whether or not council should be involved purely as a response to the conduct of an individual such as persistent demands or threats.

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### **13. Investigating reports of alleged unauthorised activity**

Not all reports alleging unauthorised activity will warrant investigation. A preliminary assessment of all matters will be made to determine whether investigation or other action is required. On an annual basis Council will adopt a Compliance Priorities' Program which will allocate Council's regulatory responsibilities and functions into High, Medium and Low categories.

Where Council does have an annual Compliance Priorities Program, this program must be used in undertaking the abovementioned preliminary assessment.

If there is insufficient information in the report to undertake an assessment, further information may need to be sought from the person who made the report or an inspection undertaken. Staff may also need to consult council records and other internal business units to understand the relevant history and context of a matter.

### **14. Preliminary circumstances where no investigative action may be taken**

Council may take no further action if, following an assessment, it is identified that:

1. 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
2. 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).
3. The allegations relate to an unauthorised activity (eg where there is an existing approval or the activity is permissible without council approval or consent being required).
4. The report is not supported with evidence or appears to have no substance.
5. The relevant 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.

### **15. Relevant factors guiding decisions as to whether to take investigative action**

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

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1. The activity is having a significant detrimental effect on the environment or it constitutes a risk to public safety.
2. The report is premature as it relates to some unfinished aspect of work that is still in progress or is yet to occur.
3. The activity or work is permissible with or without permission.
4. All conditions of consent are being complied with.
5. Much time has elapsed since the events the subject of the report took place, the matter is legally stale.
6. Another body is a more appropriate agency to investigate and deal with the matter.
7. It appears there is a pattern of conduct or evidence of a possible wide spread problem.
8. The person or organisation reported has been the subject of previous reports.
9. The report lacks information that would give Council lawful reason to act.
10. The report is trivial, frivolous or vexatious.
11. The report raises matters of special significance in terms of the council's existing priorities.
12. There are significant resource implications in relation to an investigation and any subsequent enforcement action.
13. It is in the public interest to investigate the report.
14. The report has already been dealt with.

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. Discretionary powers are fully explained in Section 5 of the NSW Ombudsman Enforcement Guidelines for Council's 2015.

The objective of the processes council staff use when investigating incidents of alleged unauthorised activity is to:

1. Determine the cause of the incident.
2. Determine if there has been a contravention of law, policy or standards.
3. Gather evidence to the required standard to support any required enforcement action.
4. Determine any necessary action to mitigate the possibility of reoccurrence of similar incidents.

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

## **16. Taking Enforcement Action**

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:

1. Take no action.

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2. Counsel the alleged offender.
3. Issue an electronic caution.
4. Issue a Penalty Infringement Notice (PIN).
5. Issues Notices and Orders.
6. Commence criminal proceedings.
7. Commence civil proceedings.
8. Report broader matters to the elected council.

When deciding whether to take enforcement action, Council will consider the circumstances of the case. These include:

- Has Council created an estoppel situation?
- Is the breach a technical breach only?
- When was the unauthorised activity carried out and for how long?
- How has the unauthorised activity affected the natural or built environment and the health, safety and amenity of the area?
- Would consent have been given if it had been sought?
- Can the breach be easily remedied?
- Does the person in breach show contrition?
- Are there any particular circumstances of hardship affecting the complainant or the person the subject of the CRM?
- Has the person the subject of the CRM received a previous warning or other non-coercive approach or has formal legal action been taken?
- Would an educative approach be more appropriate than a coercive approach?
- What are the costs and benefits of taking formal enforcement action as opposed to taking informal or no action?
- What are the chances of success if the proposed enforcement action was challenged in court?
- Is there a draft planning instrument on exhibition that would make the unauthorised use legal?
- What action would be reasonable and proportionate in this case?
- What would be in the public interest?

## **17. The Nature and Seriousness of the Unauthorised Activity**

Council will have regard to the impact the unauthorised activity is causing on amenity or harm to the environment. If action is required, Council will consider what is reasonable in the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the unauthorised activity.

## **18. Relevant factors**

Where unauthorised activity is identified, the seriousness of the unauthorised activity will guide the appropriate enforcement response. The following factors are relevant to determining the significance of the unauthorised activity:

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1. The **severity** or **seriousness** of the unauthorised activity, which includes:
  - a. The degree of harm or potential harm resulting from the unauthorised activity, including whether it seriously endangers human health or safety, the environment, or the economic or social fabric of the community;
  - b. Whether any environmental harm caused by the unauthorised activity is temporary or long lasting;
  - c. The magnitude or degree of non-compliance – whether the non-compliance is trivial or not;
  - d. Whether the offence occurred on public lands and has harmed the value of those lands to the community;
  - e. The level of any unjust benefit to the alleged offender arising from the unauthorised activity and whether the unauthorised activity was motivated by financial gain.

Certain legislation for example the Protection of the Environment Operations Act (PoEO) or Environmental Planning and Assessment Act (EP&A) stipulates a hierarchy of seriousness within the legislation framework. Under such circumstances the factors (above) are used to determine the significance of the unauthorised activity within the statutory hierarchy.

2. The **public interest**, including for example:
  - a. The cost to the general community of the unauthorised activity (e.g. whether the offence caused harm to public lands including for example, Bill Posting and Graffiti) and the cost of taking further action in response to the unauthorised activity;
  - b. The need to deter an offender and the broader community from committing further offences of a similar nature in the future (particularly if the offence is prevalent);
  - c. Whether pursuing the unauthorised activity would be of little or no utility (for example, where a change in the law is imminent which would make the activity lawful).
  
3. **Aggravating or mitigating factors** - this refers to the negative and positive circumstances surrounding the offender's commission of the offence, including for example:
  - a. Whether the alleged offender committed the unauthorised activity deliberately or by mistake;
  - b. Whether the alleged offender has shown a willingness to co-operate with Council and to comply in the future;
  - c. Whether the alleged offender has a history of prior unauthorised activity and, if so:
    - i. whether Council has taken action;
    - ii. whether the unauthorised activity is continuing (the alleged offender has not ceased or abated the offence); and
    - iii. the length of time which has elapsed since the unauthorised activity occurred.

The applicability of, and weight to be given to, each of the above factors will depend on the circumstances of each case. Investigating officers will make determinations on the level of significance

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with reference to internal policies, peer review, supervisor support Council resolutions and legal advice where appropriate. Council officers will operate only within their delegated authority.

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## 19. Classifying an unauthorised activity – low, medium or high?

After the above factors have been considered, suspected unauthorised activity will be classified as being of low, medium or high significance. This classification will, in turn, guide the appropriate action to be taken. In all cases, professional judgment will need to be exercised when making the classification.

The following table provides examples in determining the significance of an unauthorised activity in consideration of the factors listed in this policy.

*Examples in determining significance of unauthorised activity*

<b>Severity/ seriousness</b>	<b>Public interest</b>	<b>Aggravating or mitigating factors</b>	<b>Significance of unauthorised activity</b>
Low to moderate environmental harm	Public interest low due to minimal cost to the community and the “one-off” nature of the unauthorised activity with minimal need for deterrence against further unauthorised activity.	No significant aggravating factors; Offender co-operated with investigation.	LOW
Moderate, short-term loss of amenity; Low environmental harm	Public interest likely to be moderate due to the need to deter the offender from further unauthorised activity of this nature but little public perception of the unauthorised activity.	No significant aggravating factors; Offender rectified unauthorised activity quickly when notified by Council.	LOW
Moderate or high degree of environmental harm	Public interest high due to the unauthorised activity impacting on the amenity of several residential neighbours and the need to deter against further unauthorised activity of this nature.	Significant aggravating circumstances due to offender knowingly committing the unauthorised activity despite likely impacts.	HIGH
Large magnitude of unauthorised activity; High level of unjust benefit; Low to moderate risk of	Public interest moderate due to the need to deter the offender against further unauthorised activity of this nature,	Aggravating circumstances due to offender knowingly committing the unauthorised activity for significant financial gain.	HIGH

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<b>Severity/ seriousness</b>	<b>Public interest</b>	<b>Aggravating or mitigating factors</b>	<b>Significance of unauthorised activity</b>
environmental harm			
High level of compliance with approval / consent	Public interest moderate due the need to deter the offender against further unauthorised activity of this nature.	Minor aggravating circumstances due to offender submitting false and misleading information about the unauthorised activity.	MEDIUM
Low level of compliance with approval / consent	Public interest high due to the high public perception of the unauthorised activity and likelihood of the offender committing further unauthorised activity.	No mitigating circumstances due to offender failure to acknowledge the unauthorised activity and instigating measures to prevent further unauthorised activity.	HIGH

## 20. Enforcement Options

When unauthorised activity has been confirmed it is then necessary to determine the appropriate enforcement response for the particular unauthorised activity. Enforcement options include actions to restrain or remedy unauthorised activity, and actions to punish an offender. The range of enforcement options available to Council in descending order of significance is shown in the enforcement actions table below.

Enforcement options are not necessarily mutually exclusive; for example in some circumstances it may be appropriate to contemporaneously issue an Order and a penalty notice.

*Enforcement actions available to the Council*

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<p><b>Court order</b></p> <p>An order from the Court requiring certain things to be done to achieve compliance (civil proceedings)</p>	<p><b>Criminal Prosecution</b></p> <p>in the Land and Environment Court or the Local Court</p>
<p><b>Order</b></p> <p>Council will issue Orders requiring certain things to be done to achieve compliance</p>	<p><b>Penalty Notice</b></p> <p>Council will issue Penalty Notices for matters listed in the Fixed Penalties Handbook</p>
<p><b>Letter requesting undertaking</b></p> <p>A letter requesting an undertaking that corrective action will be taken within a certain timeframe</p>	<p><b>Negotiation</b></p> <p>with alleged offender and written confirmation of commitments made</p>
<p><b>Warning or advisory letter</b></p> <p>to encourage future compliance and caution that further action may be taken</p>	<p><b>Record the breach</b></p> <p>No further action – for very minor breaches only</p>

## 21. Choosing the appropriate enforcement response

In all cases, Council will choose an enforcement response, which is proportionate to the seriousness of the offence and which:

1. Sets a proper precedent for future cases;
2. Is consistent with the intent and objectives of the legislation;
3. Is an appropriate use of Council's resources;
4. Does not adopt an unreasonable or extreme interpretation of a condition of approval or consent. Council will cast itself as the "reasonable person"; and
5. Is consistent with responses previously adopted for similar incidents.

Enforcement options which may be appropriate for unauthorised activities determined to be of low, medium or high significance are set out below. It is important to remember that the following is a guide only and each case must be assessed on the particular facts. A summary of the guide is provided in the table below.

Enforcement options for unauthorised activities of **low significance**:

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1. Take no action but record the unauthorised activity (only where the degree of harm and severity of the unauthorised activity are low to very low, some mitigating circumstances exist, there are no aggravating circumstances, and the public interest does not compel further action);
2. Send an electronic warning or advisory letter to the alleged offender to encourage them to comply in the future;
3. Negotiate a corrective action with the alleged offender and confirm commitments made in writing;
4. Send a letter identifying the unauthorised activity and requesting an undertaking that corrective action will be taken within a specific timeframe;
5. Issue a notice, for example to cease specified activities, comply with a development consent or project approval, and/or effect a remedy or restraint of the alleged unauthorised activity.

Enforcement options for unauthorised activity of **medium significance**:

1. Send an electronic warning or advisory letter to the alleged offender to encourage them to comply in the future;
2. Negotiate a corrective action with the alleged offender and confirm commitments made in writing;
3. Send a letter identifying the unauthorised activity and requesting an undertaking that corrective action will be taken within a specific timeframe;
4. Issue an Order, for example to cease specified activities, comply with a development consent or project approval, and/or effect a remedy or restraint of the alleged unauthorised activity;
5. Issue a PIN.

Enforcement options for unauthorised activity of **high significance**:

1. Send a letter identifying the unauthorised activity and requesting an undertaking that corrective action will be taken within a specific timeframe;
2. Issue an Order;
3. Commence civil proceedings in the Land and Environment Court seeking Court Orders requiring certain things to be done to achieve compliance or to remedy or restrain an alleged unauthorised activity;
4. Issue a PIN;
5. Commence criminal prosecution proceedings in the Land and Environment Court or in a Local Court.

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 does not achieve the desired response, it may be appropriate to give an Order or to seek an Order from the Court; or if an Order is not complied with it may be appropriate to bring enforcement or prosecution proceedings.

*Enforcement Options Summary*

Enforcement action	Significance of unauthorised activity		
	High	Medium	Low

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Prosecution	*		
Court Order	*		
Penalty Notice	*	*	
Order	*	*	*
Letter requesting undertaking	*	*	*
Negotiated outcome		*	*
Warning letter		*	*
Record unauthorised activity			*

## 22. Irrelevant considerations in choosing an enforcement response

The decision as to the appropriate action will not be influenced by:

1. The race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
2. The personal feelings of the investigating officers concerning the offence or the alleged offender;
3. The possible political advantage or disadvantage to the Government, Council or to any political party, group or individual;
4. The possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or otherwise involved in its conduct; or possible media or community reaction to the decision.

## 23. Consultation With Other Regulatory Agencies

Regulatory action taken by another authority does not preclude Council from taking compliance action in response to an unauthorised activity of legislation. However, where an offence is identified which another regulatory agency or local Council may also be addressing, Council will consult with the responsible authority to facilitate a coordinated and constructive compliance approach.

## 24. 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:

1. Provide information on the substance of the CRM to the alleged offender. This may not occur until an appropriate stage in the investigation;

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2. Provide an opportunity for the alleged offender to put their case. This will not be necessary if there is a serious risk to personal or public safety or risk of serious environmental harm;
3. Consider any submission put forward by the parties to the matter;
4. Make reasonable inquiries or investigations before making a decision;
5. Ensure no person decides a case in which they have an interest; and
6. Otherwise act fairly and without bias.

## **25. Relief by way of lodgement of a development application**

Where unauthorised development is detected and enforcement action is contemplated or has commenced, Council may use its discretion to suspend enforcement action whilst a development application to correct the unauthorised development is lodged and determined. This discretion may extend to the unauthorised activity continuing during the course of the development assessment process.

Application of the abovementioned discretion must be assessed in accordance with factors set out in clause 18.

In circumstances where Council decides to commence or continue with enforcement action whilst a development application has been lodged, the aggrieved party may seek relief from the court under section 9.46(3) of the Environmental Planning and Assessment Act 1979.

## **26. Principal Certifiers (Excluding Council)**

The building certification industry is privatised and therefore some buildings and developments under construction may not be under the supervision of Council. Each building and development site must display a sign with the contact details of the certifier for that particular site.

Prior to contacting Council about a building or development under construction you should contact the principal certifier for that site and express your concerns. If you are unable to make contact with the relevant certifier or you are not satisfied with the certifiers response you may contact Council.

In regards to Council's interactions with private principal certifiers Section 6.31 of the Environmental Planning and Assessment Act applies (see below).

### *6.31 Directions by principal certifiers*

- (1) *If a principal certifier for an aspect of development becomes aware of any non-compliance to which this section applies in respect of the aspect of development, the principal certifier must issue (or, if the principal certifier is a council, may issue) a notice in writing to the person responsible for carrying out that aspect of the development:*
  - (a) *identifying the matter that has resulted or would result in the non-compliance, and*
  - (b) *directing the person to take specified action within a specified period to remedy the matter.*

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- (2) *If a principal certifier gives a direction under this section and the direction is not complied with within the time specified in the notice containing the direction, the principal certifier who issued the direction (if not the consent authority) is, within the period prescribed by the regulations, to send a copy of the notice to the consent authority and to notify the consent authority of the fact that the direction has not been complied with.*

In circumstances where Council is required to take enforcement action in regards to a privately certified building or development, Council reserves its right to recover any costs associated with taking such action.

## 27. 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.

Individual Councillors do not have the right to direct council staff in their day-to-day activities. Councillors can help individuals who raise concerns with them by satisfying themselves that their council's policies are being carried out correctly, however they cannot ignore or alter a policy in order to satisfy the demands of special groups.

The General Manager or Chief Executive Officer 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.

### Documentation

NSW Ombudsman Enforcement Guidelines for Council's (December 2015)

### Authorisation

<b>Owner</b>	<b>Directorate</b>	Engagement – Education and Compliance
	<b>Responsible Officer</b>	Team Leader Compliance
<b>Authorisation</b>	25 June 2019 (MANEX) 28 October 2019 Council endorsed Adopted 9 December 2019	
<b>Review Date</b>	December 2023	
<b>Register</b>	This policy is included in the Public Policy and Procedure Register.	
<b>Record of Amendments</b>	Insert date	Provide brief description of the change.
	Insert date	Provide brief description of the change.

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