

COMPLIANCE AND ENFORCEMENT GUIDELINE

PURPOSE

This guideline aims:

- To provide guidance to Council staff and the community with regard to the implementation of Council's Compliance and Enforcement Policy.

DEFINITIONS

For the purpose of this guideline, the following defined terms have been used:

Council:	means Cumberland Council
Estoppel:	means impediment preventing a party from asserting a fact or a claim inconsistent with a position he or she previously took, either by conduct or words, especially where a representation has been relied or acted upon by others.
Unlawful activity:	means any activity or work that has been or is being carried out: <ul style="list-style-type: none">▪ Contrary to the terms and conditions of a development consent, approval, permit or licence;▪ 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 license; or▪ Otherwise contrary to legislation (including a legislative provision regulating a particular activity or work), and includes alleged unlawful activity
Legal advice:	means legal advice received from Council's Corporate Lawyer or external legal advisors appointed by Council for that purpose.

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Penalty Notice (PN): means a penalty or fine, also known as an “on the spot fine” issued in lieu of prosecution for an offence and in accordance with the New South Wales Self Enforcing Infringement Notice (SEIN) System.

SCOPE

This guideline applies to the management and investigation of unlawful activity, and any enforcement action required in relation to unlawful activity, within the Cumberland Council local government area for which Council is the appropriate regulatory authority. The unlawful activity to which this guideline applies includes, without limitation, unlawful activity in relation to development, pollution, food safety, public health, parking, abandoned articles and companion animals.

Whilst it is intended that the principles in this guideline will have general application, there may be cases where the particular circumstances justify departure from these principles. This guideline also applies to an internal review where written representations are submitted.

PROCEDURE STEPS / GUIDING PRINCIPLES

Investigating unlawful activity

All complaints to Council regarding unlawful activity will be reviewed to determine whether the matter requires investigation. Council may also undertake proactive investigation of unlawful activity.

Priority will be given to matters where there is an imminent threat to health, life or property.

Further enquiries or investigations may not be appropriate where:

- The matter has already been investigated and resolved or it has been determined that no further action will be taken in the absence of new information;
- Council has no power in relation to the matter or is otherwise not the appropriate regulatory authority to investigate the matter. In relation to such matters it may be appropriate for Council to bring the matter to the attention of the appropriate regulatory authority or the nominated Private Certifying Authority;
- The activity is identified as being lawful without the need for an investigation.

When considering whether a report of unlawful activity or issue warrants investigation, Council officers may consider a range of factors including:

- Is the activity having a significant detrimental effect on the environment or is a risk to health, life or property?

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- Is the report of unlawful activity premature?
- Is the report of unlawful activity trivial, vexatious or frivolous?
- On the basis of the information available, is the activity permissible without consent or approval?
- If the activity is permissible with consent/approval, is there a consent/approval in place and have conditions of consent been complied with? Or, has an application been lodged to regularise the matter?
- What is the extent of delay between events referred to by the report of unlawful activity and the notification to Council and reasons given for such delay?
- Have there been previous reports of unlawful activity about the subject premises, person or organisation?
- Given the particular circumstances of the report of unlawful activity, are there significant resource implications in relation to any investigation and any subsequent enforcement action?
- What is the severity of the impact on the amenity of the community?
- Overall, is it in the public interest to investigate the report of unlawful activity?

Where a decision is made to not investigate a report of unlawful activity, this decision should be recorded by the responsible officer together with reasons for the decision.

Taking enforcement action

After conducting an investigation and determining that there is sufficient evidence to determine that an offence has occurred, officers should consider all relevant circumstances of the individual case to determine whether to take enforcement action or recommend that enforcement action be taken (in accordance with relevant delegations), and the level of enforcement action that is appropriate.

The circumstances for consideration to determine whether and, if so, what enforcement action (including prosecution) is appropriate and in the public interest may include:

- The seriousness of the breach, (including whether the breach is merely technical) or level of impact;

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- When the unlawful activity was carried out and for how long, including whether the breach is continuing;
- The harm or potential harm to the environment, health, life, property or amenity caused by the unlawful activity;
- The need for general and specific deterrence;
- Whether the breach can be easily remedied;
- Any mitigating or aggravating circumstances;
- Any prior warnings that have been issued to the person or previous enforcement action taken against the person;
- Whether Council has created an estoppel situation;
- Whether any requisite consent would have been granted if it was sought;
- Whether the person in breach shows or has shown contrition;
- Whether there is a draft planning instrument that would make any unauthorised use lawful;
- The degree of culpability of the alleged offender;
- Whether an alternate approach would be more appropriate than a coercive approach;
- The prospects of success if the proposed enforcement action were challenged in court;
- What action would be proportionate and reasonable;
- Any precedent which may be set by not taking enforcement action;
- The availability and efficacy of any alternatives to prosecution;
- Whether the offender had been dealt with previously by non-prosecutorial means;

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- Whether the breach is a continuing or second offence;
- Whether the issue of Court orders are necessary to prevent a recurrence of the offence;
- The length of time since the alleged offence;
- Whether there are counter-productive features of the prosecution;
- The likely outcome in the event of a conviction having regard to the sentencing options available to the court;
- Whether proceedings are to be instituted against others arising out of the same incident;
- Whether the action will result in people becoming homeless;
- The matter is currently before the court.

Enforcement action (including prosecution) will not be undertaken for an improper purpose and will not be influenced by:

- a) Any matter that would constitute unlawful discrimination against a person;
- b) Personal empathy or antipathy towards a person; and
- c) Political affiliations or any other association.

Options for taking enforcement action

Council will endeavour to use the most appropriate action based on the individual circumstances of each case.

Where an investigation has been undertaken and it is considered that there is sufficient evidence to determine that an offence has occurred, a number of approaches may be considered for dealing with the incident. These may be subject to, among other things, the powers provided under the governing legislation. The approaches which Council may consider when determining what action to take include, but are not limited to:

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- No action;
- Referral to an appropriate external regulatory authority;
- Verbal warnings;
- Written warnings, including formal cautions;
- Seek voluntary compliance in order to regularise the matter (e.g., through written undertakings);
- Alternative methods of resolution, such as mediation and education;
- Issuing of Directions, Notices and Orders;
- Penalty Notices;
- Civil proceedings in Court;
- Criminal proceedings in Court;
- Contempt proceedings in Court;
- Council undertaking the requisite work and recovering the cost of doing so.

Accordingly, the appropriate strategy will depend on the individual circumstances of the case and an escalating approach may be appropriate.

Officers who issue Penalty Notices under the *Fines Act 1996* must have regard to the guidelines issued by the Attorney General under section 19A(3) of the *Fines Act 1996* entitled *Caution Guidelines under the Fines Act 1996* in deciding whether to give a person a caution for a Penalty Notice offence.

All decisions to take enforcement action (including all decisions to commence civil proceedings or prosecution) shall be made in accordance with the relevant delegations and appointments.

Enforcement action will be monitored and a decision made in relation to what action to take in relation to non-compliance.

Discretion

Like any discretionary decision, there are several important requirements that Council must observe for the decision to be lawful, which include:

- An officer's power must only be used for a proper purpose (i.e. within the lawful scope and purpose for which the power was given).
- The decision-maker must give proper, genuine and realistic consideration to the merits of the particular case.
- The decision-maker must consider only relevant considerations and must not consider irrelevant considerations in reaching a decision (i.e. the decision must not be manifestly unreasonable).
- The decision-maker must give adequate proportionate weight to relevant factors.
- The decision-maker must exercise discretion independently and not act under the dictation or at the behest of any third person or body.
- The decision-maker must observe the basic rules of procedural fairness (i.e. natural justice).
- The decision-maker must not act in a way that is biased.

Responding to complainants

In all circumstances complaints will be responded to in accordance with the appropriate Council Policy or Guideline. However in some circumstances it may not be appropriate to discuss the details and outcomes of an investigation and subsequent legal action with anyone, including the person originally lodging the report of unlawful activity. Confidentiality of information, of all parties, will be dealt with in accordance with the *Privacy and Personal Information Protection Act 1998* and the *Government Information (Public Access) Act 2009*.

Role of Council where there is a private certifier

Where a private certifier is appointed, it is not council's responsibility, in the first instance, to ensure building and construction compliance.

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Private certifiers have enforcement powers as the PCA. They have the power to issue a notice of intention to issue an order to the owner or builder to comply with the conditions of consent or rectify any breaches. A copy of any notice of intention issued by a private certifier must be provided to council for assessment as to whether council will enforce the notice by issuing an order.

Council and private certifiers should endeavour to work together 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.

When Council has determined that a private certifier has, or is, not acting in accordance with provisions of the *Building Professional Act 2005* or *Building Professionals Regulation 2007*, a formal complaint is to be made to the Building Professional Board as provided under *Part 3 section 21* of that Act.

Role of Councillors and Administrator in enforcement

Decision making relating to the investigation of reports alleging unlawful activity and taking enforcement action is the responsibility of appropriately authorised council staff.

Councillors or administrator are required to adhere to all of the requirements of the Cumberland Council Code of Conduct, for example; under clause 6.7(g) Councillors and Administrators, must not, '*directing or pressuring Council staff in the performance of their work, or recommendations they should make*'.

Councillors or administrator can assist individuals who raise concerns with them by satisfying themselves that their council's policies are being carried out correctly, however they cannot ignore or alter a Council policy.

Council will delegate the General Manager authority to adopt and review operational guideline documents to ensure best practice in handling reports of unlawful activities.

Representations on action

How to make a representation

Representations should be submitted in accordance with the Compliance Review Panel Operational Guideline and contain all information relevant to the matter. The Compliance Review Panel can determine to receive any written representation for review, so long as all of the information required to give consideration and determine the matter, is provided.

Directions, Notices & Orders

Directions, Notices and Orders may be formally appealed in terms of specific legislation.

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In addition, Council may internally review any Direction, Notice and Order it issues for accuracy and error and take appropriate action to redress this, including but not limited to; amending the Direction, Notice and Order, or withdrawing the Direction, Notice and Order.

Note: Representations received regarding Directions, Notices or Order shall have no effect on the legal timeframes permitted for right of appeal timeframes specified in the relevant legislation for the action being taken. It is the responsibility of the affected party to ensure that compliance with the statutory appeal period.

Penalty Notices

All representations in relation to Penalty Notice issued by Council must be made to Revenue NSW.

Council will not conduct a merit based assessment on any Penalty Notice, as all representations must be made to Revenue NSW.

Where Revenue NSW refers a Penalty Notice representation to Council for direction, the representations will be referred to Council's Compliance Review Panel for consideration and recommendation back to Revenue NSW.

Any representations directly received by Council will be forwarded to Revenue NSW and the person making the representation informed of this action.

Council may review any Penalty Infringements it issues for accuracy and error and take appropriate action to redress this, including but not limited to; amending the Penalty Notice, or withdrawing the Penalty Notice.

Compliance Review Panel (CRP)

A Compliance Review Panel (CRP) will be convened in accordance with the Charter stipulated in APPENDIX A of this guideline, in order to:

- a) Ensure openness and transparency in the decision making process with regard to enforceable Directions, Notice & Orders.
- b) Ensure openness and transparency in the decision making process with regard to Penalty Notices, where Revenue NSW refers a Penalty Notice (PN) to Council for direction.
- c) Ensure a balanced assessment is made against each representation to a PN, Direction, Notice, Order and that State Guidelines and Council Policies are consistently and fairly considered and applied;
- d) Ensure consistent outcomes on PN, Directions, Notice, Order matters

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Any members of the public requesting information on decision made by the CRP must submit a GIPA application for consideration.

ROLES & RESPONSIBILITIES

All Council staff who deal with unlawful activity are responsible for implementing this guideline.

Relevant Council officers are to be given appropriate delegations in relation to unlawful activity.

All complaints alleging unlawful activity shall be logged in Council's records system as soon as practicable upon receipt and directed to a Council officer in the appropriate section.

Council officers responsible for the investigation of a matter shall keep a record of their actions.

Council officers generally have discretion whether or not to investigate or take enforcement action and, if so, how to do so. The issue of discretion is relevant to various Sections of this guideline and is addressed specifically on page 7.

RELATED DOCUMENTS AND COUNCIL POLICY

- Cumberland Council Complaints Management Policy
- Cumberland Council Compliance & Enforcement Policy

RELATED LEGISLATION

Boarding Houses Act 2012 & Regulations

Building Professionals Act 2005 & Regulations

Companion Animals Act 1998 & Regulations

Environmental Planning & Assessment Act 1979 & Regulations

Fines Act 1996 & Regulations

Food Act 2003 & Regulations

Graffiti Control Act 2008 & Regulations

Local Government Act 1993 & Regulations

Noxious Weeds Act 1993

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Protection of the Environment Operations Act 1997 & Regulations

Public Health Act 2010 & Regulations

Roads Act 1993 & Regulations

Roads Transport Act 2013 & Regulations

Swimming Pools Act 1992 & Regulations

ACKNOWLEDGMENTS

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

Government Agency Compliance & Enforcement Policies

Government Agency	Title	Year
Penrith City Council	Compliance & Enforcement Policy	2016
Warringah Council	Compliance & Enforcement Policy	2012
Mosman Council	Compliance & Enforcement Policy	2012
City of Parramatta	Regulatory Services Enforcement Policy	2009
Auburn City Council	Compliance & Enforcement Policy	2015
NSW Ombudsman	Model Compliance & Enforcement Policy	2015
NSW Planning	Prosecution Guidelines	2010
NSW Food Authority	Compliance & Enforcement Policy	2015
NSW EPA	Compliance Policy	2013
NSW Health	Prosecution Policy & Guidelines	2014

AUTHORISATION & VERSION CONTROL

Procedure Owners	<i>Director Works & Infrastructure & Director Environment & Planning</i>
Date Adopted / By Whom	<i>2 March 2017 adopted by Leadership Team LT021/17 Version 3 – June 2019 adopted by Council on</i>
Version No / Date last Reviewed	<i>Version 1 – 2 March 2017 Version 2 – November 2018 Version 3 – June 2019</i>
TRIM Number	<i>HC-08-04-2/02</i>

Next Review Date

1 September 2021

APPENDIX A

COMPLIANCE REVIEW PANEL CHARTER

1. Owing to statutory appeal processes, determinations made by the Compliance Review Panel (CRP) are final and cannot be appealed except through due legal process.

2. Functions of the CRP

The functions of the CRP are to:

- a) To undertake a review of representations made to Council regarding the issuing of enforceable Directions, Notices and Orders issued under the relevant Acts & Regulations made thereunder where permissible.
- b) Make determinations on enforceable Directions, Notices and Orders issued under the relevant Acts & Regulations made thereunder.
- c) To undertake a review of representation made to Revenue NSW, that have been referred to Council by Revenue NSW, in response to Penalty Notices (PN's) issued by Council;
- d) Make determinations on PN's issued by Council (irrespective of their amount). Determinations available to the CRP include:
 - (i) cancelling the PN
 - (ii) cancelling the PN and issuing a formal caution
 - (iii) requiring the PN to stand
 - (iv) seeking additional or clarifying information
- e) Undertake a review of all PN's commenced by Officers but voided before being issued.
- f) Provide advice to the relevant manager in relation to regulatory matters as required.

3. Matters available for consideration by the CRP in determinations

In making determinations on Directions, Notices, Orders and Penalty Notices that have been referred to Council by Revenue NSW, the CRP may consider the following:

- a) The provisions of Council's Compliance & Enforcement Policy
- b) Was the Direction, Notice, Order or PN lawfully issued?

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- c) Are there any reasonable mitigating or aggravating factors to consider in the circumstances of the individual case?
- d) Did the Issuing Officer act professionally, lawfully and in accordance with Council policies and standard procedures?
- e) Does the evidence obtained establish prima facie that the offence is proven?
- f) Any legal advice received by Council.

4. Meeting Practices

A meeting of the CRP will consist of three (5) members with three members having voting rights. The panel members, including alternate panel members, will be broadly representative of the five directorates reporting to Council's General Manager. Positions marked as "Technical" members of the CRP are deemed to be CRP members for advice only and do not hold voting rights.

The Compliance Review Panel will invite Council's General Counsel or a solicitor or barrister to review all matters before the panel, either prior to or during a CRP meeting, and give appropriate legal advice. Any legal practitioner attending a CRP meeting does not hold voting rights.

The Panel to consist of the following roles:

Non-voting Panel Members	Non-voting Alternate(s)
Executive Manager Regulatory & Technical Services (Technical)	Manager Health & Environment Protection (Technical)
Manager Development Operations (Technical)	Executive Manager Development & Building (Technical)
Voting Panel Members	Voting Alternate(s)
Manager Executive Support	Manager Customer Service
Executive Manager Community & Place	Coordinator Social Research & Planning
Executive Manager Corporate Services	Coordinator Internal Audit & Risk
Secretary Function	Secretary Alternate
Senior Administration Assistant reporting to Manager Development Operations	Administration Officer reporting to Manager Development Operations

- (b) Proceedings of the CRP shall be by way of a closed meeting.
- (c) CRP will meet on fortnightly basis, subject to the requirement to review any representations received. The first meeting of each quarter shall consider item 1e).
 - (i) out of session meetings may be required dependant on matters requiring determination. In these instances reviews can occur electronically.
 - (ii) CRP members may alter the meeting frequency to account for Public Holidays, or other periods, that may affect the ability of the Panel to achieve a quorum.

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- (c) Determinations and any relevant decision of the CRP shall be made by majority votes of voting members present at a meeting.
- (d) Outcomes and decisions made will be communicated to the relevant Manager for implementation.