



COMPLIANCE AND ENFORCEMENT POLICY

Amendments

Date	Amendment	Reference
3 July 2012	Adopted	EP/41
26 April 2016	Administrative amendment to 9.3.1 due to NSW Ombudsman guidelines and trailer legislation	Manager Governance

Contents

1	Introduction.....	1
1.1	Name of Policy.....	1
1.2	Commencement	1
1.3	Objects of Policy	1
1.3.1	Policy Statement.....	1
1.3.2	Policy Objectives	2
1.4	Definitions.....	2
2	Requests for compliance and enforcement action.....	2
3	Privacy.....	3
4	Appropriate Regulatory Authority (ARA).....	4
5	Civil Enforcement.....	5
6	Statutory Discretion.....	5
7	Investigation.....	6
7.1	Authorised Officers	7
7.1.1	Delegations.....	7
7.1.2	Identification and Authority.....	7
7.2	Powers of Authorised Officer	7
7.3	Limitations of Powers of Entry.....	8
8	Nature and Seriousness of the Breach.....	8
8.1	Relevant factors.....	8
8.1.1	Seriousness.....	8
8.1.2	Public Interest.....	9
8.1.3	Aggravating or mitigating factors.....	9
9	Compliance and Enforcement Options.....	9
9.1	Alternative Dispute Resolution ADR.....	10
9.2	Caution or Reprimand.....	10
9.3	Penalty Infringement Notices (PIN)	10
9.3.1	PIN Options	11
9.4	Notices and Orders.....	12
9.5	Summary enforcement proceedings (Prosecution).....	13
9.6	Civil enforcement proceedings (Court Orders)	14
9.7	Report broader matters to Council	14

10	Service Standards.....	14
10.1	Taking and recording customer request.....	14
10.2	Assessment	14
10.3	Investigation.....	14
10.4	Determination of appropriate enforcement option	15
10.5	Case Management.....	15
11	Review of Compliance and Enforcement Decisions	16
12	Dictionary.....	16
13	Acknowledgments.....	18

Table of Amendments

1. Nil
 2. Nil
 3. Nil
 4. Nil
-

1 Introduction

This policy is an "umbrella" policy applying to all service and regulatory functions of Council where compliance or enforcement may be necessary. This policy applies to a wide range of compliance and enforcement activities including, but not limited to, Development and Building Compliance, Environmental Health, Fire Safety, Debt Recovery and Rangers.

Council has adopted a separate [Debt Recovery Policy](#) and [Food Safety Compliance and Enforcement Policy](#). These policies also apply to the extent to which debts are referred to Council's mercantile agent for legal debt recovery action or action is taken under the Food Act respectively.

Additional information on the more detailed aspects of each function may be obtained from the relevant Council department. This policy does not contain detailed statutory provisions as the laws that govern the wide range of services and regulatory functions of Council are subject to regular amendment by the NSW Government.

This Policy should be read in conjunction with the NSW Ombudsman's Enforcement guidelines for councils, June 2002 as it relates to unlawful activity.

1.1 Name of Policy

This policy is the *Compliance and Enforcement Policy*.

1.2 Commencement

This policy repeals all previous policies relating to the regulatory functions of Council under all Acts and Regulations where the Council is the appropriate regulatory authority to the extent that previous policies conflict with this policy. This policy was adopted by Council and applies from 12 July 2012.

Refer to the table of amendments for details of subsequent changes to this policy.

1.3 Objects of Policy

1.3.1 Policy Statement

Council is strongly opposed to unlawful activity at any time and under any circumstances and will therefore initiate compliance and enforcement action in accordance with this policy.

The Council's adopted position is that effective and well-targeted regulation is essential in promoting fairness and to protect our natural, built and social environment from harm.

Council adopts a proactive approach towards ensuring compliance by helping and encouraging a proper understanding of relevant laws. Council will respond proportionately to alleged and actual breaches. We will in all our dealings seek to educate our community and those that serve our community about the relevant laws, regulations, environmental planning instruments, development controls, codes and standards that apply. While Council is proactive in the detection of unlawful activities, not all offences are readily discernible and early detection can only be achieved with support and direct advice from our community.

Council will take a soft brush approach to those who comply with regulatory requirements and those who work with us to achieve compliance. However, Council will not hesitate to take all necessary enforcement action against those who commit serious breaches, flout the law, refuse to work with us to seek compliance or who commit offences which are preventable.

The Council's adopted position is that its compliance and enforcement actions must facilitate the just, quick and cheap resolution of the real issues irrespective of the compliance or enforcement option we may take. We will efficiently use available compliance and enforcement resources.

1.3.2 Policy Objectives

The objectives of this policy are:

- To meet Council's charter under section 8 of the Local Government Act 1993, in particular; ensure that, in the exercise of its regulatory functions, Council acts consistently and without bias, particularly where an activity of the council is affected.
- To meet administrative service standards in the assessment and investigation of requests alleging breaches of the law.
- To meet Council's adopted [Statement of Values](#).
- To comply with Council's [Code of Conduct](#).
- To meet Council's obligations under GIPA - [Access to Information Policy](#).
- To apply the principles of procedural fairness at all times.
- To promote alternative dispute resolution.
- To always act within delegations
- To be a model litigant¹.

1.4 Definitions

Unless specified in the dictionary (Section 12) to this policy, all terms used have the same meaning as in the [Interpretation Act 1987](#) and relevant Acts and Regulations for which Council is the appropriate regulatory authority (ARA).

2 Requests for compliance and enforcement action

When a request is received Council records it as a complaint in the corporate records management system. Council will require the person making the request to provide their contact details and details of the issues and any specific allegations. All requests received and designated as a complaint, are dealt with confidentially where this is possible (refer to Section 3).

The request is assigned to the appropriate officer to assess.

The key assessment steps are:

1. Determining the ARA (or if there are more than one ARA all potential ARAs).
2. Determine the immediate priority to be given to the request.
3. Determining whether the complaint or request should proceed to formal investigation.
4. Advising the customer of the initial assessment outcome and service standards that apply under Council's current [Customer Response Policy](#).
5. Advising the customer of any obvious civil options including alternative dispute resolution options that may be appropriate.

¹ A Model Litigant is the concepts of behaving ethically, fairly and honestly to model best practice in litigation. We will: a) Deal with claims promptly b) Not take advantage c) Pay legitimate claims d) Avoid litigation e) Keep costs to a minimum, and f) Apologise where we have acted inappropriately.

Council will advise the person making the request how the matter will proceed within 14 days but there should not be any expectation that often-complex compliance and enforcement issues will be resolved quickly. Complex compliance and enforcement matters, which may ultimately proceed to Court, are seldom resolved quickly.

Not all requests or allegations warrant formal investigation even when Council is the ARA. Council, when determining whether the complaint will proceed to formal investigation will take into consideration the following (where Council is the ARA):

1. Has the customer provided sufficient information?
2. Does the request relate to a civil dispute?
3. Does the request relate to a potential future breach, not yet apparent?
4. Is the allegation unfounded without the need for further investigation?
5. Has the matter already been dealt with?
6. Is the request trivial, frivolous or vexatious?

Where the responsible officer determines not to take any further action that officer will inform the person who made the request by letter advising that the request will not proceed to formal investigation. The responsible officer will give reasons why the request will not proceed to formal investigation.

Council will apply its [Complaints Handling Policy](#) where customers are dissatisfied with Compliance and Enforcement response or outcomes.

3 Privacy

Council will take all reasonable measures to protect the privacy of a person making a request. Generally, information on this person will not be released. However, Council may be required to disclose this information in a variety of circumstances including the following;

1. Access to the information is permitted under legislation, including [Government Information \(Public Access\) Act 2009 \(GIPA\)](#);
2. Access to the information is permitted under another Council policy;
3. Legal proceedings are commenced and the information is disclosed in evidence or in required disclosures; and
4. The nature of the allegation otherwise makes it a necessity.

Council recognises that, in some circumstances, it may be possible for a person or persons the subject of a request or allegation, to identify the person submitting the request or making the allegation, by the nature or details of the request or allegation.

If you are making a request to Council relating to the conduct of your neighbour or a neighbouring developer, where they are aware that you have previously objected to or lodged complaints, they will probably infer that you are the source of future requests to Council to take compliance or enforcement action. This is the most common way that complainants are identified.

Anonymous requests will be accepted by Council and assessed. The real issue is whether or not there is substance to the request, not how the request was made. Council regards it as inappropriate not to assess each request made, for example, about a potential risk to life, property or to the environment simply because the complainant wished to remain anonymous.

The problem with anonymous requests is that we cannot inform the person making the allegations what determinations we make and what compliance and enforcement options have been taken. We cannot contact the informant to obtain further information that may assist compliance and enforcement action.

Council will in the first instance always request any person making a request or alleging a breach of any laws to provide their contact details and relevant information to allow Council's officers to assess the request and determined the appropriate compliance and enforcement option to be applied.

4 Appropriate Regulatory Authority (ARA)

Council may be the ARA for compliance and enforcement of many matters however; Council is not the ARA for all compliance and enforcement matters.

We will advise customers as soon as practicable as to whether or not we are the ARA. If we are not the ARA we will inform customers who the ARA is and provide contact details for that authority.

Other regulatory Authorities include:

- NSW and Commonwealth Courts and Tribunals (interlocutory injunctions, court orders, prosecutions).
- NSW Police Service
- NSW Environment Protection Authority
- NSW Department of Planning and Infrastructure
- NSW Local Lands Board
- NSW Building Professionals Board
- NSW Fair Trading
- NSW Food Authority
- NSW Workcover Authority
- NSW Department of Transport Roads and Maritime Services
- NSW Department of Primary Industries

Private Accredited Certifiers - Where the request relates to a development site under the supervision of a private Accredited Certifier we will provide you with the Principal Certifying Authority's (PCA) contact details, if not displayed on the development site. You must first raise your allegations of any breach of development consent with the private PCA. If the private PCA does not act within a reasonable period of time to address your request including any allegation of unauthorised works then we will take formal allegations as a request. PCA have the power to issue a Notice of Intention to Issue an Order under section 109L of the EPA Act and where there is a breach of any development consent, Council expects that a section 109L Notice will be issued by the private PCA. Where a AC/PCA fails to act in the public interest to inform the Council formally (s.109L or informally) Council may lodge a complaint with the BPB.

See: <http://www.bpb.nsw.gov.au/>

Council will act together with other regulatory authorities and the PCA to remedy breaches of relevant laws, including development consent where appropriate.

The bed of Sydney Harbour is publicly-owned land. This land is vested in NSW Department of Transport Roads and Maritime Services (RMS) which manages it for the benefit of the people of NSW. Any development, occupation or use of these waterways requires the consent of RMS, in addition to any required planning or construction approvals.

See: <http://www.maritime.nsw.gov.au/mpd/development.html>

5 Civil Enforcement

Anyone may commence civil proceedings to remedy or restrain breaches of the LG Act, EPA Act, POEO Act and several other Acts². Anyone may seek declaratory relief, injunction, interlocutory injunction or court orders seeking relief.

The Land and Environment Court deals with most environmental and local government issues in Class 4 of the Court's jurisdiction. The Equity Division of the Supreme Court deals with claims for civil relief that do not involve the recovery of debts or damages.

Examples include:

- claims for injunctions to restrain wrongful conduct;
- claims to have contracts specifically enforced or set aside;
- claims to have rights to property declared and enforced.

Irrespective of whether or not Council takes any compliance or enforcement action anyone can commence civil proceedings to protect themselves and their property from harm. If very quick action is required then you should speak with your solicitor immediately as to whether or not civil proceedings are a more appropriate response.

Council does not provide legal advice with respect to civil legal proceedings. Where civil proceedings are taken with respect to compliance and enforcement matters (where Council may be the ARA) Council requests that it be formally notified of such proceedings if not formally joined by the application or by the Court. Council, at its discretion, may seek joinder in any proceeding. Council will consider requests to join proceedings.

Council's role in civil enforcement is addressed by this policy under "Compliance and Enforcement Options".

6 Statutory Discretion

Council has unfettered discretion to determine whether to proceed to a formal investigation of a request or allegation. Where an investigation finds evidence of a breach of the law Council will determine the appropriate remedy applying this policy to the individual circumstances of each case. Council maintains statutory discretion as to the compliance and enforcement option(s) it takes.

² See for example, EPA Act s 123; LGA 1993 s 674; POEO Act ss 252 - 253; Native Vegetation Act 2003 s 41; National Parks and Wildlife Act 1974 s 176A. Also see: Environmental Defenders Office Fact Sheets 2.2, 2.3 and 2.4.

[Statutory Discretion](#) - In *Ryde City Council v Echt & Anor* [2000] NSWCA 108 the NSW Court of Appeal confirmed that "Council has a "responsibility" to enforce the law. However, in this context the word "responsibility" has an allusive sense. It does not support anything in the nature of a legal obligation to act on statutory power which is enforceable at the insistence of a third party." Council has discretion as to what action if any it takes.

Where the initial assessment determines that the nature and seriousness of the breach is severe or devastating Council may determine to immediately proceed to civil enforcement by seeking interlocutory injunction or court orders seeking relief.

Council will only proceed to Civil Enforcement urgently when the alleged breach cannot be remedied by later orders of the Courts. i.e. threatened demolition of a heritage item.

7 Investigation

Where the assessment has determined to formally investigate the request and any allegations made by the request, that investigation will be undertaken by authorised officers of Council.

The investigator is responsible for finding out all the relevant facts about a request. This task must be done in an impartial, independent and objective manner. The role and functions of an investigator are quite distinct from those of a mediator, conciliator or adviser. However, Council officers will adopt these roles when appropriate to satisfactorily respond to certain request.

In certain circumstances, matters should be referred to an appropriate external agency or other third party for investigation or action. For example, Council Officers will refer a request or complaint if:

- it concerns possible criminal conduct or serious corruption and the council is unlikely to have adequate powers or expertise to investigate,
- it is particularly complex or sensitive and there is an appropriate alternative agency (such as the Environment Protection Authority) with jurisdiction to investigate the matter, or
- the subject of the complaint is the council itself or a senior manager of the council and the investigation therefore needs to be impartial.

Council's officers are encouraged to document circumstances where they are of the opinion that matters should be referred to an appropriate external agency or other third party for investigation or action.

The provisions of the *Public Interest Disclosures Act 1994* sets up a scheme that aims to encourage people who work in the NSW public sector to report [maladministration](#), serious waste and wrong conduct of their colleagues or of any public sector agency they work for or with. Under the Act, if a public official makes a 'public interest disclosure' they will have certain rights and protections. All reporting must be done in accordance with Council's adopted Internal Reporting Policy and System under the *Public Interest Disclosures Act 1994*.

7.1 Authorised Officers

7.1.1 Delegations

Council's [Delegations Manual](#) sets out all delegations to the general manager.

The general manager has sub-delegated many functions delegated to the general manager by the council to specific Council officers by position or in person. Delegation of regulatory functions is limited in that a regulatory function of a council under Chapter 7 of the LG Act cannot be delegated or sub-delegated to a person or body other than: (a) a committee of the council of which all the members are councillors or of which all the members are either councillors or employees of the council, or (b) an employee of the council.

Council's regulatory functions have been properly delegated to Council officers such that they may respond quickly to most routine compliance and enforcement requests and meet Council's service standards in the provision of regulatory functions.

7.1.2 Identification and Authority

Each Council officer is required to and carries identification. This is a written authority setting out the Acts under which they are authorised.

7.2 Powers of Authorised Officer

Each Act sets out the powers of authorised officers. Council's officer will employ different powers under each Act and in some cases may enter premises and undertake investigations utilising powers under several Acts.

These powers include but are not limited to:

- Powers of entry (and notice requirements where applicable)
- Inspection and investigation powers,
- examine and inspect any works, plant or other article,
- take and remove samples,
- make such examinations, inquiries and tests as the authorised officer considers necessary,
- take such photographs, films, audio, video and other recordings as the authorised officer considers necessary,
- require records to be produced for inspection,
- examine and inspect any records,
- copy any records,
- seize anything that the authorised officer has reasonable grounds for believing is connected with an offence against this Act or the regulations,
- Issuing a Penalty Infringement Notice (PIN),
- Issuing a Court Attendance Notice (CAN),
- Commencing legal proceedings

Council Officers seldom have to utilise formal powers of entry as most members of our community accept and facilitate the Council Officers in providing access and assisting with investigations. In the rare circumstance that cooperation is not afforded Council will obtain search warrants and use every power required to facilitate a proper investigation of allegations.

7.3 Limitations of Powers of Entry

No Council officer is authorised to use force for the purpose of gaining entry. Where force is required to be used, access will be gained by search warrant and/or a specific resolution of Council and Council will seek that the NSW Police Service supervise entry for Work Health and Safety purposes.

8 Nature and Seriousness of the Breach

The investigation will determine the nature and seriousness of the breach.

The investigation will classify the nature and seriousness of the breach in the following general terms;

1. **negligible**, - little or no environmental harm – no significant risk to life safety – no ongoing breach with any significant consequence – technical breach – objectives of relevant laws may be achieved notwithstanding breach.
2. **minor**, - little environmental harm – minor impact upon public health safety of convenience - breach remedied by offender already – no ongoing breach.
3. **moderate**, - environmental harm – adverse impacts on public health safety and convenience – no continuing breach – may be remedied by appropriate orders.
4. **severe**, or – serious environmental harm – serious impacts on public health, safety and convenience - ongoing breach(es) – may be adequately remedied by compliance with Council or Court orders.
5. **devastating** – irreversible environmental harm - continuing breach – threatened breach – Court orders may not adequately reverse environmental harm caused if it continues - urgent interlocutory injunction required to restrain activity.

In the case of an initial assessment determining that the nature and seriousness of the breach is devastating Council may move quickly to obtain interlocutory injunctions to restrain the activity and Court orders to remedy any harm already done. Council however, will not become involved in damages to third parties or third party claims for damages resulting from any breach of any Act.

This classification of impacts is commonly used to describe environmental impacts arising from the merits assessment of development applications and is a subjective assessment.

8.1 Relevant factors

In assessing the nature and seriousness of any breach the following factors will be considered.

8.1.1 Seriousness

1. the degree of harm or potential harm resulting from the breach, including whether it seriously endangers human health or safety, the environment, or the economic or social fabric of the community;
2. whether any environmental harm caused by the breach is temporary or long lasting;

3. the magnitude or degree of non-compliance – whether the breach is trivial or not;
4. whether the offence occurred on public lands and has harmed the value of those lands to the community;
5. the level of any unjust benefit to the alleged offender arising from the breach and whether the breach activity was motivated by financial gain.

8.1.2 Public Interest

1. Does the breach result in a failure to achieve the aims and object of the relevant laws including Acts, regulations, environmental planning instruments, development controls plans, the Building Code of Australia or relevant standards?
2. Does the breach result in a denial of procedural fairness to others?
3. Does the breach result in environmental harm?
4. Does the breach result in economic loss?
5. Does the breach result in an unsatisfactory social consequence?
6. Does the breach encourage further breaches?

8.1.3 Aggravating or mitigating factors

1. whether the alleged offender committed the breach deliberately or by mistake;
2. whether the alleged offender has shown a willingness to co-operate with Council and to comply in the future;
3. whether the alleged offender has a history of prior breach and, if so:
 - a. whether Council has taken action;
 - b. whether the breach is continuing (the alleged offender has not ceased or abated the offence); and
 - c. the length of time which has elapsed since the breach activity occurred.

The attitude of the alleged offender plays a significant role in determining how Council responds to an alleged breach.

9 Compliance and Enforcement Options

In broad terms Council compliance and enforcement options include:

1. Take no action (may include other statutory options);
2. Resolution by ADR
3. Counsel the alleged offender;
4. Issue a caution or reprimand;
5. Issue a PIN;
6. Issue Notices or Orders;
7. Commence summary proceedings;
8. Commence civil proceedings;
9. Report broader matters to Council

Statutory Options – Where a breach is a failure to obtain an approval or comply with an approval, remedies may include lodgment of an application and the merit assessment of such applications. Where an application has been lodged seeking to remedy a breach it may not be justifiable for Council to expend significant resources pursuing compliance and enforcement options until the application and any appeal has been determined. The only exception is where a proceeding, that may be lawfully commenced, may become statute barred. In such circumstances Council may commence legal proceedings to prosecute a breach whilst merit assessment and merit appeal remain undetermined.

9.1 Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution or ADR is usually an umbrella term for processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also mean *assisted* or *appropriate* dispute resolution. The main types of ADR are mediation, arbitration and conciliation.

ADR processes may be *facilitative*, *advisory*, *determinative* or, in some cases, a combination of these. The ADR practitioner in a facilitative process, such as mediation, uses a variety of methods to assist parties to identify the issues and reach an agreement about the appropriate resolution of a dispute. Advisory processes, such as conciliation or expert appraisal, employ a practitioner to more actively advise the parties about the issues and range of possible outcomes. A process can be selected to best suit a particular dispute.

There is currently no comprehensive legislative framework for the operation of ADR in Australia. Council's main formal exposure to ADR is through section 34AA of the [Land and Environment Court Act 1979](#). In civil proceedings the [Uniform Civil Procedure Rules 2005](#) provide for arbitration and conciliation.

Where the nature of the request relates to issues best resolved by ADR Council will promote mediation, arbitration and conciliation. Council's [Complaints Handling Policy](#) provides for ADR.

Community Justice Centres (CJC) provide free mediation services throughout NSW. Mediation is an informal, problem-solving process in which a neutral person (a mediator) helps people with a dispute come together to reach an agreement everyone can live with. Thousands of people use mediation services every year to talk about their disputes and reach a solution. CJC do not mediate criminal or civil enforcement matters by Councils.

See: <http://www.cjc.nsw.gov.au>

9.2 Caution or Reprimand

In exceptional circumstances where there has been no environmental, social or economic consequence of a breach and no antecedence, Council may elect to issue a caution or reprimand. These breaches may be technical breaches of complex laws where the person has acted in good faith but nevertheless committed an offence.

Where this option is taken the issuing of the Caution or Reprimand will be recorded on the public record and this record will be taken into consideration by Council and will be placed before the Court as a record of antecedences if any further offence is proven.

Offences that are generally subject to PIN are not subject to caution or reprimand.

9.3 Penalty Infringement Notices (PIN)

PIN are an effective enforcement tool. They provide a deterrent to breaches of many laws. PIN are extremely efficient as they are coordinated by the NSW State Debt Recovery Office (SDRO) through a single state wide integrated computer system.

Read more about the SDRO and PIN - <http://www.sdoro.nsw.gov.au/>

Council utilises PIN as the preferred enforcement option in the case of most breaches of the laws for which Council is the ARA.

Council's Building Surveyors, Senior Planners, Environmental Health Officers and Rangers have delegated authority to issue a PIN.

9.3.1 PIN Options

If a person or corporation receives a penalty notice they may choose to:



Pay

The payment of a PIN is not an admission of any guilt. The payment of a PIN is a simple and effective way to dispose of an alleged offence. Other than for specific offences that result in loss of points on a drivers licence, the consequence of paying a PIN is a monetary penalty. Payment arrangements may be made with the SDRO.



**Nominate
another
driver**

In the case of most parking offences the owner of the vehicle is liable for the PIN. However, where the PIN attracts a loss of driver licence points, such as No Stopping offences in school zones, the SDRO can be informed who the driver was at the time of the offence and the PIN will be reissued to the driver.



**Request
a review**

As a contractual requirement of the State Debt Recovery Office (SDRO) all representations seeking a review of a PIN must be made to the SDRO as detailed on the reverse of the infringement notice.

Note: Please choose carefully. From 31 March 2010, the law requires the SDRO cease considering any request for review once a court election is received. If you wish to submit a request for review by SDRO, **do not** also request to have the matter decided in court or refer to court election in your letter. Also, if you send a request for review it is unlikely that time will permit you to request to have the matter decided in court if the outcome of your review is unfavourable.

If you are unsure whether to request a review or choose to have the matter decided in court, the SDRO Review guidelines may assist you in your decision.



**Choose
to go to
court**

If an alleged offender elects to have a PIN heard in court, the PIN becomes a Court Attendance Notice (CAN) and the alleged offence proceeds before the court as a prosecution by the Council.

In the case of PINs for environmental offences and some other offences, many are criminal offences. Therefore, if the alleged offender chooses to go to Court it may proceed as a criminal prosecution.

The single largest risk, besides monetary penalty and the payment of Court costs (Council's enforcement and legal fees), is that if the Court finds a person (or company) guilty of the

offence, the person (or company) may be convicted of a criminal offence and receive a criminal record.

Payment of PIN for a criminal offence is not an admission of any guilt and there is no conviction recorded. Payment of a PIN relating to a criminal offence is recommended.

Instead of proceeding to court, the alleged offender can dispute or seek leniency for an offence by requesting a review by SDRO. You can use the form or send your request in writing by the due date on the original penalty reminder notice. Please attach all supporting documentation.

Choose carefully - Do not lodge a court election if you wish to request a review as the law requires the SDRO to cease any review upon receipt of a court election. If you seek a review and the outcome is unfavourable, you are unlikely to meet legislated deadlines for court election. You can contact the SDRO for assistance in deciding whether to request a review or proceed to court.

Read more about what to expect when going to court -
http://www.sdرو.nsw.gov.au/publications/online_court.html

9.4 Notices and Orders

Where the alleged offender has shown a willingness to co-operate with Council and to comply in the future or there are reasonable prospects that the alleged offender or responsible person will comply with notices or orders, Council may use such instruments.

The procedures under the various Acts differ in that procedural fairness provisions have been written into some Acts, triggering a requirement for a Notice of Intention to issue an order, before the issue of a final order. The exception is where there is a need to issue emergency orders or where the relevant Act recognises that matters likely to be subject to a notice or order are too serious to allow for delays caused by having to give notice and consider representations, before ordering that something needs to be done or not done.

Council officers will:

1. ensure they have delegations to issue the notice or order;
2. issues a Notice of Intention to Issue the Order where required (except in emergencies);
3. hear and properly consider representations where required (except in emergencies);
4. ensure that the reasons for giving the notice or order is clear "*as to the rationale for the giving of the order*" (J & J O'Brien Pty v South Sydney City Council [2002] NSWCA 259 at 49).

There are a number of matters where notice of intention will not be given, they include but are not limited to, urgent fire safety, food, pollution, public health, road, companion animals, and impounding matters. It is at the discretion of the issuing officer to determine what constitutes an emergency and the officer will document the reasons why they have made such a decision.

A person may, in accordance with a notice, make representations concerning a notice or order.

Under the Local Government Act 1993 and the Environmental Planning & Assessment Act 1979:

- the person may be represented by a barrister, solicitor or agent
- the person who gives the order, or a nominated person is required to hear and consider any representations made.
- after hearing and considering these representations, it may be determined to give the proposed order, give a modified order, or not give an order at all
- if the determination is to give an order with modifications, the person who gives the order is not required to give notice of these.

Council, having regard to the rules of procedural fairness will take into proper consideration all facts and submissions before them from time to time.

At every step in the process of dealing with notices and orders Council officers will have regard to the current circumstances, any representations and this policy's other enforcement options. Council may elect at any point to utilise another compliance or enforcement option.

Where a notice or order is not complied with, Council will determine whether to pursue civil or summary legal proceedings. This decision will be based on this Policy.

Council maintains a register of Outstanding Notices or Orders. An application can be made to Council for a certificate which outlines whether any outstanding notices or orders have been issued for properties in Mosman.

9.5 Summary enforcement proceedings (Prosecution)

Summary enforcement proceedings are commenced in the Local Court by Council staff issuing a Court Attendance Notice (CAN) to the alleged offender. More serious environmental offences proceed in the Land and Environment Court.

Council can elect to proceed in either jurisdiction. Most matters proceed in the Local Court which provides the just, quick and cheap resolution of most alleged criminal breaches.

The Land and Environment Court is reserved for more serious environmental offences where high level consideration of environmental harm is required.

A prosecutor is a "minister of justice". The prosecutor's principal role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness.

A prosecutor is not entitled to act as if representing private interests in litigation. A prosecutor represents the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest. The "public interest" is to be understood in that context as an historical continuum: acknowledging debts to previous generations and obligations to future generations.

Source: Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales 1 June 2007

Council's advocates are expected to apply the Director of Public Prosecutions Guidelines .

9.6 Civil enforcement proceedings (Court Orders)

Civil enforcement proceedings seeking Court orders to restrain or remedy breaches (or potential breaches) are generally commenced in Class 4 proceedings before the Land and Environment Court.

Interlocutory injunction is only sought when the nature and seriousness of the breach is severe or devastating and where irreparable environmental, economic or social harm would arise without the alleged breach being restrained.

Civil enforcement may be taken in preference to issuing a notice or order where the nature of the matter could turn upon whether the relevant Act allows the notice or order to proceed or there are significant prospects that there will be a procedural challenge to the notice and orders process.

Where any breach or threatened breach would occasion irreversible environmental harm, that is harm that could not be remedied by compliance with Council or Court orders at a later date, interlocutory injunctions may be sought to restrain that potential or actual breach.

9.7 Report broader matters to Council

Council officers may take prospect of success advice from the Council's solicitor and/or counsel.

Where a decision to take compliance or enforcement action may impact upon Council policy, undermine or abandon a strongly held position or result in extreme costs with an inherent risk of the proceedings failing, based on prospects of success advice, Council officers may elect to report the matter to Council.

The decision to proceed with such proceedings will then be subject to a resolution of Council having a full understanding of all elements of the compliance and enforcement matter.

10 Service Standards

10.1 Taking and recording customer request

All customer requests and complaints are recorded by Council in accordance with the *State Records Act 1998*.

All persons who make a written action request about alleged unlawful activity will be acknowledged within two (2) days.

10.2 Assessment

A request for compliance and enforcement action will be assessed in accordance with section 2 of this policy and the person making the request will be advised of how the matter will proceed within 14 days.

10.3 Investigation

Where the assessment has determined to formally investigate the request and any allegations made by the request, the investigation will proceed within 14 days of that determination.

10.4 Determination of appropriate enforcement option

Council will determine the most appropriate enforcement option(s) having regard to the nature and seriousness of the breach and the public interest.

Council will weigh up the public interest or benefits that will be served against the cost to the Council, and the community, of taking enforcement action.

In considering the 'public interest' Council will have regard to whether the unlawful activity;

- will impact on a significant number of people;
- will impact on disadvantaged or marginalised groups;
- is indicative of a systemic flaw;
- is individual in nature but often occurs;
- has attracted sustained public attention and no alternative resolution is proposed or likely; and
- flouts Council's authority.

10.5 Case Management

We will at all times:

- a) avoid litigation, wherever possible (but not at the expense of deterring breaches)
- b) not commence any litigation where it is statute barred or estoppel exists,
- c) ensure that we weigh up the public interest or benefits that will be served against the cost to the Council, and the community, of taking compliance and enforcement action,
- d) act with complete propriety, fairly and in accordance with the highest professional standards,
- e) not cause unnecessary delay in the handling of litigation,
- f) act consistently in the handling of litigation,
- g) not take advantage of a person who lacks the resources to litigate,
- h) not relying on technical issues unless the interests of the Council would be prejudiced by the failure to comply with a particular requirement,
- i) not undertake or pursue proceedings or appeals unless the Council believes that it has reasonable prospects for success and it is justified in the public interest, and
- j) seek to limit legal costs to Council and the other party.

This does not prevent,

- a) enforcing cost orders or seeking to recover costs;

- b) relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;
- c) pleading limitation periods;
- d) seeking security for costs;
- e) opposing unreasonable or oppressive claims or processes;
- f) requiring opposing litigants to comply with procedural obligations; or
- g) moving to strike out untenable claims or proceedings.

11 Review of Compliance and Enforcement Decisions

Where a compliance or enforcement decision is to be reviewed, a more senior officer of Council than the officer who made the decision will undertake the review. Where a compliance or enforcement decision of the General Manager is to be reviewed it will be reviewed by the General Manager.

12 Dictionary

- ARA means appropriate regulatory authority as defined by the POEO Act or as otherwise determined by Council.
- CAN means 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.
- Caution means a 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. (Less serious than a reprimand)
- Complainant means in the context of this policy means a person lodging a request.
- Complaint means "Complaint" are a limited class of request where the customer specifically refers to a staff member's behaviour or performance as the matter of concern. A separate process is available for the review of complaints against staff and such complaints do not form part of this policy.
- Council means Mosman Council
- Defendant means the accused person against whom criminal proceedings are brought.
- EPA Act means *Environmental Planning and Assessment Act 1979*.
- Estoppel is a 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.
- Fines Act means Fine Act 1996
- GIPA means Government Information (Public Access) Act 2009
- ICAC means Independent Commission Against Corruption established under the Independent Commission Against Corruption Act 1988 and Independent Commission Against Corruption (Commissioner) Act 1994
- Informant means the person whom brings about criminal proceedings.

- LG Act means *Local Government Act 1993*
- POEO Act means *Protection of the Environment Operations Act 1997*
- Procedural Fairness mean the the procedures used by a decision-maker, rather than the actual outcome reached. It requires that 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. 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.
- Reprimand means a rebuke or censure given instead of a penalty to somebody who has done something unauthorised or illegal, advising that enforcement action will follow if it is repeated. (More serious than a caution)
- Request means a person's request to Council to investigate an alleged breach. It is not a complaint as defined.
- Roads Act means *Roads Act 1993*
- SDRO means State Debt Recovery Office
- Statute Barred means proceedings are prohibited from being commenced because of a statutory time limit within which such proceedings must be commenced.
- Statutory Discretion means the statutory discretion of Council as detailed by Part 6 of this policy.
- Technical breach is a minor divergence from the terms of an Act, Regulation, Order, Development Consent or other document or direction, but is not a failure to comply with an order or direction of any Court which may be contempt of court upon such a judgement.
- Unlawful activity mean any activity or work that has been or is being carried out; 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; and/or contrary to the terms or conditions of a development consent, approval, permit or licence.

13 Acknowledgments

The following policies and guidelines informed the drafting of this policy:

Council Compliance & Enforcement Policies

Council	Title	Year
Cessnock City Council	Ranger Enforcement Policy	
Port Stephens Council	Compliance Policy	2007
Singleton Council	Compliance & Enforcement Policy	2008
Wyong Shire Council	Enforcement Policy	2006
Blue Mountains City Council	Enforcement Policy	2006
Brisbane City Council	Prosecutions Policy	
Byron Shire Council	Unauthorised Development and Activities Policy	
City of Ryde	Enforcement Policy	2008
City of Ryde	Environmental Incidents from Building and Construction Sites – Enforcement Policy	
Hornsby Shire Council	Hornsby Shire Council Compliance Code	2006
Hurstville City Council	Enforcement Policy	28 May 2008
Hurstville City Council	Private Principle Certifying Authority Complaints Policy	May 2008
Oberon Council	Unauthorised Development Works and Other Activities Policy	
Shoalhaven City Council	Compliance Policy	2007
Warringah Council	Compliance and Enforcement Policy	2007
Woollahra Municipal Council	Enforcement Policy	2007
Ombudsman (NSW)	Enforcement Guidelines for Councils	2002
Office of Director of Public Prosecutions (NSW)	Prosecution Guidelines	2003