

1. Purpose

The purpose of this policy is to outline compliance and enforcement activities and actions undertaken by Warrumbungle Shire Council within the Local Government Area in response to dealing with alleged unlawful activities that fall under Council's delegated functions.

2. Objectives

The objective of this policy is to:

- Ensure that Council exercises its regulatory functions consistently and without bias in accordance with its obligations under Section 8 of the Local Government Act 1993;
- Assist those employed by Council in responding promptly, consistently and effectively in relation to allegations of unlawful activity whilst ensuring that principles of natural justice are respected;
- Provide information to all stakeholders about Council's position in relation to the enforcement of compliance with legislation, including the circumstances which will be considered when assessing different enforcement actions.

3. Policy Scope

This policy applies to investigations undertaken by Council under delegated functions, relating to unlawful activity. It also applies to failures to comply with terms or conditions of approvals and orders, and taking enforcement action in relation to such breaches.

This policy is applicable to development activity, contamination and pollution control, regulation of parking, control over animals, unauthorised development, food safety, public health safety issues and other regulatory functions for which the Council is the responsible authority.

4. Legislation and Associated Documents

| | |
|-------------------------------|--|
| ASSOCIATED POLICIES | <ul style="list-style-type: none"> • <i>Contaminated Lands Policy</i> • <i>Business Use of Footpath Policy</i> |
| ASSOCIATED LEGISLATION | <ul style="list-style-type: none"> • <i>Environmental Planning and Assessment Act 1979</i> • <i>Local Government Act 1993</i> • <i>Protection of the Environment Operations Act 1997</i> • <i>Companion Animals Act 1998</i> • <i>Roads Act 1993</i> • <i>Food Act 2003</i> • <i>Public Health Act 2010</i> • <i>Swimming Pools Act 1992</i> • <i>Contaminated Land Management Act 1997</i> • <i>Biodiversity Conservation Act 2016</i> • <i>Public Spaces (Unattended Property) Act 2021</i> |
| ASSOCIATED DOCUMENTS | <ul style="list-style-type: none"> • <i>Warrumbungle Shire Council - Privacy Management Plan</i> • <i>NSW Attorney General – Caution Guidelines</i> • • <i>Warrumbungle Local Environmental Plan 2013</i> • <i>Regional Contaminated Land Policy</i> |

5. Definitions

| Term | Definition |
|-------------------|--|
| Unlawful activity | <p>Is defined as any activity or work that has been or is being carried out:</p> <ul style="list-style-type: none"> • Contrary to the terms or condition of a development consent, approval, permit 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 particular land • Contrary to a legislative provision regulating a particular work activity or work • Without a required development consent, approval, permit or the like • Contrary to legislation for which the Council is the appropriate regulatory authority • Unlawful activity also includes any activity, place or structure which is a risk to public health and safety. |

6. Policy Statement

This policy aims to provide a clear pathway for the exercise of Council's delegated functions in the context of proactive regulatory action and investigation and pursuit of complaints about unlawful activity. It provides an outline of:

How Council will assess whether complaints alleging unlawful activity require investigation;

Options available to Council for dealing with unlawful activity; and

How to decide whether enforcement action is warranted and what type of enforcement action is appropriate in the particular circumstances.

6.1 Enforcement Principles

Warrumbungle Shire Council is committed to:

- Acting in the best interests of protecting public health, safety and the environment;
- Ensuring all actions are consistent, fair and impartial;
- Ensuring all actions are without unlawful discrimination;
- Ensuring all enforcement action is in keeping with the relative severity of the offence;
- 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, including assisting the Court by providing all necessary information whether or not that information is in favour of Council's case;
- Issuing cautions to the alleged offenders where necessary and appropriate;
- Making cost effective decisions concerning enforcement action having regard to the likely outcome at court;

- Ensuring action is instigated within any relevant specified time frames.

6.2 Responsibility

All Council staff who deal with written and verbal action requests or complaints alleging unlawful activity and those officers who are involved in the enforcement of relevant legislation are responsible for implementing this policy.

All notifications of alleged unlawful activity should be appropriately recorded by the Council's electronic records system as soon as possible upon receipt. Council officers responsible for the investigation of a matter are responsible for keeping a full and complete record of their actions, including reasons for all decisions made in relation to an investigation.

6.3 Unlawful Activity and Enforcement Action

6.3.1 Responding to Complaints

Council will make every effort to ensure that all Customer Service Requests or complaints about alleged unlawful activity are recorded and actioned in a timely manner by the appropriate staff.

Confidentiality of information will be dealt with in accordance with Council's *Privacy Management Plan* and all relevant legislation including the *Privacy and Personal Information Protection Act 1998* and the *Government Information (Public Access) Act 2009*.

6.3.2 Investigating Unlawful Activities

All matters regarding alleged unlawful activity will be reviewed to determine whether the matter requires enquiry or investigation. Further enquiries or investigation will not be undertaken 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;
- The Council has no jurisdiction in relation to 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. For example, SafeWork NSW in relation to workplace safety issues on building sites or the Department of Environment and Heritage in relation to environmental offences;
- The activity is identified as being lawful without the need for an investigation;
- The Council is not the appropriate regulatory authority.

When considering whether a complaint will warrant enquiry or investigation Council will consider a range of factors including:

- Is the complaint premature? Does it relate to some unfinished aspect of work still in progress?
- On the basis of the information available, is the activity permissible without consent or approval?
- If the activity is permissible with consent, is there a consent in place and have all conditions been complied with?
- Has a development application, building certificate application or other appropriate application been lodged in relation to the activity?

- Is the complaint trivial, frivolous or vexatious?
- What is the extent of the delay between events referred to by the complainant and their notification to Council and reasons given for such delay?
- Is the activity having a significant detrimental effect on the environment or does it constitute a risk to public health, safety and amenity?
- Have there been previous complaints about the subject premises or this person or organisation?
- Does the complaint have special significance in relation to the priorities of Council?
- Given the particular circumstances of the complaint, are there significant resource implications in relation to any investigation and any subsequent enforcement action?
- Overall, is it in the public interest to investigate the complaint?
- Where a decision is made not to investigate a complaint, this decision should be recorded along with the reasons for that decision. The complainant should be advised of the decision and the reasons for making that decision unless such notification is impossible, for example an anonymous complaint.

6.3.3 Taking Enforcement Action

When determining whether to take enforcement action and the level of enforcement action that is appropriate, in relation to a particular case of verified unlawful activity, officers should consider all the circumstances of the case including:

- The seriousness of the breach, including whether the breach is merely technical or “trivial” in nature;
- 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 or public health, safety or amenity caused by the unlawful activity;
- Would consent have been given if it had been sought;
- The need for general and specific deterrence;
- Whether the breach can be easily remedied;
- Any particular circumstances of hardship affecting the complainant or the person the subject of the complaint;
- Any mitigating or aggravating circumstances;
- Any prior warnings that have been issued to the person or previous enforcement action taken against the person;
- The degree of culpability of the alleged offender;
- Whether an educative approach would be more appropriate than a coercive approach;
- The costs and benefits of taking formal enforcement action as opposed to taking informal or no action;
- The prospects of success if the proposed enforcement action were challenged in court;
- What action would be proportionate and reasonable;
- If a criminal prosecution is contemplated that there is the existence of a *prima facie* case
- What would be in the public interest;

- Any precedent which may be set by not taking enforcement action.

Prior to taking enforcement action, officers should always consider the criteria outlined above in undertaking an objective consideration of the evidence that has been gathered during the course of their investigation. Officers must never allow their actions to be used purely to pursue the agendas of external parties or interest groups and enforcement action must never be undertaken purely as a means of appeasing a virulent complainant in circumstances where that application of the criteria in the Enforcement Policy would otherwise indicate that enforcement action should not be taken.

Where there is sufficient evidence to issue a penalty notice, the officer may instead elect to issue a formal caution if such an approach is considered appropriate under the Caution Guidelines issued by the NSW Attorney General under the *Fines Act 1996*.

6.3.4 Options for Dealing with Unlawful Activity

Where an investigation has been undertaken and that investigation has confirmed an instance of unlawful activity there are a number of options Council can take including but not limited to the following:

- Taking no action on the basis of a lack of evidence or because it is appropriate having regard to the matters set out in this policy;
- Warning or counselling the person the subject of the investigation to educate them as to the relevant legal requirements;
- Obtaining undertakings from the appropriate person that steps will be taken to address the concerns, for example, the lodging of a development application, within a reasonable period;
- Issue a warning letter indicating that unless certain action is taken, for example certain work is done or activities cease, more formal enforcement action will be taken by Council;
- Serving a notice of intention, followed by an order where appropriate, under relevant legislation requiring works to be done or for a use to cease or to otherwise address the unlawful activity;
- Issue a formal caution in relation to a penalty notice offence under s19A of the *Fines Act 1996* and in accordance with the Caution Guidelines;
- Issue a Penalty Infringement Notice, where available;
- Issue a Court Attendance Notice alleging that an offence has been committed against nominated legislation for determination in the Local Court
- Commence proceedings in the Land and Environment Court to remedy or restrain a breach of legislation, including enforcement action seeking compliance with a statutory order or the commencement of injunctive proceedings where necessary;
- Commence proceedings in the Land and Environment Court for the prosecution of a criminal offence in Class 5 of the court's jurisdiction;
- Carrying out the works specified in an order under the *Local Government Act 1993* or the *Environmental Planning and Assessment Act 1979* at the cost of the person served with the order.

The options outlined above are not mutually exclusive. The approach adopted will be entirely dependent on the individual circumstances of the particular matter, with public safety being the primary concern at all times.

6.3.5 Enforcement Priorities

From time to time different functions of Council will be identified as having the need for enforcement or regulatory action to be focussed on that area. Where a Director in consultation with relevant stakeholders, considers it necessary to identify particular enforcement priorities for their department, he or she may develop a list of proposed enforcement priorities and/or guidelines for enforcement action in relation to particular types of unlawful activity.

6.3.6 Shared enforcement responsibilities

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

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

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

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

6.3.7 Role of council where there is a private certifier

Council retains its regulatory role and enforcement powers where a private certifier has been appointed the Principal Certifying Authority (PCA). However, if a private certifier is appointed the PCA, it is not council's responsibility to ensure building and construction compliance.

Private certifiers have limited 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 will 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.

7. Responsibilities

The Manager Planning and Regulation will hold responsibility over this policy.

8. Getting Help

The staff member/s who can assist with enquiries about the policy

Position: Manager Planning and Regulation, Building Certifier, Town Planner, Environment Compliance Officer and Compliance Officer

Department: Environment and Development Services

9. Version Control

| | | | |
|-----------------------------------|------------------------------------|-------------------|---------------------|
| DEPARTMENT | ENVIRONMENT AND DEVELOPMENT | | |
| RESPONSIBILITY | MANAGER PLANNING AND REGULATION | | |
| VERSION CONTROL | | | |
| Policy Name | Id No and Version | Resolution | Date Adopted |
| Enforcement Policy | 1 | 132 | 22/10/2009 |
| Enforcement Policy | 2 | 417/1213 | 20/06/2013 |
| Enforcement Policy | 3 | 64/1718 | 17/08/2017 |
| Compliance and Enforcement Policy | 4 | | |
| Next Review Date | | By September 2025 | |