



COMPLIANCE AND ENFORCEMENT POLICY

Adopted: 24 July 2024

TRIM: 281536.2023-019



COMPLIANCE AND ENFORCEMENT POLICY

DIRECTORATE: Planning and Compliance

BUSINESS UNIT: Community Standards

1. PURPOSE/ OBJECTIVES

This Policy provides information about Council's position on compliance and enforcement matters for Liverpool City.

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

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

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

Responsible Council staff will apply this Policy as appropriate in their use of discretion and exercise of official functions. In each case, staff will consider the relevant circumstances and facts and decide what action to take on all available information.

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

The Policy is supported by a culture that puts the "Customer at the Centre", our "People at the Heart" of what we do, removes the red tape and gets us back to delivering the basics. The culture provides our customers with seamless quality experiences by understanding and prioritising their needs, while engaging meaningfully and delivering service, operational and planning excellence.

2. DEFINITIONS

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

Enforcement

Actions taken in response to contraventions of laws.

Regulation

A legal instrument made under an Act of the Parliament of New South Wales. In this Policy, the term Regulation refers to Rules, Regulation or other statutory instruments administered by Council.

Report alleging unlawful activity

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

Unlawful activity

Any activity or work that has been or is being carried out contrary to the below and/or failure to take required action in order to be compliant with:

- Terms or conditions of a Development Consent, Approval, Permit or Licence.
- An environmental planning instrument that regulates the activities or work that can be carried out on particular land.
- A legislative provision regulating a particular activity or work.
- A required Development Consent, Approval, Permission or Licence.

3. POLICY STATEMENT

This Policy applies to the investigation of customer complaints about unlawful activity or failure to comply with the terms or conditions of Approvals, Consents, Notices or Orders. It outlines how to prioritise action based on impact by determining whether complaints of unlawful activity require investigation, options for dealing with unlawful activities and regulatory breaches, matters for consideration and facilitates a proportionate approach to compliance management.

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

The Objectives of this Policy are:

1. To establish clear guidelines and protocols for Council staff in the managements of Council’s regulatory activities.
2. To provide a framework to facilitate a responsive and risk-based approach to proactive and reactive compliance and enforcement matters.

3. To improve compliance management and reduce the impact of unlawful activity on the community and our environment.

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

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

3.1 Compliance and Enforcement Principles

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

Principle	Actions
Accountable and transparent	• Acting in the best interest of public health and safety and in the best interests of the environment. • Ensuring accountability for decisions to take or not take action. • Acting fairly and impartial, without bias or unlawful discrimination. • Providing information about compliance and enforcement priorities and the framework for decisions to improve understanding and certainty and promote trust by the regulated community. • Ensuring meaningful reasons for decisions are given to all relevant parties, particularly when there is a departure from this Policy.
Fair and Consistent	• Ensuring compliance and enforcement action is implemented consistently. • Encouraging customer reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter.
Proportionate	• Ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach. • Making cost effective decisions about enforcement action. • Taking action to address harm and deter future unlawful activity.
Timely	• Ensuring responses to reports alleging unlawful activity and decision making in relation to those is timely.

3.2 Risk Based Regulation

Our Community expects to live in a healthy and liveable City where we value and protect our environment. The number of laws and regulations have increased expanding the scope of necessary enforcement. From time-to-time reports alleging unlawful activity will exceed available resources.

Risk based approach to compliance action chosen by Council will depend on the degree of risk, and the impact of the non-compliance on Council's ability to achieve its objectives. This risk based approach is a way to target resources where they are most needed and where they will produce the most effective impact.

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

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

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

Council's risk-based approach involves categorising alleged unlawful activity into low, medium, and high risk, based on the following:

- degree of impact on health, property or the environment;
- seriousness of the offence;
- priority for council and the community based on impact.

Council's Risk Category Matrix in Appendix 1 reflects these factors and will be used to guide enforcement action. The colour-coding in Figure 1 indicates how enforcement action may be related to the risk assessment. Council will apply its risk-based approach intelligently and consider the appropriate action in the facts and circumstances of each case.

Periodic reviews of Council's Risk Category Matrix will be undertaken using intelligence collated from its case management systems and other sources. When reviewing the matrix, Council will consider whether systemic or more serious patterns are emerging which warrant re-assessing the risk exposure of unlawful activities.

3.3 Responsibility

Council receives information about alleged unlawful activity from members of the public, contact from other government agencies and information gathered by its officers during proactive inspections.

Only Council staff with appropriate delegations from the Chief Executive Officer can undertake investigations, compliance and enforcement action in relation to this policy.

Where enforcement action is taken, Council staff are required to:

- Deliver seamless quality experiences by understanding and prioritising relevant parties needs, while engaging meaningfully and delivering service excellence;
- Treat all relevant parties with courtesy and respect;
- Communicate with all relevant parties and provide feedback on the progress of an investigation and any reasons for delay without compromising the integrity of the investigation;
- Maintain full and proper records in relation to the assessment and investigation of reports alleging unlawful activity, including reasons for any decisions;
- Provide as much information as possible to all relevant parties about the outcomes of investigations to demonstrate adequate and appropriate action was taken and/or is proposed to be taken in response to a report of alleged unlawful activity; and
- Provide information to all relevant parties about any avenues to seek an internal or external review of a decision.

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

3.4 Submitting Reports of Unlawful Activity

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

The name, address and contact details of the person submitting the report will also be recorded. This information is critical as Council may need to rely on evidence from the complainant to prove any alleged offence and commence enforcement action. Council will advise any Complainant of the progress and outcome/s of the investigation.

As outlined in Privacy Information Statement | Liverpool City Council (nsw.gov.au)

3.4.1 What Council expects from people who report allegations of unlawful activity

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

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

3.4.2 Anonymous Reports

Council shall not undertake an investigation into an anonymous complaint, unless the issue places public safety at risk and raises a serious matter and there is sufficient information for the officer to undertake the investigation.

3.5 Responding to concerns about Unlawful Activity

Council will record every report alleging unlawful activity.

A preliminary assessment of all matters will be made to determine the priority for a response, and whether investigation or other action is required, inline with the principles above.

An investigation of alleged unlawful activity may take a significant amount of time to complete, particularly where the issues are complex. If an investigation is required by Council, staff will give the person who reported the alleged unlawful activity regular feedback on the progress of the investigation, and any reasons for delay. Feedback provided would not include 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 in accordance with this Policy. This means the objective is that reports alleging unlawful activity will be resolved based on the best outcome for the community as a whole and in-line with relevant legislation and benchmarks.

Council staff will endeavour to manage the expectations of people who report alleged unlawful activity, in particular where there is an absence of sufficient evidence of unlawful activity and Council is unable to take further action.

Council has limited resources and powers to deal with reports alleging unlawful activity.

Council will prioritise understanding any allegations raised and endeavour to respond in a timely manner. This will include regular updating of all parties involved, where appropriate, completing investigations and actions within a reasonable timeframe. Actions taken will always be based on the best outcome for the community as a whole and in-line with relevant legislation and benchmarks.

3.6 Investigating alleged Unlawful Activity

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

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

3.6.1 Circumstances where no regulatory action will be taken

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

- The complaint is not supported with evidence, or appears to have no substance,
- Council does not have 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 that matter to the attention of the authority or provide information and contact details to the individual. For example, Safework NSW for workplace safety matters, the NSW Environment Protection Authority (EPA) for possible environmental offences and Community Justice Centres NSW for personal disputes.
- The report relates substantially to a matter previously determined by Council and no new or compelling information is presented which would cause Council to change its earlier decision. In this case, staff will acknowledge the report and advise that no further action will be taken as no new information had been provided (other than where the person has previously been advised they would receive no further response).
- The allegations relate to a lawful activity (e.g. where there is an existing approval, or the activity is permissible without Council approval or consent being required).

The relevant Coordinator, Manager, Director, or CEO may use discretion in determining that an investigation or further regulatory action isn't required.

Examples of circumstances where regulatory action may be determined not be required include where:

- a. The investigation revealed that approval is likely to be achieved.
- b. It is not a safety concern.
- c. There is no amenity impact to the community.
- d. The complaint is made anonymously, relates to low-risk activity as defined by Councils 'Risk Category Matrix' and is without supporting evidence.
- e. The complaint relates to a known neighbourhood dispute and has no substance.
- f. It is not in the public interest as the outcome will not justify the expenditure of resources.

3.6.2 Relevant factors guiding decisions as to whether to take regulatory action

When deciding whether to investigate, Council will consider factors relevant to the circumstances of the case, which may include whether:

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

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

The objective of the processes Council staff use when investigating incidents of alleged unlawful activity, is to:

- Determine the cause of the incident;

- Determine if there has been a contravention of Law, Policy or Standards;
- Gather evidence to the required standard to support any required enforcement action; and
- Determine any necessary action to mitigate the possibility of reoccurrence of similar incident.

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

3.7 Deciding whether or not to take enforcement action

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

3.7.1 Considerations about the alleged offence and impact:

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

3.7.2 Considerations about the alleged offender:

- Any prior warnings, cautions, instructions, advice that was issued to the person or organisation reported or previous enforcement action taken against them.
- Whether the offence was committed with intent.
- Whether the person or organisation reported has been proactive in the resolution of the matter and assisted with any Council requirements and instructions.
- Any mitigating or aggravating circumstances demonstrated by the alleged offender.
- Any particular circumstances of hardship affecting the person or organisation reported.
- The youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or a victim.
- The willingness of the alleged offender to cooperate in the investigation and prosecution of others.

3.7.3 Considerations about the impact of any enforcement action:

- The prevalence of the alleged offence or breach and the need for deterrence.
- Whether an educative approach would be more appropriate than a coercive approach in resolving the matter.

- The prospect of success if the proposed enforcement action was challenged in court.
- The costs and benefits of taking formal enforcement action as opposed to taking informal or no action.
- What action would be proportionate and reasonable in response to the unlawful activity.
- Whether Council's prior advice or actions have been relied upon by the alleged offender such as to create a form of estoppel.

3.7.4 Consideration about the potential for remedy:

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

3.8 Options for dealing with Confirmed cases of Unlawful Activity

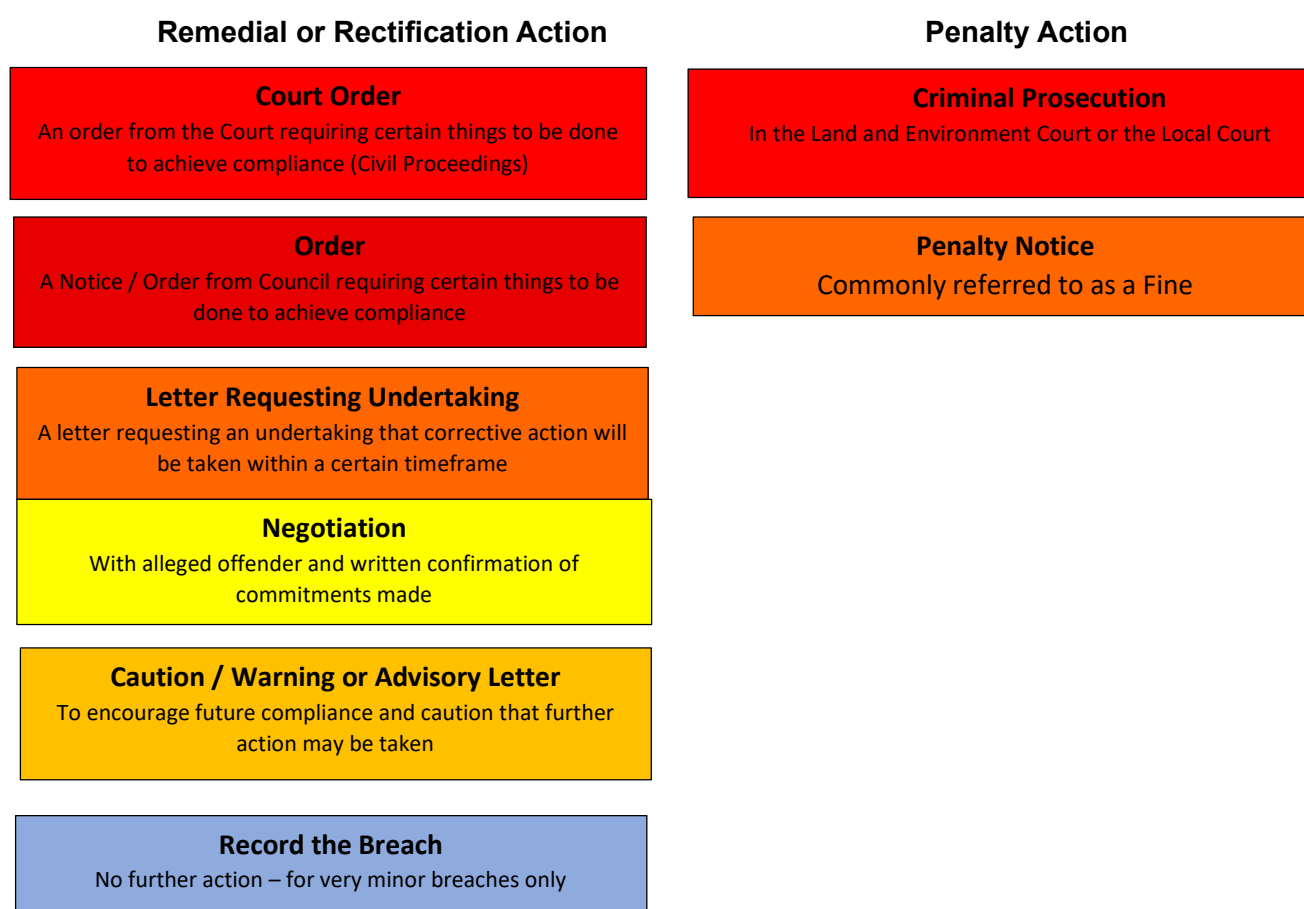
There is a range of enforcement action available as illustrated below in Figure 1. The examples given in Figure 1 have been ranked from highest formality at the top to lowest formality at the bottom.

In deciding what enforcement action to take, Council will:

- use discretion to determine the most appropriate response to confirmed cases of unlawful activity;
- take a risk-based approach;
- choose the least formal option likely to achieve its enforcement objectives;
- consider the circumstances and facts of each case and decide on the merits of the case.

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

Figure 1: Enforcement actions available to Council



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

3.9 Offences when penalty notice can be issued

For certain offenses a penalty notice can be issued as the appropriate regulatory action, even for these certain offences, Council officers have the authority to use discretion and issue a caution in place of a monetary fine. The circumstances for which a Council Officer may use discretion are clearly outlined as guidelines in section 19A (3) of the *Fines Act 1996*.

<https://dcj.nsw.gov.au/justice/policy-reform-and-legislation/publications/guidelines.html> Following up enforcement action

All enforcement action will be reviewed and monitored to ensure compliance with any undertakings given by the subject of enforcement action or advise, directions or orders issued by council. Reports alleging continuing unlawful activity will be assessed and further action taken if necessary. If the unlawful activity has ceased or the work has

been rectified, the matter will be resubmitted for follow up action to ensure compliance outcomes are met. Should initial enforcement action be found to have been ineffective, Council staff will consider other enforcement options.

3.10 Taking Legal Action

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

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

The same considerations apply to whether Council should continue with proceedings. Council will act reasonably in response to new material.

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

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

The basic requirement of any **criminal** prosecution is that the available evidence establishes a prima facie case.

The Prosecutor is required to prove the elements of the offence beyond reasonable doubt.

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

Whether there is a reasonable prospect of success before a Court

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

Whether the public interest requires legal action to be pursued

The principal consideration in deciding whether to commence legal proceedings is whether to do so is in the public interest. In making this determination, the same factors to be considered when taking enforcement action apply.

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

- Whether the applicable law is obsolete or obscure
- Whether proceedings may be counter-productive and bring the law into disrepute
- The availability of any effective alternatives to proceedings
- Whether an urgent resolution is required (court proceedings may take some time)
- The possible length and expense of court proceedings
- What sentencing options are available to the court in the event of conviction
- The alleged offender's degree of culpability
- The attitude of the victim and possibly material witnesses
- Whether a precedent will be set by instituting proceedings.

Council will consider discretionary factors to the extent applicable to the facts and circumstances of the case and will give them appropriate weight.

Time within which to commence proceedings

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

3.11 Shared Enforcement Responsibilities

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

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

- Which authority will take the leading role on any joint investigation
- Which activities each authority will carry out
- Responsibilities for updating an individual where relevant
- Protocols for exchanging confidential information between the relevant authorities.

Council will reasonably endeavour to respond to requests for information or assistance on joint regulatory matters in a timely manner.

3.12 Role of Council Where a Private Certifier Has Been Nominated as the Principal Certifier

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

Private Certifiers have limited enforcement powers. They can issue a Written Directions Notice (WDN) to the owner or builder to comply with the conditions of consent or rectify any breaches. A copy of any WDN issued by a Private Certifier must be provided to Council for assessment as to whether Council will consider enforcement action.

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

Should the Private Certifier fail to use their enforcement powers to address the issue raised within a reasonable timeframe, Council will give consideration to investigate the matter dependent upon the specific circumstances and whether there is a serious threat to persons and/or property.

It must be noted that Council is not the regulator of Private Certifiers and any complaints about the conduct of Private Certifiers must be directed to NSW Fair Trading.

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

3.13 Review and Appeal Processes

Any order issued by Council (as a proposed order) (unless issued in an emergency) will have a notice period allowing representations to be made (generally up to 21 days). Representations should be made in writing to the attention of the relevant section Manager.

Fines issued by Council under a range of legislation have a review process that is managed by Revenue NSW. Information on how to request a review of a fine can be found at www.revenue.nsw.gov.au.

3.14 Role of Councillors in Enforcement

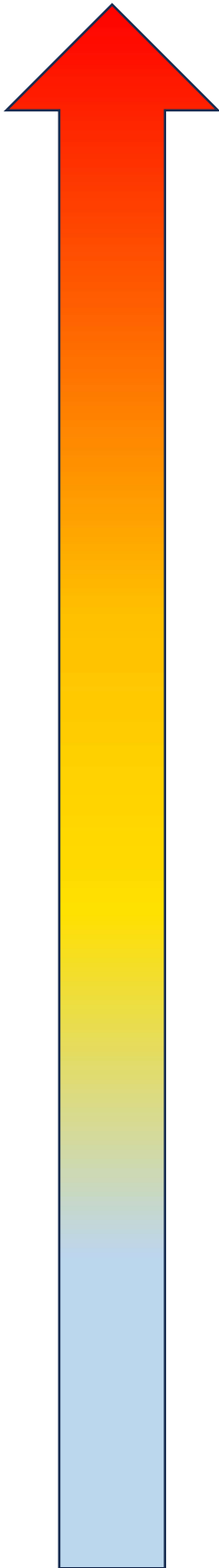
Compliance and enforcement matters are sensitive and easily susceptible to allegations of impropriety, bias or inconsistency. In order to manage those risk, and consistent with Council's Code of Conduct, Councillors do not attend on-site meetings with Council staff, the complainants, or persons the subject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

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

4. RELEVANT LEGISLATIVE REQUIREMENTS *(where applicable)*

This policy is based in the NSW Ombudsman "Enforcement Guidelines for Councils" and "Model Policy" (2015).

APPENDIX 1



RISK CATEGORY MATRIX

Including but not limited to:

High Risk

- Large scale / significant pollution incidents
- Dog attacks, straying stock and roaming dogs
- Large scale vegetation clearing
- Unattended/Illegally parked vehicles in unsafe locations
- Collapsed or unsafe building works adjacent to public areas
- Poor sediment control on building sites
- Swimming pool barrier fencing
- Fire safety matters
- Domestic sewage surcharge

Medium Risk

- Abandoned motor vehicles
- Minor pollution incidents
- Breaches of tree preservation orders
- Commercial & industrial air/noise complaints (criteria)
- Food/beauty/Skin penetration and other health related premises complaints
- Significant unauthorised/non-complying building works
- Building works where a Private Certifier appointed
- Land filling
- Rubbish dumping
- Parking
- Footpath obstructions
- Onsite sewage management systems
- Illegal Boarding houses/multi occupancies/dual occupancies

Low Risk

- Animal registration / general companion animal enquiries
- Barking Dogs
- Domestic air noise complaints (power tools, air conditioners, pool pumps, amplified music)
- All other animal related enquiries
- Overgrown land (criteria)
- Home business / home occupation
- Minor unauthorised / non-complying building works (criteria)
- Overland stormwater flow (criteria)
- Smoke nuisance from domestic wood heaters, outdoor BBQ's, burning prohibited items
- Keeping of roosters, rooster noise, including poultry and fowl houses
- Strata issues where NSW Civil and Administrative Tribunal (NCAT) is appropriate authority

RELATED POLICIES & PROCEDURE REFERENCES

This Policy has been developed in consultation with Wollongong City Council.
Liverpool Council acknowledges the Wollongong City Council Compliance and Enforcement Policy in the creation of this document.

AUTHORISED BY
Council Resolution

EFFECTIVE FROM
24 July 2024

REVIEW DATE
The policy must be reviewed every two years or more frequently depending on its category or if legislative or policy changes occur.

VERSIONS

Version	Amended by	Changes made	Date	TRIM Number
1	New Policy	NA	24 July 2024	281536.2023-019