



Enforcement Policy

Policy Statement

This policy aims to provide a consistent and transparent approach to enforcement action which follows the principles of natural justice and procedural fairness.

Related Legislation, Circulars or Guidelines (as amended)

- Roads Act 1993
- Impounding Act 1993
- Companion Animals Act 1998
- Food Act 2003
- Public Health Act 1991
- Swimming Pools Act 1992
- Noxious Weeds Act 1993
- Rural Fires Act 2008
- Contaminated Land Management Act 1997
- Environmental Planning and Assessment Act
- Local Government Act 1993
- Library Act 1939
- Crown Lands Act 1989
- Australian Road Rules 2008
- Graffiti Control Act 2008
- Road Transport Act 2005
- Protection of the Environment Operations Act 1997 and the various Regulations made there under.

Does this Document Replace an Existing Policy, Procedure or Plan? **NO**

Related Council Policy or Procedure **N/A**

Application and Distribution

It is mandatory for all Council officials to comply with this Policy.

This Policy and Guideline is available on Council's website under Council Policies.

<p>Approved by: Executive Team..... [Meeting date]</p> <p>Council : 10/02/2011 CB11/2 [Meeting date & Resolution No.]</p>	<p>Signature:</p> <hr/> <p><i>General Manager</i></p>
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Responsible Council Department/Officer: Manager Land Use Management

Version History Table:

RESPONSIBILITIES

Position	Directorate	Responsibility
General Manger	Executive	To lead staff, (either directly or through delegated authority) in their understanding of, and compliance with, this policy and any related procedures. To approve resources to develop, implement and review this policy.
Director	Director Land Use Health & Development	To communicate, implement and comply with this policy and any related procedures.
Executive & Managers	All Directorates	To communicate, implement and comply with this policy and any related procedures To lead staff in their understanding of, and compliance with, this policy.
All Council officials	Council	To comply with this policy and any related procedures.

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1. PREFACE

A Council is created under legislation (the Local Government Act 1993) and has powers of regulation by that Act. A Council does not have the status, privileges and immunities of the Crown but rather has powers prescribed by NSW legislation. Many of Councils' regulatory functions are derived from the Local Government Act. Other Acts relevant to Council's regulatory powers are referenced in this policy. As a body created by legislation, a Council cannot change the law and has a duty to uphold the law as created by the NSW Parliament. This policy sets out the procedures and principles which are adopted by the Council in undertaking its duty.

Coffs Harbour City Council is involved in a broad range of regulatory activities. In recognition of the increase in the regulatory role of all Council's, the NSW Ombudsman in June 2002 published "Enforcement Guidelines for Council's" including a Model Enforcement Policy. That model enforcement policy forms the basis of this Coffs Harbour City Council Policy.

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

2. PURPOSE OF POLICY

Coffs Harbour City Council's core values reflecting responsive and responsible regulation, and fairness and equity will apply to any action taken in accordance with this policy.

The Council acknowledges that it has an obligation under Section 8 of the Local Government Act 1993 to ensure that the exercise of its regulatory powers are carried out in a consistent and without bias manner.

3. POLICY OBJECTIVES

The objective of this policy is to establish clear guidelines for the exercise of discretion in dealing with proactive regulatory action by Council and customer service requests or complaints about unlawful activity. It provides a framework for:

- Assessing whether complaints require investigation;
- Options for dealing with unlawful activity;
- Determining appropriate enforcement action.
- This policy also provides information to the public and other government agencies about Council's role in enforcement matters and is designed to ensure that the enforcement process is conducted effectively and efficiently whilst being consistent with the principles of natural justice and procedural fairness.

4. ENFORCEMENT PRINCIPLES

Coffs Harbour City Council is committed to:

- Acting in the interest of protecting community health/ safety and or the environment;
- Acting consistently, fairly and impartially;
- Preventing discrimination on the basis of race, religion, sex, national origin, political association or other personal reason/s;
- Ensuring the proposed enforcement action is in keeping with the relative severity of the offence/s;
- Ensuring enforcement action is taken against the right person for the correct offence;

- Ensuring that any actual or potential conflict of interest situations are managed in a fair, consistent and impartial manner;
- Disclosing all evidence relevant to the alleged offence/s as and when required by law.
- Assisting the Court by providing all necessary information whether or not that information is in favour of the Council case;
- Issuing cautions to the alleged offender/s in accordance with SDRO and legislative guidelines and in keeping with public interests.
- Making cost effective decisions concerning enforcement action having regard to the likely outcome at court;
- Ensuring action is instigated within legislative time limits.
- To conduct investigations with the highest regard to professionalism and integrity in each case.

5. APPLICATION

This policy applies to the investigation and enforcement of complaints about unlawful activity or failure to comply with the acts, regulations, policies, terms or conditions of approvals and/or orders as policed by the Coffs Harbour City Council's Authorised Officers from time to time.

While primarily directed at the regulation of development activity, the policy is also applicable to pollution control, regulation of parking, control over animals, unauthorised development including buildings, non-compliance with development consent conditions, food safety, public health and safety issues, tree/s removal, land clearing, library misdemeanour/s, water supply, sewerage and trade waste and abandoned vehicles and articles.

6. RESPONSIBILITY

6.1 Council Staff

All the Council staff who deal with the proactive enforcement of relevant legislation in addition to written and verbal action requests or complaints alleging unlawful activity is responsible for implementing these policy guidelines.

All notifications of alleged unlawful activity or related requests shall be logged in Council's customer request system.

All matters reported will be investigated by the relevant Council staff unless:

- The Council has no jurisdiction over the matter (e.g. NSW Work Cover issues on building sites or some internal matters within strata buildings etc); or
- The activity is determined to be lawful without an investigation; or
- The complaint is deemed to be frivolous or vexatious in nature.

If a decision is made not to investigate a complaint, the complainant will be notified and advised of the reasons why the complaint was not investigated or why the use/building etc was not deemed to be unlawful.

6.2 Principal Certifying Authority (PCA)

Principal Certifying Authorities are companies and/or individuals who are generally registered building surveyors responsible for undertaking mandatory building inspections as work progresses on a construction site. They are also the authority responsible for ensuring compliance with the conditions of development consent. Principal Certifying Authorities can be Council officers or private certifiers.

Persons making complaints regarding a site where the Principal Certifying Authority is a private certifier will be advised to contact the certifier. Where a complaint is received in writing regarding a site under the responsibility of a private certifier, Council will forward the complaint to the private certifier registered in Council's records and will advise the complainant of this action and the name and contact details of the Private Certifier for action.

Council will investigate matters where:

- The PCA fails to or is unable to appropriately action a matter or where it is in the immediate public interest for Council to investigate;
- The PCA has taken all the action available under the legislation, but the offence continues or re-occurs despite the action;
- Where the complaint relates to Council property; and/or
- Where the complaint relates to an environmental pollution incident

6.3 Building Professionals Board (BPB)

The Building Professionals Board is an authority established by the NSW Government to accredit private certifiers to issue Construction, Occupation, Subdivision, Strata, Compliance and Complying Development Certificates under the Environmental Planning and Assessment Act 1979, and the Strata Schemes (Freehold Development) Act 1973 and Strata Schemes (Leasehold Development) Act 1986. The Board also investigates complaints against accredited certifiers and audits accredited certifiers and Councils in their certification roles.

Under Section 21 of the Building Professionals Act 2005, any person can make a complaint to the BPB in relation to the professional conduct of an accredited certifier. Before making a complaint against an accredited certifier, it is recommended that the complainant contact the certifier first to discuss the complaint and to allow the certifier to consider the matters raised in the complaint and take any appropriate action available to the certifier.

It should be noted that private certifiers are not bound by the terms of this Enforcement Policy.

7. DEFINITIONS

'Unlawful Activity' is any activity or work that has been or is being carried out on any land:

- Contrary to the terms or conditions of a development consent, approval, permission or other written authorisation from the Council;
- Contrary to an environmental planning instrument that regulates the activities or work that can be carried out on a particular land
- Contrary to a legislative provision regulating a particular activity or work;
- Without required development consent, approval, permission or the like;
- Contrary to New South Wales legislation for which the Council is the appropriate regulatory authority.

'Register of Delegations' and 'Implementation of Delegated Authority' means the Delegations Register adopted by Coffs Harbour City Council from time to time and any Implementation of Delegations adopted by Council from time to time.

8. INVESTIGATING UNLAWFUL ACTIVITIES

In considering whether a complaint will warrant enquiry or investigation the Council will consider a range of factors:

- Is the matter within the jurisdiction of the Council

- Is the complaint premature e.g. does it relate to some unfinished aspect of work that is still in progress?
- Is the activity or work permissible with or without consent?
- If the activity is permissible with consent, is there consent in place?
- Is it possible to determine from the information available to the Council whether the activity or work is permissible without consent and/or whether all conditions of consent are being complied with?
- Is the complaint trivial, frivolous or vexatious?
- Has too much time elapsed since the events the subject of complaint took place?
- Is there another body that is a more appropriate agency to investigate and deal with the matter?
- Is the activity having a significant detrimental effect on the environment, or does it constitute a risk to public safety?
- Does the complaint indicate the existence of a systemic problem e.g. if the complaint is one of a series, could there be a pattern of conduct or a more widespread problem?
- Is there a history of related complaints against this person or organisation?
- Does the complaint have special significance in terms of the priorities of the Council?
- Are there significant resource implications in relation to an investigation and any subsequent enforcement action?
- Is it in the public interest to investigate the complaint?
- The effective use of resources having regard to the circumstances of the case.

If the decision is made not to investigate a complaint, this decision must be recorded with the reasons for that decision and the complainant so advised.

9. RESPONDING TO COMPLAINTS

Every effort will be made to ensure that all Customer Requests or complaints about alleged unlawful activity are actioned within the 'service standard' time allowed for resolving the category of complaint as indicated in the Customer Request system.

Council will make every effort to instigate preliminary investigation within the following time frames:

- Urgent and life threatening matters should be actioned as soon as possible following receipt of the complaint. Examples include unsafe building works, dangerous awnings, collapsed building/wall, serious pollution, food safety issues and public health and safety matters, etc. as a guide these matters should be dealt with on the day of the receipt of a complaint.
- General compliance matters will be dealt with on a priority basis having regard to the relative seriousness of the matter. These examples include works not in accordance with consent or construction without consent, illegal use, noise and food complaints.
- Nuisance matters should be actioned within Management Plan Guidelines; examples include domestic noise matters, minor non-compliance such as overgrown land or other matters in which there are no likely immediate health or safety implications.

Note that response times may vary depending on staff and other resources. However the Council will acknowledge the complaint and keep the complainant informed in accordance with the service standards of the Council.

10. CONFIDENTIALITY OF COMPLAINANTS

The Council will respect the privacy and confidentiality of information received. However due to its statutory obligations and other requirements, confidentiality cannot always be guaranteed. In cases where the release of information is considered to be necessary the person who made the complaint will be consulted before such a decision is made. The complainant's identity may be disclosed where:

- The person consents in writing to the disclosure of that information; or
- The principles of natural justice dictate that information be disclosed to the person who is the subject of the complaint, which may enable the complainant to be identified; or
- The Council is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively.
- Legislative guidelines are adhered to (PIPPA).

11. OPTIONS FOR DEALING WITH CONFIRMED CASES OF UNLAWFUL ACTIVITIES

As indicated in Clause 8 above, Council will consider a range of matters before taking regulatory action:

Regulatory action is any formal or informal action taken to investigate, and rectify as necessary, infringements of the relevant legislation.

The options for taking regulatory action will differ where different pieces of legislation are used, but the principles of application remain consistent, i.e., the legislative requirements and evidence of a breach are required in each case.

Approaches which may be considered include (see summarised table in Appendix 1 on page 11 of this policy):

- Referring that complaint to an external agency for further investigation or prosecution
- Taking no action on the basis of a lack of evidence or for some other relevant reason.
- Counselling the subject of the investigation to educate them of the relevant Council requirements if it appears that there is a genuine ignorance or lack of understanding of legislative requirements etc.
- Negotiating with the subject of the investigation and obtaining some undertakings to address the issues of concern arising from the investigation e.g. an application for modification of development consent.
- Referring the parties for mediation with the Community Justice Centre or alternatively for private mediation.
- Issuing a letter requiring work to be done or activity to cease in lieu of more formal action.
- Issuing a notice of intention to serve an order or notice under relevant legislation, followed by service of an appropriate order or notice Local Government Act (LG Act) SS. 124 – 128, Environmental Planning & Assessment Act (EP&A Act) s. 121B, the Protection of the Environment Operations Act (POEO Act) Pts 4.2 – 4.4 and 8.6) and the Companion Animals Act, Sections 21, 34.
- Issuing a notice requiring work to be done under various legislation.
- Starting proceedings in the Land & Environment Court for an order to remedy or restrain a breach of the relevant Act or Regulation (s. 673 LG Act; s 123 EP&A Act)
- Seeking injunctions from the Land & Environment Court or the Supreme Court.
- Issuing a Court Attendance Notice in the Local Court.
- Issuing a penalty infringement notice.
- Taking proceedings for an offence against the relevant Act or Regulation (s 691 LG Act, s 125 EP&A Act, Chapter 5 POEO Act).

- Carrying out of the works specified in an order under the LG Act at the cost of the person served with the order (s. 678 LG Act)

In many cases following investigation, no further action is required for minor breaches where no serious impacts have occurred.

Whilst these approaches recognise that Council may use discretion in the process, Council is also obliged to uphold the law, including compliance with relevant administrative law principles (for example: acting fairly and equitably), and to act in the public interest.

Where appropriate, a staged approach to ensure compliance will be adopted. In the first instance businesses and individuals will be given the opportunity to discuss and remedy the breach before action is taken, unless immediate action is required due to the seriousness of the breach. All enforcement action will be monitored and a decision made in relation to non-compliance as soon as practicable.

12. TAKING ENFORCEMENT ACTION

From an operational perspective the Council has a range of enforcement options including, but not limited to the following:

- The issuing of a verbal warning;
- The issuing of a written warning;
- The issuing of a 'show cause' letter
- The service of a Notice of Intention to issue an Order
- The service of written or oral Notices/Orders/Directions;
- The issuing of a penalty infringement notice/s;
- The recommendation to instigate legal action;
- The waiving of certain fees and the granting of an extension of time for compliance;
- the revocation of an approval;
- The removal/impounding of abandoned motor vehicles, goods or items.

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

- Has the Council created an estoppel situation? Estoppel is a legal rule which prevents a person from later denying conduct or words which have been relied, and acted, upon by another person to their detriment.
- Is the breach a technical breach only?
- When was the unlawful activity carried out and for how long?
- How has the unlawful 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 complaint?
- Has the person the subject of the complaint 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?
- Is there sufficient evidence to establish a prima facie case?
- Has Council staff acted appropriately in investigating the matter and were standard procedures followed including officers having appropriate authorisation and delegation?

- 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?
- Is it in the public interest including there being a reasonable prospect of success?
- Has the alleged offender been given an opportunity, if appropriate, to provide information as to why enforcement action should not be instituted?
- Has the alleged offender been advised, if appropriate, that no response to a show cause letter will result in the commencement of enforcement action?
- What is the likely length and net expense of the legal action?

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

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

13. IMPORTANCE OF FOLLOW UP ACTION

Council staff will follow up matters particularly where a serious risk of harm is present. Council endeavours to follow up on previous action in all cases reasonably required to be followed up to determine compliance

This includes conducting follow up inspections or reinspections and resubmitting documents in the corporate information system on expiry of compliance periods for warnings, Notices and Orders issued.

14. BUILDING CERTIFICATE APPLICATIONS UNDER SECTION 149D OF THE ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979

Council recognises that persons who may have carried out unlawful works may apply for a Building Certificate under Section 149D of the Act to regularise or formalise such unlawful works. However, it is Council's policy that such applications should not be encouraged to justify unlawful works. Even where Section 149D is applied to illegal building works, a PIN or other regulatory action will usually be applied.

15. PROCESS FOR REQUESTS OR REPRESENTATIONS SEEKING RECONSIDERATION

To ensure that Council manages the penalty infringement process and enforcement action in a consistent, transparent, accountable and unbiased manner, any requests or representations seeking reconsideration or waiving of a Penalty Infringement Notice (PIN) are required to be made directly to the NSW Office of State Revenue. Requests to waive PINs are not to be made directly to Council.

The decision to waive a PIN must be made by the NSW Office of State Revenue. In some cases, the Office of State Revenue may consult with Council prior to making a determination.

To maintain the integrity of the Council's regulatory and enforcement functions, Council will not support the waiving of a PIN unless:

- it is evident that an error has been made in the issuing of the PIN, or
- the extent of evidence or circumstances may affect the successful defence of the infringement in the event of a Court hearing or appeal, or
- it is evident that Council has acted unreasonably in the issuing of the PIN, or
- Legal advice has been obtained and it is considered appropriate to support the waiving of the PIN on the basis of such advice.

16. DELEGATIONS FOR ENFORCEMENT ACTION

Council staff delegated to initiate various levels of enforcement action is set out in ***Council Register of Delegations*** and each relevant council staff member is issued with a Certificate of Authority. The legislation applicable to the delegation is as follows:

- Roads Act 1993
- Impounding Act 1993
- Companion Animals Act 1998
- Food Act 2003
- Public Health Act 1991
- Swimming Pools Act 1992
- Noxious Weeds Act 1993
- Rural Fires Act 1997
- Contaminated Land Management Act 1997
- Environmental Planning and Assessment Act
- Local Government Act 1993
- Australian Road Rules 2008
- Crown Lands Act 1989
- Protection of the Environment Operations Act 1997 and the various Regulations made there under.

17. RELATED POLICIES AND PROCEDURES

This policy should be read in conjunction with the following Coffs Harbour City Council policies:

- Swimming Pool Complaints Procedure
- Enforcement of Parking Restrictions Policy.

APPENDIX A – Warning Given Prior to Enforcement

As a guide the following offences may result in a prior warning being given before any enforcement action in the form of the service of an order or notice or penalty infringement notice or court action is undertaken.

- Annual Fire Safety Statement – non submission by owner
- Advertising signs without approval or unsightly
- Air pollution – smoky chimney
- Barking / Roaming dog, unregistered dog
- Commercial swimming pool not properly maintained
- Development/Activity without consent or not in accordance with a condition/s of consent
 - Minor development or old unauthorised development
 - Minor breach of consent condition/s
- Erosion & sediment control matters involving no imminent risk of pollution.
- Food safety/hygiene matters of a less serious nature
- Noise pollution
 - Air conditioner*
 - Intruder alarm*
 - Musical instrument and sound equipment*
 - Power tools*
 - Motor vehicle on residential premises*
 - Use of refrigeration equipment fitted to a motor vehicle*
- Non compliance with an Order/Notice/Direction-work partly done or other mitigating circumstances
- Obstruction of Public Place/Road – (Minor matters)
- Residential swimming pool issue not serious (e.g. resuscitation chart not provided)
- Revocation of an approval 9(e.g. footpath dining/place of public entertainment).

*Mandatory warning required by legislation

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

APPENDIX B – Enforcement of Offences Without Warning

As a guide the following offences may result in NO prior warning being given before any enforcement action in the form of the service of an order or notice or penalty infringement notice or court action is undertaken.

- Dangerous Dog Order / Attacking Dog / Restricted Dog
- Dangerous building / awning
- Dangerous waterhole
- Deposit litter from vehicle
- Development not in accordance with consent / risk to health & safety / bush fire protection / notice of intention issued by PCA

APPENDIX C - Options for Dealing with Confirmed Cases of Unlawful Activity

Council may consider the following range of actions available under the following Acts

Compliance Option	F	PH	SP	NW	CLM	EPA	LGA	POEO
Verbal Advice	✓	✓	✓	✓	✓	✓	✓	✓
Warning Notice	✓	✓	-	✓	✓	✓	✓	✓
Notices	✓	✓	-	✓	✓	✓	✓	✓
Orders	✓	✓	-	✓	✓	✓	✓	✓
Impound Articles	✓	-	-	-	-	-	-	-
Directions	✓	✓	✓	✓	✓	✓	✓	✓
Penalty Notice	✓	-	✓	✓	✓	✓	✓	✓
Prosecution	✓	✓	✓	✓	✓	✓	✓	✓

- F = Food Act 2003
- PH = Public Health Act 1991
- SP = Swimming Pools Act 1992
- NW = Noxious Weeds Act 1993
- CLM = Contaminated Land Management Act 1997
- EPA = Environmental Planning & Assessment Act 1979
- LG = Local Government Act 1993
- POEO = Protection of the Environment Operations Act 1997