



WAVERLEY
COUNCIL

Compliance and Enforcement Policy

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PART A – Preliminary

1. Purpose

Waverley Council has an obligation under section 8 of the *Local Government Act 1993* to ensure that the exercise of its regulatory power is carried out with consistency and without bias. This policy refers to both an act and/or an omission by an alleged offender as 'unlawful activity'.

This policy is designed to assist Council decision-makers to investigate and assess unlawful activities and reach a responsive, effective and collaborative outcome. It 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 amendments by the NSW Government. However, this policy outlines Council's approach to compliance and enforcement.

The policy also outlines matters to be considered at the different stages of the assessment process and the range of enforcement options available to Council.

2. Scope

This policy applies to authorised Council staff who receive and respond to reports about alleged unlawful activities and regulatory matters. Council staff are not limited by this policy in their use of discretion and exercise of official functions. Some regulatory issues within Council's area of responsibility include, but are not limited to:

- development and building approvals
- pollution control
- fire safety
- food safety
- public health and safety
- noxious weeds
- water and sewer
- environmental health
- control over animals
- parking control
- tree preservation
- waste disposal

Complaints about Council staff are not covered by this policy. For information about Council's complaints process refer to the Complaints Management Policy.

3. Principles

Council will:

- give primary consideration to what is in the public interest when making decisions about taking or not taking legal action;
- put public health, safety and environmental impact ahead of private interests when making decisions about enforcement action;
- act in the best interests of the environment and community;
- take action that is transparent, consistent, fair and impartial
- ensure that any actual or potential conflict of interest situations are managed and resolved in a fair, consistent and impartial manner;
- disclose all evidence relevant to the alleged offence, including assisting the Court by providing all necessary information; and

- make cost effective decisions concerning enforcement action having regard to the likely outcome of a matter if taken to court.

4. Definitions

For this policy, the definitions are as follows:

Term	Meaning
Compliance	<ul style="list-style-type: none"> • Actions taken to obey the law, regulation, an order or policy.
Enforcement	<ul style="list-style-type: none"> • Actions taken in response to serious or deliberate contravention of laws.
Regulation	<ul style="list-style-type: none"> • Using a variety of tools and strategies to influence and change behaviour to achieve the objectives of an Act, Regulation or other statutory instrument administered by Council.
Report alleging unlawful activity	<ul style="list-style-type: none"> • An expression of concern or a request for service in relation to alleged unlawful activity, where a response or resolution is expected or legally required.
Unlawful activity	<ul style="list-style-type: none"> • Any activity or work that has been or is being carried out contrary to the below and/or failure to take required action in order to be compliant with: <ul style="list-style-type: none"> ○ terms or conditions of a development consent, approval, permit or licence ○ an environment planning instrument that regulates the activities or work that can be carried out on particular land ○ a legislative provision regulating a particular activity or work ○ a required development consent, approval, permission or licence.

Part B – Policy Contents

5.0 Shared enforcement responsibilities

Reports of unlawful activities made to Council can involve a shared regulatory responsibility with other authorities including the police, environmental authorities, NSW Fair Trade, Liquor and Gaming NSW and NSW Food Authority.

Where there is shared legislative responsibilities Council will liaise with the relevant authority to establish the following:

- which authority will take the lead in any joint investigation
- the activities each authority will carry out
- protocols for exchanging confidential information.

5.1 Role of Council where there is a private certifier

If a private certifier is appointed the Principal Certifying Authority (PCA), Council will forward the allegation of unlawful activity to the PCA for investigation in the first instance unless the matter is required to be dealt

with on a priority basis due to the seriousness of the allegation.

However, private certifiers have limited enforcement powers as PCAs. Private certifiers 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 to Issue an Order must be provided to Council to assess whether Council will enforce the notice by issuing an order.

Individuals will be encouraged to report unlawful activity to the private certifier first. Council staff will take steps to ensure individuals are clear about the Council's role.

5.2 Role of Councillors in enforcement

Individual Councillors do not direct Council staff in their day-to-day activities. Councillors can help individuals who raise concerns with them by satisfying themselves that the Council policies are carried out correctly. Councillors do not ignore or alter a policy to please an individual or a group.

Councillors may have the right to call for a report about a particular issue to a Council meeting.

6.0 Responding to concerns about unlawful activity

6.1 How reports alleging unlawful activity will be dealt with by Council

Council records and assesses every report alleging unlawful activity. Council responds to each report unless the report is anonymous or the person reporting indicates that they do not wish to receive a response.

Not all reports are investigated. A preliminary assessment is made to determine the priority of a response, and whether investigation or other action is required.

6.2 Confidentiality

Council officers do not disclose confidential or personal information. However, the identity of a person may be apparent, due to the nature and location of the matter being investigated. Confidential and personal information may be required to be disclosed in the following cases:

- The disclosure has been made after determination of an application made under the *Government Information (Public Access) Act 2009*
- The identity of a person has been disclosed in a publicly available document or report
- The individual consents to their identity being disclosed
- The matter is subject to legal proceedings

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

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

- provide a clear description of the problem
- give all available and relevant information to Council including any new information
- not give any information that is intentionally misleading or wrong
- cooperate with Council's inquiries and give timely responses
- treat Council staff with courtesy and respect
- allow the investigation to be completed without prematurely taking the matter to other agencies unless referred to by Council.

6.4 What parties can expect from Council

People who report alleged unlawful activity, can expect that Council staff will:

- treat them with courtesy and respect
- advise them of the outcome of the allegation reported
- explain decisions clearly in plain English
- assess any new information provided by any party after a decision has been made and advise whether further action will be taken.

6.5 Complaints about Council's enforcement actions

Any complaints about the conduct of Council staff in handling reports alleging unlawful activity will be recorded separately and dealt with under the Complaints Management Policy.

Where there is a dispute on Council's decision to take enforcement against a person or an organisation, they will be directed to make representations in accordance with any relevant internal and external appeal process.

6.6 Anonymous reports

Anonymous reports are recorded and assessed in accordance with this policy. However, because it is not possible to seek further information, it may be difficult to evaluate the allegations.

6.7 Alleged unlawful activities outside standard operating hours

Council may receive reports about alleged unlawful activities which occur outside of standard operating hours and on weekends. For example, alleged failure to comply with conditions relating to operating hours or use of plant or equipment at night. Investigations outside of standard operating hours are limited and based on an assessment of the risk of harm to public health, safety and the environment and the public interest.

6.8 Neighbour issues

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

Council staff will assess reports to determine whether there is evidence of possible unlawful activity requiring action by Council. Council will explain which aspects of a report they can deal with and which they cannot deal with.

NSW Community Justice Centres may be able to assist with neighbour complaints. For more information visit www.cjc.justice.nsw.gov.au.

7.0 Investigation of alleged unlawful activity

7.1 Council becoming aware of alleged unlawful activity

Council may become aware of alleged unlawful activities in different ways, ranging from compliance monitoring activities by Council staff to receiving reports from the general public.

Investigations are an important element in compliance and enforcement. Council will conduct them in a manner that is:

- objective, fair and impartial
- consistent with the presumption that an alleged offender is innocent until proven otherwise
- within the delegated authority of the investigating officer
- in line with the law
- respectful of individuals.

8.0 Taking enforcement action

8.1 Prioritisation of investigations

Not all reports and allegations made to Council require an investigation. A preliminary assessment is made to determine whether investigation or other action is required.

Council assesses reports of unlawful activity and gives priority to complaints in accordance with the following risk category:

Degree of harm from the offence:

High	<ul style="list-style-type: none"> • Large impact that has caused a high degree of actual harm or has potential to cause a high degree of harm to the environment, safety or amenity or any impact on the health of many individuals. • The effect has medium or long-term permanent environmental impact that will require remediation and/or mitigation works, or compensatory offset in some cases. • The offender has obtained an economic benefit from the non-compliance.
Medium	<ul style="list-style-type: none"> • An impact of medium extent that has caused some actual harm or has potential to cause harm to the environment, safety or amenity of some individuals. • The duration of the impact is medium-term, localised and may require remediation.
Low	<ul style="list-style-type: none"> • None or very little harm or potential harm to the environment or amenity and no actual or potential human health impacts. • A very small and temporary impact to the environment or to an amenity that is easily rectified.

Culpability of the offender:

High	<ul style="list-style-type: none"> • Subject to past enforcement activities. • Acted knowing that harm or potential harm to the environment and community could result. • Harm not abated, remediated or breach not rectified. • Wilful disregard of regulation or involved in misleading or dishonest conduct. • Motivated by financial gain. •
Medium	<ul style="list-style-type: none"> • Past non-compliance

	<ul style="list-style-type: none"> • Harm was unintentional, yet disregard for controls or conditions to prevent harm. • Non-compliance was of a short or medium duration, and operational standards were satisfactory at the time of the incident. • Harm abated quickly and remediation initiated.
Low	<ul style="list-style-type: none"> • Good performance history, non-compliance was of short duration caused by unforeseen circumstances or genuine misunderstanding of requirements. • Operational standards at the time of the incident were high. • Harm was avoided or quickly remedied.

8.2 Reports which may not be investigated

Council may decide not to investigate further if the initial assessment identifies that:

- the matter has already been investigated and resolved, or a determination has been made that no further action will be taken in the absence of new information
- the activity reported is considered to be lawful
- the complaint of unlawful activity is not supported with evidence
- Council has no jurisdiction to take action (e.g. matters under the jurisdiction of a State authority such as NSW Police, Safework NSW, NSW Environmental Protection Authority, NSW Food Authority, NSW Office of Fair Trading or the Building Professionals Board)
- the complaint relates to a private matter or serves to progress a private interest
- The matter may be resolved via alternative dispute resolution processes i.e. strata by-law or tenancy matters which may be resolved between the parties or through the NSW Civil and Administrative Tribunal (NCAT)
- the complaint is considered to be trivial or unreasonable

If a decision is made not to investigate the complaint based on reasons above, Council will record the decision. Where possible Council will advise the complainant of the decision.

8.3 Relevant factors guiding decisions about whether Council will take action

Council will consider a range of factors when considering whether to investigate. They include, but are not limited to:

- the activity is having a significant detriment to the environment and constitutes a public risk
- the report is premature as it relates to some unfinished aspect of work still in progress
- the activity is permissible with or without Council permission
- all conditions or consents are being complied with
- much time has lapsed between the events the subject of the report took place
- another body is a more appropriate agency to investigate and deal with the matter
- the person or organisation has been the subject of previous reports
- there are significant resource implications in relation to an investigation and any subsequent enforcement action.

9.0 Options for dealing with confirmed cases of unlawful activity

After determining that an unlawful activity has taken place, Council has a number of enforcement options available.

9.1 Informal Action

Warning	Issued for minor issues. For example, where education is the preferred first option.
Consultation	Consult and negotiate with the parties and/or obtain undertakings, to achieve a reasonable outcome and resolution of a particular matter.
Voluntary undertaking	Voluntary undertaking by the offender by entering in to an agreement with Council that the offender will remedy an issue that has already occurred or refrain from acting where a non-compliance is anticipated.

9.2 Formal Action

Criminal proceedings	<p>Taken for serious offences where there is sufficient evidence and the reasons for prosecution serves the public interest.</p> <p>Criminal proceedings are punitive and may result in the issue of a fine by the court, if the case is proven. There is generally no provision which enables the court to issue an order requiring the offender to remedy the breach or restrain the unlawful activity</p>
Civil proceedings	<p>In cases of a significant breach, environmental harm, life safety or ongoing offence, Council may commence civil proceedings in the Land & Environment Court, seeking an order from the court requiring the offender to do or refrain from doing something.</p> <p>In civil proceedings, the level of proof is based on the balance of probability, which is less onerous than that in the criminal jurisdiction. However, even if the breach is established, the court has the discretion as to whether or not an order will be issued.</p> <p><u>The costs of litigation may be substantial and the court may order the parties to pay their own legal costs or may order one party to pay the other parties legal costs in addition to their own costs.</u></p>
Formal caution	<ul style="list-style-type: none"> The breach is minor and does not pose a threat to the health and safety of the community, property and the environment.
Notice of intention to issue a Notice/Order	<p>Issued for unauthorised works where works are required to be re-instated in accordance with relevant approvals.</p> <p>Generally an infringement notice will be issued to act as a deterrent for any further unlawful activity.</p>
Emergency Order (without notice)	Issued where a building structure is compromised and is likely to cause imminent threat to public health and safety and works are being undertaken without permission.

9.3 Taking legal action

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

<p>Is there sufficient evidence to establish a case and the standard of proof?</p>	<p>Council will only take legal action once it is established that there is admissible, substantial and reliable evidence to the required standard of proof.</p> <p>Criminal proceedings</p> <ul style="list-style-type: none"> ▪ require that the available evidence establishes a <i>prima facie</i> case. The elements of the offence are required to be proved beyond reasonable doubt. <p>Civil proceedings</p> <ul style="list-style-type: none"> ▪ require sufficient evidence to satisfy the court that an actual or threatened breach has occurred on the balance of probabilities.
<p>Is there reasonable prospect of the case succeeding in court?</p>	<p>Court proceedings are expensive. Council will not take legal action unless there is reasonable prospect of success before the court. In making an assessment, Council staff will be guided by legal advice as to the likelihood of success of any action.</p>
<p>Does public interest require legal action to be pursued?</p>	<p>In making a determination on public interest Council staff will consider:</p> <ul style="list-style-type: none"> • the alleged offence and impact • nature, extent, severity of the unlawful activity • harm or potential harm to the environment and public health • seriousness of the breach • time period that has lapsed since the date of the unlawful activity. • in relation to the offender <ul style="list-style-type: none"> ○ any prior warnings, instructions, advice issued to the offender ○ whether offence committed with intent ○ whether offender was proactive with resolution ○ mitigating or aggravating factors ○ hardship affecting person or the organisation • the impact of any enforcement action <ul style="list-style-type: none"> ○ need to deter future unlawful activity ○ whether education is a more appropriate approach ○ prospect of success if proposed enforcement action was challenged in court ○ costs and benefits of taking formal enforcement actions as opposed to taking informal action ○ appropriate response to unlawful activity

	<ul style="list-style-type: none"> • the potential for remedy <ul style="list-style-type: none"> ○ whether breach can be easily remedied ○ whether consent would be given for the activity sought
Time within which to commence proceedings	There are legislative time limits. Legal action could be statute barred despite good evidence that unlawful activity has occurred.

PART – C Legislation, Policies and Procedures

10.0 Applicable Legislation

This policy applies to the enforcement of those sections of various Acts and their associated Regulations, Standards and Rules that relate to Council responsibilities, including, but not limited to:

- *Biosecurity Act 2015*
- *Boarding Houses Act 2012*
- *Companion Animals Act 1998*
- *Crown Land Management Act 2016*
- *Environmental Planning and Assessment Act 1979*
- *Graffiti Control Act 2008*
- *Food Act 2003*
- *Impounding Act 1993*
- *Local Government Act 1993*
- *Protection of the Environment Operations Act 1997*
- *Public Health Act 2010*
- *Roads Act 1993*
- *Rural Fires Act 1997*
- *Road Transport Act 2013*
- *Swimming Pools Act 1992*

10.1 Related Policies and Procedures

The regulatory functions of the council is not limited to the relevant legislation outlined in this policy. Council also has regulatory power and functions under the Regulations made under those Acts.