



COMPLIANCE AND ENFORCEMENT GUIDELINES

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Lismore City Council acknowledges the people of the Bundjalung Nation, traditional custodians of the land on which we work.

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1.0 Introduction

Lismore City Council has an adopted Enforcement Policy which details principles for Council staff to observe when exercising compliance and enforcement functions in relation to unlawful activity.

It is important that this compliance function is carried out in a responsible manner and with integrity. The community, quite rightly, expects that unlawful activity is dealt with in the appropriate manner. This Guideline for breach management, prosecutions and penalty notices provide a solid platform for Council to undertake its compliance and enforcement work. They also will help with community and stakeholder understanding as to how Council goes about its work.

Council incurs costs in undertaking compliance and enforcement activities, and there is a need to consider the long term financial sustainability of providing these services to the community in a cost effective manner. It is therefore important that these costs incurred by Council are not solely funded from Council's general rate revenue provided by the community at large, and that consideration is given to recovery of costs incurred by Council from offenders. This can be achieved through appropriate penalties, compliance cost notices and cost orders that are determined with consideration to actual costs incurred by Council in following compliance matters through.

Unlawful activity is any activity or work that has been or is being carried out:

- a) contrary to the terms or conditions of a development consent, approval, permission or license;
- b) contrary to the Lismore Local Environmental Plan, as amended, that regulates the use, activities or work that can be carried out on particular land;
- c) contrary to a legislative provision regulating a particular responsibility, use, activity or work;
- d) without a development consent, approval, permission or license; and includes unauthorised works and uses; and
- e) contrary to the laws of New South Wales for which Council is the appropriate regulatory authority.

The purpose of the Policy is to outline how Council conducts its compliance monitoring and enforcement activities in a fair and equitable manner. The Policy is supported by these operational guidelines to assist Council officers in implementing the Policy. These guidelines are based upon enforcement policies/guidelines published by the NSW Department of Planning and Infrastructure, and their assistance in allowing permission for reproduction of their enforcement publications is greatly appreciated.

Council officers and contractors carrying out works must do so in accordance with the law. It is recognised Council has limited authority to take certain legislative enforcement action against its own employees or contractors. In such instances those issues may be best handled under contractual terms and performance agreements or by the appropriate regulatory authority. For example, it may be the case that the Environment Protection Authority will have a role as the appropriate regulatory authority (see for example EPA v Ballina Shire Council [2006] NSWLEC 289). It may also be appropriate to refer such matters to the Department of Local Government to ensure there is no allegation that Council has failed to act in an appropriate manner.

2.0 The Council's compliance role

A major role of the Council is to monitor and enforce compliance with various legislation, including (but not necessarily limited to) the provisions of:

Building Professionals Act 2005
Companion Animals Act 1998
Contaminated Land Management Act 1997
Environmental Planning & Assessment Act 1979
Food Act 2003
Heritage Act 1977
Impounding Act 1993
Liquor Act 2007
Local Government Act 1993
Plumbing and Drainage Act 2011

Protection of the Environment Operations Act 1997
Public Health Act 2010
Public Health (Tobacco) Act 2008
Restricted Premises Act 1943
Road Transport (General) Act 2005
Road Transport (Safety and Traffic Management) Act 1999
Roads Act 1993
Smoke Free Environment Act 2007
Swimming Pools Act (Amended) 2012
Trees (Dispute between Neighbours) Act 2006
Water Industry Competition Act 2006
Water Management Act 2000
Work Health and Safety Act 2011

The key components of Council's compliance program are:

(a) Conditions of Approval

Council is responsible for ensuring conditions of approvals are relevant, reasonable, achievable, clearly articulated and enforceable. The level of compliance monitoring and reporting required of the proponent will generally be consistent with the significance of the project and level of potential harm if a breach occurs.

(b) Compliance Monitoring

Council conducts programmed compliance audits and inspections of certain premises to ascertain the level of compliance and environmental performance. Council's audits and inspections will generally target higher risk projects, or other projects where information available warrants such an approach. Audits and inspections may be conducted on individual premises or on groups of premises, for example in a specific area or of a specific activity type. The findings of the compliance monitoring activities will inform any follow-up investigation of potential breaches.

Compliance monitoring also includes reviewing proponents' environmental monitoring reporting and independent audits and records, together with any other information received from councils, other agencies or members of the public.

(c) Assessment and Investigation of potential breaches

Where a potential breach is identified, Council will conduct a preliminary assessment to determine whether the matter is one for which Council is responsible and warrants further investigation. A further investigation will obtain sufficient evidence to establish whether a breach has occurred and the facts surrounding the breach (including the identity of the responsible person(s)). Where a breach is established the investigation will also assist in choosing the nature of any enforcement response.

(d) Responding to Breaches (enforcement)

Council has a range of enforcement options to penalise offenders and/or to remedy or restrain a breach, including warning letters, statutory orders, penalty notices and the commencement of civil or criminal proceedings. Council will choose an enforcement response which reflects the seriousness of the particular breach and the subjective circumstances of the alleged offender (e.g. whether the offender deliberately committed the offence). The following guidelines outline the principles adopted by Council in delivering these components of the compliance program.

(e) Cost Recovery (Compliance Cost Notices)

Under specified legislation, Council has the power to recover the cost of enforcement actions required to enforce compliance with Council directions/orders under specified circumstances. Council will keep appropriate records and issue invoices to recover the cost of undertaking enforcement actions as a debt owed to Council in accordance with applicable legislative provisions, and in addition to, or separate from any remedial or penalty actions.

3.0 Compliance obligations on proponents

Proponents of approved activities, and other persons carrying out activities on approved projects, are required by law to comply with conditions of approval. Failure to do so is an offence. Where conditions of approval require specific actions, proponents are obliged to conduct such activities to relevant standards and acceptable industry practice.

4.0 Conditions of approval

Approvals granted by Council are usually subject to conditions requiring action(s) to be undertaken or setting limits on what may be done. For example, a condition may require a proponent to mitigate environmental effects or it may set maximum levels of production or truck movements. Conditions provide the parameters within which an activity or work must be carried out and any identified impacts effectively managed.

A proponent is required by law to comply with conditions of approval and failure to do so is an offence against the Act. To ensure that conditions are capable of being applied and enforced, conditions of approval will be:

- unambiguous;
- measurable, for example, conditions which are time specific; and
- reasonable, that is, they must relate to the approved development and be achievable.

Note: Practice notes may apply to the imposition of conditions to achieve these requirements.

5.0 Assessment and investigation of suspected breaches

5.1 Preliminary assessment

When Council has information of a suspected breach, it will assess the matter to determine an appropriate response. As part of that assessment, Council staff should consider:

- (a) Whether it is a matter for which Council is responsible or whether it falls within the responsibility of another government authority (such as another State regulatory agency);
- (b) Whether it warrants further investigation (for example, whether there is enough information to establish the facts, or any evidence to support a claim being made);
- (c) Is the complaint premature eg does the complaint relate to some unfinished aspect of works that are still in progress?
- (d) Is the activity or work permissible with or without an approval, and is there an approval in place that is being complied with?
- (e) Is the complaint trivial, frivolous or vexatious?
- (f) Has too much time elapsed since the events the subject of the complaint took place? (eg Statute of limitations may apply, or any prospect of successfully pursuing the matter may be extremely remote);
- (g) Is the activity having a significant detrimental effect on the environment or does it constitute a risk to public safety?
- (h) Does the complaint indicate the existence of a systemic problem, eg if a complaint is one of a series, could there be a pattern of conduct or a more widespread problem?
- (i) Does the complaint have special significance in terms of the Council's existing priorities and Enforcement Policy?
- (j) Are there significant resource implications in relation to an investigation and any subsequent enforcement action?
- (k) How is the public interest affected?

Council staff will conduct an analysis of the available information, including Council records. This may be followed by a site visit and/or discussions with the person concerned on mutually agreed terms.

Complaints that seem to involve ill will, vengeance or vindictiveness should not be immediately dismissed. Although a complainant's motive may cloud their judgment and flavour the complaint, the complaint may still be well founded.

If the Council receives an anonymous complaint, or the complainant subsequently withdraws the complaint, the allegations should still be investigated if the subject matter of the complaint is sufficiently serious and there are other avenues of inquiry reasonably available. However, you need to remember that evidence will not be available from the complainant.

This preliminary assessment may provide sufficient information to establish whether or not a breach has occurred or is likely to have occurred that justifies a response from Council. It will also assist in prioritising the variety of compliance issues that require attention.

Based on that information, Council may choose to proceed with an enforcement response without further investigation, or it may determine no response is required, or it may determine that further investigation is necessary.

If the decision is made to take no further action, the reason for that decision must be clearly documented and peer reviewed where necessary.

5.2 Investigation

The purpose of an investigation is to obtain sufficient evidence to establish whether a breach has occurred and the facts surrounding the breach (including the identity of the responsible person(s)). NSW Legislation empowers authorised Council officers to enter and search premises and conduct associated investigative activities, obtain information and records by written notice, and require persons to answer questions in relation to matters being investigated.

Council's investigations are conducted in accordance with Council policy 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 officers;
- in accordance with the law; and
- respectful of individuals.

The order of intervention wherever possible and dependent on the nature of the offence should be demonstrated as follows:

1. Encourage voluntary compliance/good practice;
2. Persuade to comply/improve practice;
3. Enforce to comply/impose penalty.

Evidence collected in an investigation may take various forms including inspection notes, photographs, videos, samples and physical evidence, witness statements and records of interview.

Evidence obtained from an investigation will assist Council staff in determining whether an enforcement response is warranted and, if so, the nature of that response.

5.3 Communication regarding alleged offences

There are a number of ways in which complaints, investigations, compliance and enforcement activities can be initiated. One important thing in ensuring a receptive response to our compliance activities is to ensure all our communications are not received in a negative perception.

It is important to remember there are two aspects to enforcement activities, the first is achieving compliance, the second is determining whether a penalty is appropriate in the circumstances.

The primary goal is to achieve compliance, and the tone of your initial contact should always be based on the assumption people want to comply with Council requirements. Our statistics demonstrate 85% actually do respond positively to requests from Council compliance staff.

As a Council Officer, you may have cause to visit a site and discuss a compliance matter with a person who may have committed an offence either in person or by phone and first impressions often dictate how people will respond.

Attached to this guideline is a template letter detailing the format to be adopted for initial contact with people on compliance matters. Formal notices and the like that may be required should be attached to this initial enforcement covering letter.

The template is a tool that must be modified to suit the circumstances of the matter you are dealing with.

The following are some basic principles we should always follow to assist your supervisor in their response to complaints about the actions of compliance staff in dealing with matters:

1. Always begin compliance letters with reference to previous discussions or written communications by their date to ensure the context of your letter is clear and not misunderstood or misinterpreted by others.
2. Use plain English and avoid technical jargon or acronyms unless it is clear what you mean.
3. Make sure you provide details of what has occurred and why that is a problem.
4. Explain and/or determine what they need to do in order to resolve the situation, together with advice on action Council may intend to take (you can include fact sheets and notices etc. as attachments).
5. Provide options to people to ensure the action taken is their decision and avoid the accusation "I did what Council told me to do!". The options are better drafted as numerical, alphabetical or in dot points and also be in a form which is easy to read.
6. Always sign off compliance correspondence with offers to clarify queries or understanding of alternative options or what is required, including meeting with the person concerned if required to help them understand. Your willingness to facilitate an outcome can be a powerful tool when people do not intend to do the right thing, and then claim, "I didn't understand what the problem was!".

6.0 Significance of a breach

6.1 Relevant factors

Where a breach is identified, the significance of the breach will guide the appropriate enforcement response. The following factors are relevant to determining the significance of a breach:

- (a) the severity or seriousness of the breach, which includes;
 - 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;
 - whether any environmental harm caused by the breach is temporary or long lasting;
 - the magnitude or degree of non-compliance – whether the non-compliance is trivial or substantial;
 - whether the offence occurred on public lands and has harmed the value of those lands to the community;
 - the level of any unjust benefit to the alleged offender arising from the breach and whether the breach was motivated by financial gain.

- (b) the public interest, including for example:
- the cost to the general community of the breach (eg whether the offence caused harm to public lands) and the cost of taking further action in response to the breach;
 - the need to deter the particular offender and the community from committing offences in the future (particularly if the offence is prevalent);
 - the likely public perception of the breach and the manner in which it is dealt;
 - whether pursuing the breach would be of little or no utility (for example, where a change in the law is imminent which would make the activity lawful).
- (c) aggravating or mitigating factors - this refers to the negative and positive circumstances surrounding the offender's commission of the offence, including for example:
- whether the alleged offender committed the breach deliberately or by mistake;
 - whether the alleged offender has shown a willingness to co-operate with Council and to comply in the future;
 - whether the alleged offender has a history of prior breaches and, if so, whether Council has taken action;
 - whether the breach is continuing (the alleged offender has not ceased or abated the offence);
 - whether the alleged offender is a State Owned Corporation and, as such, may have a statutory responsibility to ensure compliance, particularly environmental obligations under section 8 of the State Owned Corporations Act 1989; and
 - the length of time which has elapsed since the breach occurred.

The applicability of, and weight to be given to, each of the above factors will depend on the circumstances of each case. Investigating officers will make determinations on the level of significance with reference to internal policies, peer review, supervisor support and legal advice where appropriate. Council officers will operate only within their delegated authority.

6.2 Classifying a breach – low, medium or high?

After the above factors have been considered, suspected breaches will be classified as being of low, medium or high significance. This classification will, in turn, guide the appropriate action to be taken. In all cases professional judgment will need to be exercised when making the classification.

The following table provides **examples** in determining the significance of a breach in consideration of the factors listed in this policy.

Table 1: Examples in determining significance of breaches

| Severity/seriousness | Public interest | Aggravating or mitigating factors | Significance of breach |
|---|--|--|-------------------------------|
| Low to moderate environmental harm | Public interest low due to minimal cost to the community and the “one-off” nature of the breach with minimal need for deterrence against further breaches | No significant aggravating factors; Offender co-operated with investigation | LOW |
| Moderate, short-term loss of amenity; Low environmental harm | Public interest likely to be moderate due to the need to deter the offender from further breaches of this nature but little public perception of the breach | No significant aggravating factors; Offender rectified breach quickly when notified. | LOW |
| Moderate or high degree of environmental harm | Public interest high due to the breach impacting on the amenity of several residential neighbours and the need to deter against further breaches of this nature. | Significant aggravating circumstances due to offender knowingly committing the breach despite likely impacts | HIGH |
| Large magnitude of exceedance; High level of unjust benefit; Low to moderate risk of environmental harm | Public interest moderate due to the need to deter the offender against further breaches of this nature | Aggravating circumstances due to offender knowingly committing the breach for significant financial gain | HIGH |
| Low environmental harm | Public interest moderate due the need to deter the offender against further breaches of this nature | Significant aggravating circumstances due to offender submitting false and misleading information about the breach | MEDIUM |
| High environmental harm | Public interest low due to the low public perception of the breach and unlikelihood of the offender committing further breaches | Significant mitigating circumstances due to offender immediately rectifying the breach and instigating measures to prevent re-occurrence | MEDIUM |

7.0 Enforcement

7.1 Enforcement options

When a breach has been identified, it is then necessary to determine the appropriate enforcement response for the particular breach. Enforcement options include actions to restrain or remedy a breach, and actions to punish an offender.

The range of enforcement options available to Council in **descending order of significance** is shown in **Figure 2**. Enforcement options are not necessarily mutually exclusive; for example in some circumstances it may be appropriate to contemporaneously issue an Order and a penalty notice.

Figure 2: Enforcement actions available to Council

Remedial or rectification action:

Court order
An order from the Court requiring certain things to be done to achieve compliance
(civil proceedings)

Order
An Order from Council requiring certain things to be done to achieve compliance

Letter requesting undertaking
A letter requesting an undertaking that corrective action will be taken within a certain timeframe

Negotiation
with alleged offender and written confirmation of commitments made

Warning or advisory letter
to encourage future compliance and caution that further action may be taken

Record the breach
No further action – for very minor breaches only

Penalty action:

Criminal Prosecution
in the Land and Environment Court or the Local Court

Penalty Notice

7.2 Choosing the appropriate enforcement response

In all cases, Council staff will choose an enforcement response which is proportionate to the seriousness of the offence and which:

- sets a proper precedent for future cases;
- is consistent with the intent and objectives of the legislation;
- is an appropriate use of Council's resources;
- does not adopt an unreasonable or extreme interpretation of a condition of approval or consent; and
- is consistent with responses previously adopted for similar incidents.

Enforcement options which may be appropriate for breaches determined to be of low, medium or high significance are set out below. It is important to remember that the following is a guide only and each case must be assessed on the particular facts. A summary of the guide is provided in **Table 2**.

Enforcement options for breaches of **low significance**:

- take no action but record the breach (only where the degree of harm and severity of the breach are low to very low, some mitigating circumstances exist, there are no aggravating circumstances, and the public interest does not compel further action);
- send a warning or advisory letter to the alleged offender to encourage them to comply in the future;
- negotiate a corrective action with the alleged offender and confirm commitments made in writing;
- send a letter identifying the breach and requesting an undertaking that corrective action will be taken within a specific timeframe;
- issue a Penalty Notice;
- issue an Order or Direction under the applicable legislation, for example to cease specified activities, comply with a development consent or approval, and/or effect a remedy or restraint of the alleged breach.

Enforcement options for breaches of **medium significance**:

- send a warning or advisory letter to the alleged offender to encourage them to comply in the future;
- negotiate a corrective action with the alleged offender and confirm commitments made in writing;
- send a letter identifying the breach and requesting an undertaking that corrective action will be taken within a specific timeframe;
- issue an Order or Direction under the applicable legislation, for example to cease specified activities, comply with a development consent or project approval, and/or effect a remedy or restraint of the alleged breach;
- issue a Penalty Notice.

Enforcement options for breaches of **high significance**:

- send a letter identifying the breach and requesting an undertaking that corrective action will be taken within a specific timeframe;
- issue an Order or Direction under the applicable legislation;
- commence civil proceedings in the Land and Environment Court or other jurisdiction seeking Court Orders requiring certain things to be done to achieve compliance or to remedy or restrain an alleged breach;
- issue a Penalty Notice;
- commence criminal prosecution proceedings in the Land and Environment Court or in a Local Court.

Note that it may be appropriate to use more than one enforcement option in some cases. If initial enforcement action does not achieve a satisfactory outcome, it may be necessary to proceed to a higher level of enforcement response. For example, if a warning letter does not achieve the desired response, it may be appropriate to give an Order or to seek an Order from the Court; or if an Order is not complied with it may be appropriate to bring enforcement or prosecution proceedings.

Table 2: Enforcement Options Summary

| Enforcement Action | Significance of Breach | | |
|-------------------------------|------------------------|--------|-----|
| | High | Medium | Low |
| Prosecution | * | | |
| Court Order | * | | |
| Penalty Notice | * | * | |
| Order | * | * | * |
| Letter requesting undertaking | * | * | * |
| Negotiated outcome | | * | * |
| Warning letter/caution | | * | * |
| Record breach | | | * |

Irrelevant considerations in choosing an enforcement response:

The decision as to the appropriate action will not be influenced by:

- the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- the personal feelings of the investigating officers concerning the offence or the alleged offender;
- the possible political advantage or disadvantage to the government, Council or any political party, group or individual;
- the possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or otherwise involved in its conduct; or
- possible media or community reaction to the decision.

7.3 Consultation with other regulatory agencies

Regulatory action taken by another authority does not preclude Council from taking compliance action in response to a breach of the planning legislation. However, where an offence is identified which another regulatory agency or local council may also be addressing, Council will consult with the responsible authority to facilitate a coordinated and constructive compliance approach.

8.0 Responsibilities of Council officers

8.1 Recording potential breaches

Any potential breach that comes to the attention of Council is recorded and assessed to determine whether an investigation is warranted. Recording potential breaches allows all decisions about the matter to be tracked and reported on. It also enables repeat offenders to be identified. The decision whether or not to conduct an investigation is recorded together with the reasons for making that decision.

8.2 Natural justice

Natural justice, also known as procedural fairness, is a fundamental principle for discharging regulatory duties. Council officers will carry out their investigative and enforcement functions having regard to the principles of natural justice which include:

- Providing a fair hearing – allowing a person whose interests may be adversely affected by a decision to present their case, and considering any representations that have been made by a person likely to be affected in response to the prospect of enforcement action;
- Impartiality in the decision making process – officers are to be unbiased and not hold a vested interest in the outcome of a process;
- Decisions based on evidence – decisions must be based on the evidence provided, not on irrelevant issues, and there must be a rational basis upon which the decision maker has decided to accept the evidence as credible;
- Acting in good faith – at all times Council officers are to act in good faith.

8.3 Ethical conduct

Council officers are required to comply with Council's Code of Conduct. Discretionary powers of Council officers will be exercised in accordance with Council policies and procedures and to the highest ethical and professional standards. Any approach to bribe, influence or engage an officer in corrupt or unlawful behaviour will be reported immediately to the appropriate authority.

8.4 Peer Reviews/Concurrence

Council officers are expected to facilitate peer reviews of their activities in consultation with their supervisor. In particular:

1. Any issues with proposed penalties intended to be imposed with a face value that totals more than \$2,000 shall be referred to Manager – Development & Compliance for peer review in an agreed summary format that contains:

- A brief description of the issue;
- Dot points of the actions taken by Council and any actions by the alleged offender;
- A brief description of the offence(s);
- Photos;
- A brief statement confirming consideration of relevant provisions of Council's Enforcement Policy and Guideline, and the outcome of those considerations and any alternative options;
- A clear recommendation of any further proposed action in relation to achieving compliance;
- The appropriate penalty to be applied in the circumstances.

In order to ensure appropriate oversight of enforcement activities, the Manager – Development and Compliance will:

- Inform Excom/General Manager prior to initiating any legal proceedings against offenders and detail proposed course of action
- Details of targeted enforcement programs that commit an ongoing resource (eg CBD safety, footpath signage etc) will be forwarded to Excom for information.
- Provide regular reports in City Notes on any significant compliance/enforcement activity (eg fines >\$2,000, investigations, actions in response to Councillor requests)
- The status of current legal matters on Planning/Development/Compliance will be reported in City Notes on a regular basis.
- Regular reports will be provided to Excom/City Notes on compliance matters.

The purpose of the above actions is to inform senior management (and if appropriate Councillors), in the enforcement decision making process, change perceptions by communicating issues proactively and enable Councillors and senior management to be aware of the associated complexities and better able to respond to complaints and enquiries with confidence.

It is envisaged that this approach will significantly reduce a number of enquiries received and the resulting lost time explaining why certain enforcement actions were taken by Council officers.

9.0 Reporting

The Council's corporate reporting will include regular reports on compliance monitoring and enforcement actions undertaken.

10.0 Appendix

Appendix 1 – Breach Management Guidelines

1. Overview

Council officers have delegated authority to act, and are responsible for **identifying** potential breaches from the information they receive in their work. Where the preliminary analysis concludes that an investigation is warranted, the Council officer will arrange for an **investigation** of the alleged breach. The investigation involves the collection of evidence to determine whether a breach has occurred and the circumstances of the breach.

If there is sufficient evidence of a breach, the Council Officer will determine the **significance** of the breach and choose an appropriate **enforcement** response in consultation with the relevant supervisor, as necessary. In all cases, the Council's response to a potential breach and the reasoning for that response must be properly **recorded**.

The following chapters provide guidance on implementing the steps.

2. Identifying potential breaches

In these guidelines 'potential breach' refers to any report, complaint or other information received by Council indicating that a breach of a legal requirement may have occurred.

Council Officers may become aware of potential breaches from a number of sources including:

- findings from an audit or inspection;
- self-reporting by a proponent or consultant;
- complaints by members of the public;
- information received from a State agency or other authority.

All potential breaches must be promptly recorded by the staff member receiving the information, for allocation to a Council Officer appropriate to the seriousness or sensitivity of the matter.

3. Investigating potential breaches

3.1 Preliminary analysis

Every potential breach that comes to the attention of Council must undergo a preliminary analysis by an appropriately authorised Council officer to determine:

- a) whether the matter is within the responsibility of the Council or whether it should more appropriately be dealt with by another authority (such as a State regulatory agency); and
- b) whether the nature or seriousness of the potential breach warrants further investigation.

This analysis will typically involve a review of Council records (applications, approvals, previous incidents, maps/plans, reports) and discussions with relevant Council staff familiar with the matter. This may be followed by a site visit and/or discussions with the alleged offender.

The results of the preliminary analysis are to be recorded in Council's Customer Request Module (CRM) or Electronic Records Management (TRIM) systems.

If the preliminary analysis finds that the matter is insignificant and able to be resolved easily, appropriate action is taken to resolve the matter and the results recorded in Council's CRM or TRIM system.

For potential breaches which may be more complex or serious and may need to be addressed through enforcement action, an investigation is warranted, and a Compliance Register is to be set up in TRIM for the matter.

Example: further investigation not required

A Council inspection finds that a development project, which had commenced a week earlier, has neglected to display a sign identifying the PCA for the project, in breach of an approval condition. Upon being alerted to the matter by the Council, the proponent erects the sign within a few days. Given that the matter is not significant and was rectified quickly, further investigation is not warranted. The matter is recorded in the records system and an email forwarded to the proponent acknowledging rectification of the matter.

Example: proceed to further investigation

Upon receipt of representations from a neighbour, Council finds evidence that construction of a subdivision has proceeded in the absence of effective erosion and sediment controls, resulting in sediment pollution of a local creek. Council finds that an erosion and sediment control plan has not been submitted as required by the approval and gives an Order to the proponent to suspend development activity until sediment and erosion controls are in place and to submit the required plan. The matter is considered by the investigating officer to be potentially serious and a detailed investigation is conducted.

3.2 Investigation

The purpose of an investigation is to obtain sufficient evidence to establish whether a breach has occurred and the facts surrounding the breach (including the identity of those responsible).

The order of action, wherever possible and dependent on the nature of the offence, should be demonstrated as follows:

1. Encourage voluntary compliance/good practice;
2. Persuade to comply/improve practice;
3. Enforce to comply/impose penalty.

It is essential that reasonable attempts are made to contact persons affected by complaints so that they can ask questions, explore options, and understand issues and consequences in a free exchange of information. This is an important fundamental to incorporate into any investigation which should be able to be demonstrated if requested. If a site visit/meeting is not possible to discuss the matter with someone prior to sending a letter or notice, make sure that the letter invites the opportunity for meetings or discussions to occur. Personal cameras are one way that these interactions are demonstrated.

If the investigation establishes a breach, the evidence will assist in determining whether enforcement action is warranted and, if so, what enforcement action should be taken.

Various legislation empowers authorised Council officers to enter and search premises and to conduct investigative activities, obtain information and records by written notice, and require persons to answer questions.

Evidence collected in an investigation may take various forms including inspection notes, photographs, videos, samples and physical evidence, witness statements and records of interview.

It is recommended that officers undertaking investigations have specialised investigation training (for example Certificate IV in Government (Investigations)) and on-the-job training in the principles and techniques used for gathering information which would be admissible as evidence in a court.

At the completion of an investigation, documentation is prepared which clearly and accurately describes the collected evidence. The documentation will make a recommendation on whether or not there has been a breach and if so the report will be used to determine what enforcement action (if any) should be taken.

4. Enforcement

When the evidence has been collected and reviewed, and a breach is identified, the significance of the breach must be determined. The significance of the breach will, in turn, determine the appropriate enforcement response for that breach.

4.1 Relevant factors in determining the significance of a breach

Where a breach is identified, the significance of the breach will guide the appropriate enforcement response. The following factors are relevant to determining the significance of a breach:

- (a) the **severity or seriousness** of the breach, which includes:
 - the degree of harm or potential harm resulting from the breach, including whether it seriously endangers human health, the environment or cultural heritage;
 - whether any harm caused by the breach is long lasting;
 - the magnitude or degree of non-compliance – whether the noncompliance is trivial or substantial, for example, where a quarry operator significantly exceeds the maximum production limit imposed by a condition;
 - whether the breach occurred on public lands and has harmed the value of those lands to the community;
 - the level of any unjust benefit to the alleged offender arising from the breach and whether the breach was motivated by financial gain.
- (b) the **public interest**, including for example:
 - the cost to the general community of the breach (eg whether the breach caused harm to public lands) and the cost of taking further action in response to the breach;
 - the need to deter the particular offender and the community from committing similar breaches in the future (particularly if the breach is prevalent);
 - the level of public concern about the breach;
 - whether pursuing the breach would be of little or no utility (for example, where a change in the law is imminent which would make the activity lawful).
- (c) the impact of the breach and the responses to it on the **integrity of the regulatory instrument or system**, such as:
 - the precedent which may be set by the response to the breach;
 - the nature of the breach in the context of the intent of the legislation;
 - avoiding an unreasonable or extreme interpretation of a condition of approval or consent;
 - consistency with responses adopted for similar incidents.
- (d) **aggravating or mitigating factors** - this refers to the negative and positive circumstances surrounding the offender's commission of the breach, including for example:
 - whether the alleged offender committed the breach deliberately or by mistake;
 - whether the alleged offender is a State Owned Corporation and, as such, may have a special responsibility to ensure compliance with statutory duties, particularly environmental obligations as a result of section 8 of the State Owned Corporations Act 1989;
 - whether the alleged offender has shown a willingness to co-operate with Council and to comply in the future;
 - whether the alleged offender has a history of prior breaches and, if so, whether Council has taken action;
 - whether the breach is continuing (the alleged offender has not ceased or abated the breach);
 - the length of time which has elapsed since the breach occurred.

The applicability of, and weight to be given to, each of the above factors will depend on the circumstances of each case. Investigating officers will make determinations on the level of significance with reference to internal policies, peer review, supervisor support and legal advice, where appropriate. Council Officers will operate only within their delegated authority.

4.2 Classifying a breach – low, medium or high?

After the above factors have been considered, suspected breaches will be classified as being of low, medium or high significance. This classification will, in turn, guide the appropriate action to be taken.

Figure 2 presents a “decision guide” on determining the significance of a breach. However, professional judgment will need to be exercised when assigning values to the criteria and in making the final classification. The "decision guide" can only be a guide. Determining the significance of a breach is the exercise of discretion, and reasonable minds can often differ as to the significance of a breach. Where there are differences of opinion, they should be documented and justified/explained to ensure transparency.



Figure 2: Decision guide for determining significance of a breach
Step 1: Determination of Severity

| | | | | | | | | | | | | | | | | | | | | | | | | | | | |
|--------------------------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|
| Degree of harm | H | H | H | H | H | H | H | H | H | M | M | M | M | M | M | M | M | L | L | L | L | L | L | L | L | | |
| Degree of non-compliance | H | H | H | M | M | M | L | L | L | H | H | H | M | M | M | L | L | L | H | H | H | M | M | M | L | L | L |
| Level of unjust benefit | H | M | L | H | M | L | H | M | L | H | M | L | H | M | L | H | M | L | H | M | L | H | M | L | H | M | L |
| SEVERITY | H | H | H | H | H | H | H | M | M | H | H | M | H | M | M | M | M | M | H | H | H | H | M | M | M | L | L |

Step 2: Determination of Significance of Breach

| | | | | | | | | | | | | | | | | | | | | |
|----------------------------------|---------------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|
| Severity (from above): | HIGH | | | | | | | | | | | | | | | | | | | |
| Public Interest | H | H | H | H | H | H | M | M | M | M | M | M | M | L | L | L | L | L | L | L |
| Aggravating/Mitigating factors* | A | A | N | N | M | M | A | A | N | N | M | M | A | A | N | N | M | M | | |
| Integrity of regulatory system** | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | | |
| SIGNIFICANCE OF BREACH | H | H | H | H | H | M | H | M | H | M | H | M | H | M | H | H | M | M | H | M |
| Severity (from above): | MEDIUM | | | | | | | | | | | | | | | | | | | |
| Public Interest | H | H | H | H | H | H | M | M | M | M | M | M | L | L | L | L | L | L | L | |
| Aggravating/Mitigating factors* | A | A | N | N | M | M | A | A | N | N | M | M | A | A | N | N | M | M | | |
| Integrity of regulatory system** | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | | |
| SIGNIFICANCE OF BREACH | H | M | M | L | M | L | M | L | M | L | M | L | M | L | M | L | M | L | L | L |
| Severity (from above): | LOW | | | | | | | | | | | | | | | | | | | |
| Public Interest | H | H | H | H | H | H | M | M | M | M | M | M | L | L | L | L | L | L | L | |
| Aggravating/Mitigating factors* | A | A | N | N | M | M | A | A | N | N | M | M | A | A | N | N | M | M | | |
| Integrity of regulatory system** | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | Y | N | | |
| SIGNIFICANCE OF BREACH | M | L | M | L | L | L | M | L | L | L | L | L | L | L | L | L | L | L | L | L |

* Aggravating/mitigating factors:
 ** Integrity of regulatory system:

A = predominantly aggravating factors; M = predominantly mitigating factors; N = neutral
 Y = the integrity of the regulatory system is unlikely to be compromised if action proceeds
 N = the integrity of the regulatory system may be compromised if action proceeds

4.3 Enforcement options

When a breach has been identified, it is then necessary to determine the appropriate enforcement response. Enforcement options include actions to restrain or remedy the breach, and actions to punish an offender.

The range of enforcement options available to Council in **descending order of significance** is shown in **Figure 2**. Enforcement options are not necessarily mutually exclusive; for example, in some circumstances it may be appropriate to simultaneously issue an Order and a penalty notice.

Figure 2: Enforcement actions available to Council

Remedial or rectification action:

Court order
An order from the Court requiring certain things to be done to achieve compliance
(civil proceedings)

Direction/Order
An Direction/Order from Council requiring certain things to be done to achieve compliance

Letter requesting undertaking
A letter requesting an undertaking that corrective action will be taken within a certain timeframe

Negotiation
with alleged offender and written confirmation of commitments made

Warning or advisory letter
to encourage future compliance and caution that further action may be taken

Record the breach
No further action – for very minor breaches only

Penalty action:

Criminal Prosecution
in the Land and Environment Court or the Local Court

Penalty Notice

4.4 Choosing the appropriate enforcement response

In all cases, Council should choose an enforcement response which is proportionate to the seriousness of the offence and which:

- has considered any representations that have been made by a person likely to be affected in response to the prospect of enforcement action;
- sets a proper precedent for future cases;
- is consistent with the intent and objectives of the legislation;
- is an appropriate use of the Council's resources;
- does not adopt an unreasonable or extreme interpretation of a condition of approval of consent; and
- is consistent with responses previously adopted for similar breaches.

Enforcement options which may be appropriate for breaches determined to be of low, medium or high significance are set out below. It is important to remember that the following is a guide only and each case must be assessed on the particular facts. A summary of the guide is provided in **Table 2**.

Enforcement options for breaches of **low significance**:

- take no action but record the breach (only where the degree of harm and severity of the breach are low to very low, some mitigating circumstances exist, there are no aggravating circumstances, and the public interest does not require further action);
- send a warning or advisory letter to the alleged offender to encourage them to comply in the future;
- negotiate a corrective action with the alleged offender and confirm commitments made in writing;
- issue a Penalty Notice;
- send a letter identifying the breach and requesting an undertaking that corrective action will be taken within a specific timeframe; or
- issue a Notice, Order or Direction under an Act, for example to cease specified activities, take specific action, comply with a development consent or approval, and/or effect a remedy or restraint of the breach.

Enforcement options for breaches of **medium significance**:

- send an advisory warning letter to the alleged offender to encourage them to comply in the future;
- negotiate a corrective action with the alleged offender and confirm commitments made in writing;
- send a letter identifying the breach and requesting an undertaking that corrective action will be taken within a specific timeframe;
- issue a Notice, Order or Direction under an Act, for example to cease specified activities, take specific action, comply with a development consent or approval, and/or effect a remedy or restraint of the breach;
- issue a Penalty Notice.

Enforcement options for breaches of **high significance**:

- send a letter identifying the breach and requesting an undertaking that corrective action will be taken within a specific timeframe;
- issue an Order or Direction under an Act, for example to cease specified activities, take specific action, comply with a development consent or approval, and/or effect a remedy or restraint of the breach;
- commence civil proceedings in the Land and Environment Court seeking Court Orders requiring certain things to be done to achieve compliance or to remedy or restrain an alleged breach;
- issue a Penalty Notice;
- commence criminal prosecution proceedings in the Land and Environment Court or in a Local Court.

Note that it may be appropriate to use more than one enforcement option in some cases. If initial enforcement action does not achieve a satisfactory outcome, it may be necessary to proceed to a higher level of enforcement response. For example, if a warning letter or notice of intention does not achieve the desired response, it may be appropriate to give an Order; or if an Order is not complied with it may be appropriate to bring enforcement or prosecution proceedings.

Table 2: Enforcement Options Summary

| Enforcement Action | Significance of Breach | | |
|-------------------------------|------------------------|--------|-----|
| | High | Medium | Low |
| Prosecution | * | | |
| Court Order | * | | |
| Penalty Notice | * | * | * |
| Order | * | * | * |
| Letter requesting undertaking | * | * | * |
| Negotiated outcome | | * | * |
| Warning letter/caution | | * | * |
| Record breach | | | * |

If an officer is considering issuing a penalty notice, it must be remembered that payment of a penalty notice fine precludes the opportunity to bring any further proceedings against any person for the alleged offence. However if a penalty notice is withdrawn before payment of the fine, then further proceedings against any person for the alleged offence may be brought. Officers will refer to further information on issuing penalty notices in **Appendix 2 - Penalty Notice Guidelines**.

In deciding whether or not to prosecute, reference will be made to guidelines contained in **Appendix 3 - Prosecution Guidelines**.

Irrelevant considerations in choosing an enforcement response:

The decision as to the appropriate action must not be influenced by:

- the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- the personal feelings of the investigating officers concerning the breach or the alleged offender;
- the possible political advantage or disadvantage to the government or any political party, group or individual;
- the possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or otherwise involved in its conduct; or
- possible media or community reaction to the decision.

4.5 Consultation with other regulatory agencies

Regulatory action taken by another authority does not preclude Council from taking compliance action in response to a breach of legislation. However, where an offence is identified which another regulatory agency may also be addressing, Council will consult with the responsible authority to facilitate a coordinated and effective compliance approach.

Appendix 2 – Penalty Notice Guidelines

1. Introduction

Penalty notices are one of a range of options available to Council to deal with offences under various legislation. Enforcement action taken by Council in response to offences will serve either two purposes:

- 1) to **remedy** a breach or **restrain** a threatened breach, by:
 - a. an order or a notice issued by Council requiring action to be taken, or not be taken;
 - b. by commencing civil enforcement proceedings in the Land and Environment Court seeking orders to remedy or restrain a breach.
- 2) to **punish** an offender and **deter** the offender and general community from committing like offences in the future, by:
 - a. issuing a penalty notice requiring payment of a fine; or
 - b. criminal prosecution which results in imposition of a fine or imprisonment.

The choice of enforcement will depend upon the particular circumstances surrounding an offence, particularly the seriousness of the offence and whether a remedial or punitive outcome is sought.

Authorised officers should choose enforcement options which are proportionate to the alleged offence and which are most likely to deter future offences. In some cases a combination of options may be considered necessary to enforce an approval and provide an effective deterrent against further breaches (for example a penalty notice and an Order issued).

These guidelines describe the circumstances in which it is appropriate for authorised officers to issue penalty notices and sets out the procedures to be followed. These guidelines should be read in conjunction with the Breach Management Guidelines and Prosecution Guidelines.

2. Purpose of these Guidelines

These guidelines have been developed for Council when issuing penalty notices for offences under various legislation. The purpose of these guidelines is to:

- provide information on the penalty notice system and the Council's use of penalty notices;
- identify offences which may be dealt with by penalty notices;
- outline the procedures for issuing penalty notices; and
- define roles and responsibilities of Council Officers involved in the process.

3. What is a penalty notice?

A penalty notice is a notice served on a person who appears to have committed a prescribed offence under the Act or the Regulation. The person may elect to pay the specified fine for the offence or elect to defend the matter in court. The notice is similar in form to a parking ticket. A penalty notice may also be referred to as an infringement notice, a penalty infringement notice or a "PIN". Generally speaking, penalty notices are issued for one-off, relatively less serious offences.

3.1 Penalty notice offences

Legislation prescribes the offences for which penalty notices may be issued and the fines payable. Authorised officers must be familiar with the prescribed offences and ensure they rely on the most up-to-date version of the applicable legislation, which is available online at www.legislation.nsw.gov.au

3.2 Who can issue a Penalty Notice?

Penalty notices may only be issued by officers authorised by the General Manager of Council to serve penalty notices. Authorisation to issue a penalty notice is given to a named officer and not by reference to a specific position. A list of officers authorised to issue penalty notices may be found on the Council's website.

Penalty notices may also be issued by police officers.

4. The penalty notice system

The penalty notice system operates under what is known as the Self Enforcing Infringement Notice Scheme (**SEINS**), which is an automated processing system operated by the State Debt Recovery Office (**SDRO**). The SDRO is the fines division of the Office of State Revenue and is responsible for the collection, processing and enforcement of fines in NSW.

4.1 What happens after a penalty notice is issued?

The recipient of a penalty notice can either:

- a) Pay the infringement notice penalty amount within the prescribed period (21 days from date of issue).
- b) Transfer responsibility for the offence by making a statutory declaration nominating the person actually responsible for the offence. For example, a developer who receives a penalty notice may wish to nominate a subcontractor responsible for the breach.
- c) Request a review of the matter by the SDRO. The payment date of the offence will be extended. In most circumstances, the request will be referred to the Council staff for consideration and advice to SDRO.
- d) Elect to have the matter heard before a Court.

Once a penalty notice is issued, the matter is dealt with by the SDRO and the Council has no further role except in the following circumstances:

- to consider any representation made by the alleged offender;
- withdraw the penalty notice if Council decides to do so; and
- to attend the Local Court if the alleged offender elects to defend the matter in Court.

The SDRO gives the alleged offender 21 days within which to exercise one of the four options listed above. If the notice is still outstanding after 21 days the SDRO forwards a reminder notice to the person named in the original notice. The reminder notice allows a further 28 days to exercise one of the above options.

Penalty notices which are not finalised within the prescribed time period will be subject to further enforcement action by the SDRO and a further penalty amount is imposed.

Further information on the infringement system can be found online at www.sdرو.nsw.gov.au.

4.2 Relationship between penalty notices and court proceedings

The issuing of a penalty notice does not in itself institute Court proceedings. The matter will only proceed to Court if the alleged offender elects to defend the matter rather than pay the fine. If a person elects to have the matter determined by a court, proceedings are brought in the criminal jurisdiction of the Local Court.

If the Court finds the person guilty, the amount on the penalty notice is not necessarily the amount that the Court will order to be paid. The Court may impose a considerably higher penalty than the penalty notice amount. In the case of the Local Court, a maximum of \$110,000 may be imposed. Payment of a fine is not considered as an admission of guilt nor does it lead to the recording of a criminal conviction.

If the fine is paid, no criminal proceedings can be taken against any person for the alleged offence. However, civil enforcement proceedings may still be taken in respect of the same breach to restrain or remedy the breach.

4.3 Relationship between penalty notices and other compliance options

The issuing of a penalty notice does not preclude the use of other compliance options (except criminal proceedings as noted above). While penalty notices are generally appropriate for breaches that can be remedied easily, the notice itself does not require the offender to remedy the breach. If the penalty does not induce the offender to remedy the breach, Council may need to take additional enforcement action to effect an appropriate remedy, for example, through the use of directions or orders issued under an Act or civil proceedings.

5. Deciding whether to issue a penalty notice

5.1 Does it appear that an offence has been committed?

A penalty notice may be issued if it appears to an officer authorised to issue penalty notices that a penalty notice offence has been committed. It is important to remember that there must be sufficient evidence to prove all the elements of the offence, particularly if a person elects to have the alleged offence dealt with by a Court.

As a minimum, before issuing a penalty notice, the authorised officer must know:

- what particular offence was committed;
- who committed the offence;
- the person's address (if it is a company, its registered office);
- where the offence took place; and
- when the offence took place.

5.2 Is a penalty notice the appropriate response for the offence?

An officer may be satisfied that, as a matter of fact, there is sufficient information to establish that a penalty notice offence has been committed. However, the decision to issue a penalty notice is discretionary and an authorised officer can determine whether a penalty notice is an appropriate response to a particular offence. Officers will refer to Council's Breach Management Guidelines for further information on choosing an appropriate enforcement response.

The circumstances of each offence, especially the seriousness, will determine whether it warrants a penalty notice or whether a stronger or more lenient response is appropriate.

- a) Generally, penalty notices **are** an appropriate response for offences where the breach is:
- relatively minor;
 - an isolated or one-off incident;
 - capable of being remedied quickly and easily;
 - supported by sufficient evidence;

and a fine is likely to be an effective deterrent.

- b) A more lenient response, such as a warning letter or negotiation, may be appropriate for less serious offences.
- c) Penalty notices are **not** appropriate for more serious offences, that is, where a breach is:
- causing or is likely to cause environmental harm;
 - ongoing and not within the alleged offender's capacity to remedy quickly;
 - a continuing non-compliance of repeated directions, orders or notices; and/or
 - warrants a higher penalty than the fine prescribed for a penalty notice.

Such cases may warrant criminal prosecution proceedings or civil enforcement proceedings. Officers will refer to the Council's Prosecution Guidelines for more information on enforcement options for serious offences.

If there is any doubt about the seriousness of the offence and appropriate enforcement options, consultation with Legal Advisors is recommended before proceeding.

- d) Penalty notices are also **not** appropriate in other circumstances, for example where:
- further inquiries are needed to ascertain the nature of the problem and develop an effective long-term solution;
 - an unreasonably long period has elapsed since the alleged offence (note that, in any event, generally the statutory limitation within which to take action for an alleged offence is 2 years from when evidence of the alleged offence became known to an authorised officer);
 - the evidence is insufficient such that if a Court heard the matter, it would be unlikely to succeed.

5.3 Multiple breaches

As already noted, penalty notices primarily deal with one-off breaches that can be remedied easily. By contrast, where multiple breaches have occurred, there is likely to be a major or continuing problem which requires a long-term solution.

In deciding whether to issue multiple penalty notices (for example, for multiple breaches identified by a compliance inspection of an approved project), consideration needs to be given as to whether the breaches warrant the commencement of legal proceedings to achieve a more effective outcome and a higher level of deterrence.

Where multiple penalty notices are chosen as the most appropriate response, the investigating and authorised officers would need to be of the view that prosecution is not warranted. In general, no more than two penalty notices should be issued contemporaneously, however the final number will depend on individual circumstances and the reasons for issuing multiple penalty notices should be fully documented.

5.4 Penalty notices to public authorities

There are particular public interest issues that need to be considered in deciding whether to issue a penalty notice to a State or local government entity. Firstly, the public has an interest in public authorities abiding by the law and that the law should be applied equally to the private and public sectors. Secondly, it is ultimately the taxpayer that bears the cost of financial penalties issued to public authorities. As with all breaches, direct negotiation can be the most effective means to achieve compliance. However, in some cases, taking punitive action may be necessary where direct negotiation has not been effective or to act as a general deterrent.

Council will take into consideration the guidelines in Premier's Memorandum No. 1997-26 "Litigation Involving Government Authorities" when deciding whether to issue a penalty notice to a public authority. The guidelines will apply if a public authority which has been issued with a penalty notice elects to have it dealt with by a Court. Council will take steps, as set out in the guidelines, to consult with the authority and attempt to reach agreement on as many issues as possible.

The guidelines are based on the general principle that litigation between Government authorities is undesirable and should be avoided whenever possible. However the guidelines are not intended to interfere with the normal prosecution discretion of Government authorities. In any case, a penalty notice will only be issued to a public authority with the approval of the General Manager.

5.5 Consultation with other regulatory authorities

Compliance action taken by another authority does not preclude the Council from issuing a penalty notice and/or taking other compliance action in response to a breach of the legislation. However, where an offence is identified that another regulatory agency or local council may also be addressing, Council will consult with the responsible authority to facilitate a coordinated and constructive compliance approach.

6. Before issuing a penalty notice

A summary of the procedure for issuing a penalty notice is shown in **Figure 1** and detailed below.

6.1 Investigation and recommendation to issue a penalty notice

The investigation may be carried out by an officer authorised to issue a penalty notice or by another officer. The investigating officer must collect sufficient evidence to prove the offence in court (in the event that the penalty notice is contested by the alleged offender). Evidence may include items such as inspection notes, photographs or video, samples and statements from the alleged offender(s) or witnesses. Recorded statements or observations on the following are useful, particularly should the matter proceed to Court:

- the state of mind of the appellant, i.e. whether the offence was wilful and/or premeditated;
- the reason for committing the offence;
- cooperation with officers.

The investigating officer will provide a brief of the evidence to the authorised officer (if different), together with a recommendation on issuing a penalty notice and other compliance options, as appropriate.

Any evidence gathered during the course of the investigation must be kept and maintained in accordance with the Evidence Act 1995 and any relevant Council procedure, in particular the Council's Breach Management Guidelines.

It is absolutely essential that the brief of evidence prepared by the investigating officer establishes that an offence has been committed because if the person who receives the notice elects to have the matter heard in Court, the Council must be able to prove in Court that the offence was committed by that person.

For matters that would fall into the category of minor offences (prescribed penalty less than \$600.00, general traffic and parking offences) it is recognised that an investigating officers brief of evidence will ordinarily consist of notations and photographs capable of being managed through 'Pinforce Applications' or contemporaneous notebook. This is recognised as 'prima facie evidence' being evidence that, on the face of it, is sufficient to convict a person and is not merely speculative and as such no further evidence gathering or investigation would be required. Prior to loading data into a Pinforce application or issuing an infringement for a minor offence the investigating officer must, in recognition of Council's Compliance and Enforcement Guidelines, form a view as to the appropriateness of issuing a penalty or warning notice.

6.2 Decision to issue a penalty notice

Upon reviewing a brief of evidence and recommendation for a penalty notice, the relevant authorised officer will either:

- approve the recommendation;
- request further information from the investigating officer; or
- reject the recommendation and consider alternative compliance options.

To issue a penalty notice the authorised officer must hold the belief that:

- a penalty notice offence has been committed, and
- sufficient evidence has been collected to prove all the elements of the offence.

The decision on whether or not to issue a penalty notice will be recorded on the relevant Council file, together with the reasons for the decision.

6.3 Advice to alleged offenders

As soon as possible after an offence is identified (other than traffic or parking offences), the alleged offender will be notified of the offence, advised whether there is a likelihood of further compliance action and the range of possible compliance actions that may be taken. This also affords the alleged offender the opportunity to remedy the alleged breach.

If it is decided to issue a penalty notice, advice of that decision will also be given to the alleged offender as soon as possible after the penalty notice is completed.

6.4 Minor Offences (eg <\$600 fine, including parking, traffic offences)

When considering compliance and/or enforcement action for minor matters it is important that the matter of public interest is still appropriately considered.

In relation to 'minor offences' a key consideration of public interest is the level of resource required to be committed to the investigation process so as to obtain sufficient evidence to establish whether a breach has occurred and the facts surrounding the breach (including the identity of the responsible person(s)). In general terms the level of evidence required will have a direct relationship with the severity of the non-compliance action and prosecution response. All Council investigations are conducted in accordance with Council policy 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 officers;
- in accordance with the law; and
- respectful of individuals.

Matters are considered to fall into the category of ‘minor offences’ where the breach is:

- relatively minor;
- an isolated or one-off incident;
- capable of being remedied quickly and easily;
- supported by sufficient evidence;
- prescribed penalty of \$600.00 or less;

and a fine is likely to be an effective deterrent.

For minor offences it is recognised that an investigating officer’s brief of evidence will ordinarily consist of notations and photographs capable of being managed through ‘Pinforce Applications’ or contemporaneous notebook. This is recognised as ‘prima facie evidence’ being evidence, on the face of it, is sufficient to convict a person and is not merely speculative and as such not further evidence gathering would be required.

An officer may be satisfied that, as a matter of fact, there is sufficient information to establish that a penalty notice offence has been committed. However, the decision to issue a penalty notice is discretionary and an authorised officer can determine whether a penalty notice is an appropriate response to a particular offence. Officers will refer to Council’s Breach Management Guidelines for further information on choosing an appropriate enforcement response.

7. Serving a Penalty Notice

7.1 Who must be served?

The notice must be served on the person who appears to have committed the offence. The person served has to be an individual or an incorporated body (such as a company or body corporate).

7.2 How must a penalty notice be served?

The notice has to be served personally or by post to a street address, not a Post Office box.

7.3 When must it be served?

There is no specific timeframe set out in legislation for the serving of penalty notices. However, a penalty notice will be served as soon as possible after Council investigates the alleged offence, to allow the recipient maximum opportunity to recall the events the subject of the notice.

As a matter of best practice it is desirable that penalty notices be served within 28 days of the breach being investigated or within 28 days of advising the alleged offender of the breach, whichever occurs first.

7.4 Submission of a penalty notice to the SDRO

There is no legal timeframe within which Part A of the penalty notice is to be submitted to the SDRO. However, for the purposes of this procedure Part A of the penalty notice should be forwarded to the SDRO at the same time the notice is issued to the alleged offender, or at least **within 1 week**.

7.5 Notifications within Council

Reporting on enforcement actions undertaken will be undertaken on a quarterly basis. Council’s corporate reporting will include reports on compliance monitoring and enforcement actions undertaken as recorded within Council’s (Commercial Client) consolidated accounts managed by the State Debt Recovery Office (warning and penalty infringement notices) and the Authority Compliance Register (warnings, notices, orders and prosecutions).

7.6 Cancellation of a penalty notice

In situations where the details on a penalty notice have been completed and there has been a subsequent decision not to issue the notice before it is served, the notice may be cancelled. For the purpose of this procedure a cancellation is to be forwarded to the SDRO as soon as practicable but within **2 weeks** of being completed.

Penalty notices forwarded to the SDRO for cancellation **must** be in the following format:

- Endorsed with the word “cancelled” on both Parts A and C.
- Clear statement of the reason for cancelling the notice.
- Name (printed in the box), Signature (in addition to name), Authority (name of organisation) and the date of cancellation must be provided by the issuing (authorised) officer.

Note: the SDRO processing fee is not charged for cancelled notices.

7.7 Withdrawal of a penalty notice

Information may become available following the issuing of a notice that may warrant its withdrawal. Circumstances in which a penalty notice may need to be withdrawn include:

- the notice was issued to the wrong person;
- it has since been determined that there is not a breach of the legislation;
- a lesser compliance action (eg warning letter) is more appropriate; or
- it has since been determined that prosecution is more appropriate.

In such circumstances a penalty notice may be withdrawn as soon as practicable, but within 28 days of service. The authorised officer who issued the penalty notice is responsible for completing the following process to withdraw a notice:

- prepare a letter or email notifying the SDRO of a withdrawal and a brief statement regarding the reasons;
- forward to the SDRO Business Development Unit; and
- contact the person to whom the penalty notice was issued and notify them that the notice has been withdrawn and provide the reason(s) for the withdrawal.

If the penalty notice has already been paid prior to withdrawal then the SDRO will refund the payment.

Where an alleged offender has elected to have the matter heard in Court, and there has been a subsequent decision to withdraw the penalty notice, the SDRO must be advised by the authorised officer at least **10 days** prior to the allocated date for the hearing.

Note: this provision should be viewed as a safety net only and not an option to be applied regularly.

7.8 Representations

A representation is a written application from the alleged offender for the penalty notice to be reviewed or withdrawn. Only written representations referred to Council by the SDRO will be considered. This is reflective of the ‘Premium Service Contract’ executed between Council and the SDRO.

To ensure impartiality, representations should be reviewed by an authorised officer other than the person who issued the original penalty notice. In most cases this will be the Manager unless they issued the notice. The details of the representation process are shown in **Figure 3**.

Representations made to the SDRO

The following process shall be followed:

1. The SDRO, upon receipt of a representation, will forward to the Manager – Development and Compliance a representations package including the actual representation from the alleged offender.
2. The Manager – Development and Compliance will, **within 2 days** of receiving the representations package, request from the authorised officer who issued the penalty notice:

- (a) A briefing note including all facts relating to the issue of the penalty notice; and
- (b) A statement specifying that the notice was or was not issued in accordance with this guideline, and a recommendation to pursue one of the following options:
 - Infringement to stand (“ITS”) - the penalty notice should remain in force and the penalty is to be paid; or
 - Caution - there are extenuating circumstances where leniency may be considered. These circumstances should be clearly set out; or
 - No action - the notice was issued incorrectly or not in line with policy and no offence is disclosed.

This information will be forwarded to the Manager – Development and Compliance **within 1 week** of receiving the request.

3. The Manager – Development and Compliance will forward the outcome of the review, contained in the completed representations schedule, to the SDRO **within 2 weeks** of the representations package being received.

If consideration of the representation is likely to take more than 2 weeks, a request to have the matter suspended should be immediately sent to the SDRO. The Manager – Development and Compliance must approve of the suspension action prior to the SDRO being notified.

The SDRO is to be advised immediately a decision on the representation is made.

Representations to the Council

Any representation made to the Council should be immediately forwarded to the SDRO to be processed as described above. Written advice that the representation has been forwarded to the SDRO must be sent to the person making the representation.

Records of representations

The Manager – Development and Compliance is responsible for the maintenance of completed representations and SDRO schedule files. For audit purposes, a representation file must be retained for two years after the date of issue of the penalty notice.

7.9 Court elections

If an alleged offender elects to have a matter determined in Court, they will fill out the “Court election” component of the penalty notice and return it to the SDRO. The SDRO will then advise the Council. Any Court election received by Council must be referred **immediately** to the Manager – Development and Compliance, who will require a brief of evidence from the authorised officer who issued the penalty notice.

Appendix 3 – Prosecution Guidelines

1. Introduction – Enforcement Role

Council has responsibilities under the Local Government Act, and an important function in discharging that responsibility is the enforcement of the requirements of the various Acts and Regulations and decisions made under the Act.

Taking enforcement action to uphold the legislation ensures that its requirements remain effective. In some cases, the appropriate enforcement action is the prosecution of wrongdoers for offences against an Act and relevant regulations.

This document has been prepared to inform Council officers of the basis upon which a decision to prosecute an offender is made. In particular, these guidelines will guide authorised officers who have been appointed under the Act to exercise the Council's enforcement powers.

The purpose of these guidelines

The purpose of these guidelines is to identify:

- (a) the basis upon which a decision to prosecute is made;
- (b) the alternatives to prosecution;
- (c) the factors to be taken into account in deciding who to prosecute;
- (d) the factors to be taken into account in deciding which charges to lay;
- (e) the factors to be considered in determining which Court to commence the proceedings; and
- (f) factors considered before commencing an appeal against a sentence imposed on an offender.

These guidelines are not legally binding.

2. Prosecution

Prosecution involves commencing **criminal** proceedings against a person for an offence against an Act or regulations. It is an important element of enforcement which aims to punish wrongdoers and act as a deterrent to the individual and the public at large.

Like most statutes, legislation specifies that a breach of any of its provisions (including the regulations) is an offence. A person found guilty of such an offence will receive a criminal conviction and is liable to a penalty.

Given the seriousness of a criminal conviction and the significant penalties that may be imposed, the decision to prosecute requires careful consideration of a number of factors which will vary from case to case. The following provides guidance on the principles to be applied when deciding whether a criminal prosecution is the appropriate option for dealing with a breach of the Act or regulations.

2.1 The decision to prosecute

2.1.1 Is prosecution available?

A consideration in deciding whether or not to prosecute is whether a conviction for an offence is precluded by an Act. A person cannot be convicted of an offence if the offence is the subject of:

- a) civil enforcement proceedings to remedy or restrain a breach of an Act which have not concluded; or
- b) an order made by the Court to remedy or restrain a breach; or
- c) civil enforcement proceedings which have concluded but did not result in the making of a Court order.

2.1.2 Evidence

To commence a criminal prosecution, Council must have 'prima facie evidence' that a person has committed an offence under an Act or regulations. This means evidence which, on the face of it, is sufficient to convict a person and is not merely speculative.

2.1.3 Public Interest

While Council has a responsibility to enforce certain laws, the decision to prosecute for an offence is discretionary. In other words, Council may choose whether or not to commence a prosecution, or whether other enforcement options are appropriate to uphold laws. The law requires Council to turn its mind to the exercise of enforcement powers, but it does not require Council to exercise them.

The law recognises that the dominant consideration in deciding whether to prosecute is whether a prosecution is in the public interest. As expressed by one judge of the High Court, “the decision when and in what circumstances to enforce public law frequently calls for a fine judgement as to what the public interest truly requires.”

The criteria for commencing a criminal prosecution cannot be reduced to a formula. In making a ‘fine judgement’ on whether a prosecution is in the public interest, the relevant Council officer will take into account a range of factors which will vary with the circumstances of each case. The task is to assess individual cases which come before it and recommend the appropriate enforcement action to be taken by the relevant officer. The general principles to be considered are set out in the following section.

2.1.4 Public interest factors relevant to a decision to prosecute

The general proposition is that prosecutions relate to serious offences, not trivial offences. Therefore, a minor or technical breach of a statutory requirement would not, in the absence of other aggravating factors, justify a prosecution (eg submitting an environmental monitoring report a few days late).

Other factors which are relevant in deciding whether it is in the public interest to prosecute for an offence include the following:

- (a) the degree of harm or potential harm caused by the offence to the environment (both natural and built), human health or the social and economic fabric of the community;
- (b) the degree of fault of the alleged offender;
- (c) the availability of any alternatives to prosecutions;
- (d) whether the breach is a continuing or second offence;
- (e) whether the offender has previously been dealt with by other less serious enforcement options (and therefore prosecution may be more effective);
- (f) whether or not the alleged offence is of considerable general public concern;
- (g) the prevalence of the alleged offence and the need for deterrence, both specific deterrence (of that individual) and general deterrence (of the community at large);
- (h) the length of time that has elapsed since the alleged offence;
- (i) the age, physical or mental health or special infirmity of the alleged offenders or witnesses (mitigating factors);
- (j) whether an urgent or prompt resolution is required (prosecution proceedings do not bring about an immediate solution);
- (k) the human and financial resources required to conduct Court proceedings;
- (l) any precedent which may be set by not instituting proceedings;
- (m) whether the consequences of any conviction would be unduly harsh or oppressive; and
- (n) whether proceedings are to be instituted against others arising out of the same incident.

2.1.5 Matters not relevant to a decision to prosecute

A decision whether or not to prosecute will not be influenced by:

- (a) any elements of discrimination against a person, eg race, nationality, political associations;
- (b) personal empathy or antipathy towards the offender;
- (c) the political or other affiliations of those responsible for the prosecution decision;
- (d) possible political advantage or disadvantage to the government or any political party, group or individual;
- (e) the possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or otherwise involved in its conduct; or
- (f) possible media or community reaction to the decision.

2.1.6 Who may prosecute

As prosecution for offences under the Act or regulations must be in the public interest, it follows that the Council and other public authorities charged with acting in the public interest have the right to bring Court proceedings. By contrast, private citizens may only bring prosecutions in very limited circumstances.

Local Councils:

A **Minister** may bring prosecution proceedings for a breach of the Act or regulations.

A **Local Council** may also bring proceedings for breaches of the Act or regulations which relate to its regulatory powers and functions (eg offences relating to breach of orders, development consents for which it is the consent authority and planning instruments). There may be instances where the Minister and Council's enforcement functions overlap. For example, a person may carry out excavation work contrary to a development consent granted by a council under Part 4. The extent of that excavation may be so significant that it amounts to 'extractive industry' and requires State approval under the Act. Consequently, it is open to the council to commence a prosecution for breach of its consent or the Minister could prosecute for failure to obtain an approval under the Act. The appropriate body to commence a prosecution will depend upon the particular circumstances surrounding the offence. Legal Advice should be sought in such cases.

Private citizens:

Members of the public have no automatic legal right to bring criminal proceedings for an offence under the Act; they require the leave of the Court to do so. A person must demonstrate a special interest in enforcing the public duty which is greater than the rest of the public generally. For example, a person might be held to have a special interest where an offence affects their property rights or has caused them to suffer damages.

In practice, private citizens are more likely to bring civil proceedings than criminal proceedings in response to a breach of the Act because:

1. they do not need the Court's leave to commence civil proceedings;
2. there is a lower burden of proof to succeed in civil proceedings than in criminal proceedings;
3. civil proceedings can be less costly than criminal proceedings.

2.1.7 Time within which to commence proceedings

Generally, proceedings for an offence against an Act or regulations must be commenced **no later than 2 years:**

- (a) after the offence was alleged to be committed; or
- (b) after the date on which the alleged offence first came to the attention of an authorised officer.

It is therefore essential to properly record the date on which evidence of an alleged offence first came to the attention of an authorised officer.

3. Alternatives to prosecution

In determining whether a prosecution is in the public interest, Council will also consider whether other enforcement options are appropriate. The following provides an overview of alternatives to prosecution, each of which are dealt with more fully in other chapters of the Council's Guidelines.

3.1 Penalty notices

Penalty notices are primarily designed to deal with one-off breaches of a relatively minor nature that can be remedied easily. Once a penalty notice fine is paid, further prosecution proceedings cannot be brought against any person for the alleged offence. However if a penalty notice is withdrawn before payment of the fine, then further proceedings may be brought for that same offence. Should the recipient of the penalty notice elect to have the matter determined by a Court, the matter would be heard in the criminal jurisdiction of the Local Court. The Council's Penalty Notice Guidelines provide guidance on the issuing of penalty notices.

3.2 Orders/Directions given by Council

Council Officer can give Directions/Orders in respect of various matters or offences against Act or Regulations. Orders cannot require the payment of a fine. Orders are an effective enforcement option when a person complies with its terms in the required timeframe. Where there is non-compliance, civil or criminal proceedings may ultimately be necessary to enforce the order (such as a fire safety order).

The Council's Breach Management Guidelines set out more information on orders.

3.3 Civil proceedings

An alternative to criminal prosecution is bringing civil proceedings for a breach of the Act. Civil proceedings are appropriate where the Council seeks a Court order to restrain or remedy a breach of an Act.

Civil proceedings may be brought not only by the Council, but by 'any person'. Unlike criminal proceedings, a private citizen may bring civil proceedings regardless of whether the breach has affected (or will affect) the rights of that person.

As noted above, once civil proceedings have commenced, a person cannot be convicted and fined in criminal proceedings for the conduct to which the civil (and proposed criminal) proceedings relate **except** where the Court declines to make an order in those civil proceedings.

3.4 Undertakings to restrain or remedy a breach

An alternative to prosecution is the Council and offender entering into an undertaking whereby the offender will take action to remedy a breach which has already occurred, or will refrain from taking action where a breach is anticipated. This option is an 'outcome-based' option rather than one which seeks to punish an offender.

Such an undertaking is, in effect, a record of what the offender has agreed to do and may not be legally enforceable against the offender. However, this option may result in an outcome which is quicker and less costly than bringing a prosecution. If an offender fails to comply with an undertaking, more serious enforcement options can then be addressed. A failure to comply with an earlier undertaking would not weigh in the offender's favour in any later prosecution proceedings for that offence.

4. Selecting the appropriate defendant

4.1 Different sources of liability

Liability for offences under the Act may be imposed on:

- a) the person who actually committed the offence;
- b) person who did not personally commit the offence, but who the law holds responsible for an offence committed by another person (for example, employers may be responsible for the acts of their employees, corporations may be held liable for their company directors);
- c) a person who participated in a crime committed by another person and is therefore liable as an accessory.

More than one person may therefore be liable for an offence arising from the one activity. For example, where unauthorised development work has been carried out by a builder in accordance with a direction given by the owner of the property, both the builder (as the principal offender) and the owner (as an accessory) may be liable for an offence.

4.2 Relevant factual issues

Factual matters which will be identified before deciding who to prosecute for an alleged offence include:

- (a) the person who actually committed the act (or omitted to act) which gave rise to the offence (the principal offender);
- (b) any other person(s) who assisted the principal offender in the commission of the offence;

- (c) whether the person is an employee and, if so, the scope of their employment and the seniority of the position held;
- (d) whether the person is a corporate officer (eg company director) and, if so, the scope of their duties and functions;
- (e) where an offence was committed by an employee or corporate officer, did they commit the offence:
 - in the course of carrying out their employment or duties (so that the employer/corporation may also be liable); or
 - outside the scope of their employment or duties (so that only the individual and not the employer/corporation may be liable).
- (f) the state of mind of the offender (and any accessory), for example, whether they acted in good faith, whether they knew or should have known that the conduct was an offence and whether they took reasonable steps to avoid the offence.

It is often difficult to determine the most appropriate person(s) to be held liable for an offence. This issue is fundamental to a successful prosecution and legal advice must be obtained before proceedings are commenced.

4.3 Prosecution of Public Authorities

4.3.1. Public Interest

Public authorities have a responsibility to comply with the law and, unless the legislation provides otherwise, they can be guilty of the same offences as the rest of the community.

As with all prosecutions, deciding whether prosecution of a public authority is the appropriate method of enforcing compliance involves a consideration of the public interest. However prosecution of one Government authority by another also involves competing public interests:

- on the one hand, the public interest in authorities abiding by the law and accepting responsibility for the consequences of a breach of the Act;
- on the other hand, the public interest in minimising the cost to the public, as it is the taxpayer that bears the cost of any prosecution of a public authority as well as the cost of its defence.

4.3.2. Consultation

Generally, litigation between Government authorities is undesirable and should be avoided where possible. This principle is expressed in guidelines issued by the Premier's Department for litigation involving public authorities (Premier's Memorandum M1997-26). The guidelines apply to all Government departments and encourage attempts to settle or narrow disputes between authorities.

When considering whether to prosecute a public authority, Council must take the steps set out in the guidelines to consult with the authority against whom the prosecution is contemplated. A copy of Premier's Memorandum M1997-27 can be found on the website of the Department of Premier and Cabinet (www.dpc.nsw.gov.au).

The consultative steps set out in the Memorandum may facilitate remedial action and may expedite any Court hearing by better defining the facts in issue. Consultation can also focus on longer term strategies and directions. Indeed, the consultative process, as an adjunct and not necessarily an alternative to prosecution, will not be restricted to public authorities but can be applied to the private sector as well. It would be inappropriate to enter consultations with Government departments solely to achieve a 'by consent' prosecution wherein the charges laid do not reflect the gravity of the offence. However, it is in the public interest that Court proceedings involving public authorities are concluded quickly. Council will, therefore, define the facts in issue and, with the concurrence of the other authority, will prepare and tender to the Court an agreed statement of facts.

5. Choosing the appropriate Court

Proceedings for an offence against regulations are brought in the local Court.

Proceedings for an offence against an Act may be brought in either the local Court or the Land and Environment Court of New South Wales. The maximum penalty which can be imposed by each Court is an important factor in deciding which Court to commence a prosecution in for an offence against the Act. This is discussed further below.

Land and Environment Court:

The Land and Environment Court (LEC) is a specialist Court which determines environmental planning and protection disputes, including criminal prosecutions for offences. An LEC prosecution is commenced in the Court's criminal jurisdiction (class 5) and is heard by a judge without a jury. The LEC has power to impose significant fines up to \$1,100,000 for an offence and, for continuing offences, a further penalty of up to \$110,000 for each day the offence continues.

Local Court:

Prosecution proceedings in a local Court are heard by a magistrate in the Court's criminal jurisdiction. The maximum penalty which can be imposed by a local court is \$110,000 - significantly less than the LEC.

Which Court?

Prosecution of an offence against regulations is taken before the local Court.

Prosecution of an offence against an Act, however, may be taken before a local court or the LEC; the choice of court will depend upon the circumstances of the particular offence.

An LEC prosecution is appropriate for serious offences under the Act where a significant penalty is warranted to punish the offender and deter future breaches. For example, an offence which has harmed the environment and/or was knowingly committed, may warrant a penalty higher than \$110,000 (ie the maximum which can be imposed by a local Court). In addition, the specialist jurisdiction of the LEC may be more appropriate to adjudicate technical issues and evidence which are the subject of a prosecution.

Conversely, local Court prosecutions may be appropriate for less serious offences which do not involve environmental harm or deterrence of repeat offenders, nor require adjudication by a magistrate on specialist technical issues.

6. Sentencing considerations

Where a person is found guilty of an offence, the Court will consider a number of matters to determine a sentence which 'fits the crime'. The general principle is that a sentence must reflect the seriousness of the offence and the personal circumstances of the offender. The following is an overview of sentencing considerations to assist Council's consideration of possible sentencing if a prosecution is successful:

Relevant considerations in determining the seriousness of the offence:

- the offender's state of mind;
- the offender's reasons for committing the offence;
- the foreseeability of the risk of harm;
- practical measures which could have been taken to avoid the risk of harm;
- the offender's control over the causes of the harm; and
- whether the offender was complying with orders from an employer or supervising employee when the offence was committed.

Relevant considerations in determining the personal circumstances of the offender:

- existence of or lack of prior criminal activity;
- good character of the offender;
- whether there has been a plea of guilty and the timing of that plea;

- whether the offender has expressed contradiction or remorse;
- whether the offender has assisted or cooperated with authorities; and
- the financial means of the offender.

7. Appeals against sentence

A Council may appeal against sentences imposed by Local Courts and the Land and Environment Court for offences. Although the Land and Environment Court has the power to impose greater fines than those which may be imposed by the Local Court, it does not necessarily follow that an appeal on sentence will result in a higher fine being imposed.

In deciding to appeal a sentence, Council will be guided by the Prosecution Guidelines of the Office of the Director of Public Prosecutions, New South Wales. The key factors to be taken in account are:

- a) appeals should only be brought to establish and maintain adequate standards of punishment for environmental crime or to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice; and
- b) appellate Courts will intervene only where it is clear that the sentence has made a material error of fact or law or has imposed a sentence that is manifestly inadequate.

In general, an appeal will only be instituted where it is considered likely to succeed. Any such appeal is to be brought promptly.

Appendix 4 – Communication Guidelines

Communications Guideline – proactive and reactive media Lismore City Council compliance and enforcement work

This guideline is intended to clarify the situations when it is appropriate to name proponents/ developers/ companies or provide details of incidents, with respect to the enforcement activities of Council. The guideline attempts to balance the public's right to information, with the need to ensure the work of the Development and Compliance Program Area is not compromised.

Council recognises the importance of providing information on its activities to maintain transparency and public accountability. The default position is for the Council to provide information on its compliance activities, except where provision of that information may:

- compromise any investigation into a potential breach or prejudice any resultant litigation; or
- compromise Council's ongoing working relationships with proponents, complainants, councils or other stakeholders.

Investigations:

Council conducts investigations into potential breaches of legislation administered by Council. Information obtained from investigations may need to be used in evidence for matters that result in litigation. To avoid any risk of compromising Council's investigations or prejudicing any subsequent litigation, Council does not divulge information concerning potential breaches under investigation, including who or what is being investigated.

Stakeholder relationships:

Under conditions of approval, proponents are sometimes required to "self-report" incidents that may involve potential breaches. Council can rely on "self-reporting" to identify breaches which might otherwise not be detected through inspections and routine monitoring. Council will generally not provide information about less serious matters self-reported by proponents, as this may have the potential to discourage companies from "self-reporting" breaches of their consent conditions. Unwarranted public attention could also diminish the co-operation of companies during investigations if they believe they will be unfairly "named and shamed". This may make it more difficult and time-consuming for the compliance unit to undertake investigations of suspected breaches, ultimately resulting in sub-optimal compliance outcomes.

Where Council receives information from complainants Council will not release details that may result in the identification of the complainant, to ensure their privacy is maintained. Council would consider identifying other agencies who report potential breaches to Council, providing any sensitivities surrounding these stakeholders are not compromised, and any investigation is not compromised.

Council recognises that where companies have clearly acted in breach of their obligations, and more serious enforcement actions have been taken, it is appropriate that these companies be identified and be publicly accountable to their communities.

The following table sets out when incidents should be detailed or proponents named, either:

- a) Proactively (eg through reports or a media release); or
- b) Reactively, in response to specific media inquiries.

The Manager – Development and Compliance may, on a case-by-case basis, decide on a different approach to the level of information about an incident (ie more detail or less detail) which is provided to the media, in consultation with the communications officer of Council.

| Type of action | Proactive communication (report or media release) | | Reactive communication | |
|--|--|--|--|--|
| | Name company? | Information provided | Name company? | Information provided |
| Inspections | No | <ul style="list-style-type: none"> General information about the nature of inspections and actions resulting. No site specific details. | No | <ul style="list-style-type: none"> General information about the number and type of inspections and the general outcomes. No site specific details/ name (unless the inspection led to enforcement actions, as in table 2.) |
| Negotiated outcome | YES (if agreed to by company.) NO (if not agreed by company.) | <ul style="list-style-type: none"> Include general information if the seriousness of the incident or public interest warrants it. Name the proponent if they have agreed to be identified as part of the negotiated outcome. | YES (if agreed to by company.) NO (if not agreed by company.) | <ul style="list-style-type: none"> Additional information of a general nature if proponent has agreed to be named. If proponent does not want to be named, no additional information to be provided, as negotiated outcomes involve cooperation from the proponent. |
| Advisory letter | NO | <ul style="list-style-type: none"> Statistics in compliance report. | NO | <ul style="list-style-type: none"> No additional information, as these are an administrative/information tool. |
| Warning letter | NO | <ul style="list-style-type: none"> If the seriousness of the incident or public interest warrants it, provide general information in the compliance report about the nature of the warning letter. | NO (if self-reported) YES (if not self-reported) | <ul style="list-style-type: none"> Additional information provided, including site specific details, if company has not self-reported and the Council has had to proactively identify the compliance issue and act. No site-specific information if the company self-reported. |
| Enforceable undertaking | YES | <ul style="list-style-type: none"> Statistics in compliance report. | YES | <ul style="list-style-type: none"> No additional information, as this is a step within the investigation process and indicates inquiries and investigations are ongoing. |
| Notices to produce information and records | NO | <ul style="list-style-type: none"> Statistics in compliance report. | NO | <ul style="list-style-type: none"> No additional information, as this is a step within the investigation process and indicates inquiries and investigations are ongoing. |
| Draft orders | NO | <ul style="list-style-type: none"> Statistics in compliance report only. | NO | <ul style="list-style-type: none"> No additional information, as this stage indicates the enforcement action has not been finalised. |
| Order from the Council | YES | <ul style="list-style-type: none"> Include in compliance report and/ or prepare a media release with name of company and details of incident and order. | YES | <ul style="list-style-type: none"> Provide additional information about the incident and investigation and reasons for the order, if requested. |
| Court order | YES | <ul style="list-style-type: none"> Include in compliance report and/ or prepare a media release with name of company and details of incident and court order. | YES | <ul style="list-style-type: none"> Provide additional information about the incident and investigation and reasons for the court order, if requested. |
| Penalty notice | YES | <ul style="list-style-type: none"> Include in compliance report and prepare a media release with name of company and details of incident and penalty. | YES | <ul style="list-style-type: none"> Provide additional information about the incident and investigation and reasons for the penalty notice, if requested. |
| Court order | | <ul style="list-style-type: none"> Include in compliance report and/ or prepare a media release with name of company and details of incident and court order. | | <ul style="list-style-type: none"> Provide additional information about the incident and investigation and reasons for the court order, if requested. |
| Penalty notice | | <ul style="list-style-type: none"> Include in compliance report and prepare a media release with name of company and details of incident and penalty. | | <ul style="list-style-type: none"> Provide additional information about the incident and investigation and reasons for the penalty notice, if requested. |
| Prosecution | Before and during court proceedings | | | |
| | NO | <ul style="list-style-type: none"> Include in compliance report with information of a general nature, but not site specific details such as the name of the proponent. | NO | <ul style="list-style-type: none"> No further details provided by the Council, but the media may be referred to the court for further information. |
| | Court action completed | | | |
| | YES (if court success) NO (if no success in court) | <ul style="list-style-type: none"> If the prosecution was successful, include in compliance report, with site specific information and the name of the proponent, and the penalty imposed. If prosecution unsuccessful, no proactive communication as the allegation is not proved and media scrutiny of the company would be unwarranted. | YES (if court success) NO (if no success in court) | <ul style="list-style-type: none"> If prosecution was successful, provide additional further information as requested about the incident, proponent, background about the site or previous incidents, penalty imposed and maximum penalties. If unsuccessful, refer the journalist to the court or provide information that is already on the public record, while making it clear that the action was unsuccessful and the allegation was not proved. |

Appendix 5 – Acknowledgements and Additional Resources

Lismore City Council would like to thank and acknowledge the NSW Department of Planning and Infrastructure for freely allowing the reproduction of a large section of these guidelines as a basis to assist Council in ensuring best practice in exercising its compliance and enforcement functions.

The NSW Ombudsman's Office published 'good practice' enforcement guidelines in 2002 to help councils act promptly, consistently and effectively in response to allegations of unlawful activity. These guidelines were the basis of Council's former policy from December 2008 to June 2013, and are a useful tool to assist Council staff in determining appropriate enforcement outcomes in the event of uncertainty or for further information. These guidelines are considered to be consistent with the NSW Ombudsman's Office 'good practice' enforcement guidelines.

The ICAC, Division of Local Government, the Building Professionals Board and the Department of Planning and Infrastructure all publish practice guidelines that relate to exercising regulatory functions by Councils, and these resources should be consulted on a regular basis to ensure up to date practice in legislation and enforcement practice is observed.

Council also has a panel of firms that provide legal advice to Council staff on a variety of matters, and this resource will be used to ensure the efficient and effective use of Council resources in responding the compliance and enforcement matters.

Sample Text for 1st contact letters on compliance matters

#####

#####

13 January 2014

####

Dear #####

Possible breach of NSW legislation

I am writing to you to follow up a on possible non-compliances with the provisions of NSW legislation at your property located at [**Insert address: #####**].

Council's desired outcome is to work with you to resolve the identified issues and ensure compliance with the relevant legislation, regulations and policies is achieved.

Details of the possible non-compliances detailed are below.

Background

Further to [**Insert details/ date(s)of any previous contact**] Council is seeking your cooperation in resolving the complaint/observation [**insert details of the complaint**]

A preliminary investigation of this matter was carried out by Council staff on [**insert date (s)**] in response to the complaint/s which identified that [**insert details of the inspection/ investigation/ outcomes**]

The above matters are of concern for the following reasons:

[**Insert details**]

(**Include a reference to relevant legislation**)

What Council is proposing (remedial actions)

In order to address the said concerns, Council has itemised the following options for you, these being:

[**Insert details in point or dot form**]

If you wish to discuss alternative options which, satisfactorily address Council's concerns, enquiries are welcome.

Council would appreciate your response with your proposed schedule of works to address these concerns, together with a reasonable timeframe to undertake those measures This information must

be provided in writing **prior to [Insert date]** for consideration by Council staff, who will then determine what follow up action which may be appropriate in the circumstances.

Please do not ignore this letter as fines or penalties may apply if Council does not receive an adequate response. In preparing your response to the above matters, you are invited to provide your reasons for why Council should not issue a fine or penalty by the above date.

Council wants to ensure that any decision in accordance with Council policy is based upon the facts. This is why we want to hear your version of events.

Upon receipt of information or advice from you, Council staff will:

- review those submissions;
- make reasonable inquiries or investigations and ensure that a decision is based upon findings of fact that are in turn based upon sound reasoning and relevant evidence;
- act fairly and without bias in making decisions, ensuring a person doesn't decide a case in which they have direct interest;
- conclude the investigation or address an issue with minimal delay;
- determine what action (including a possible fine/penalty) is appropriate in the matter plus your cooperation in responding to Council's concerns.

Please read the attached fact sheet on our approach to compliance, enforcement and dealing with complaints or breaches of NSW legislation. This is important information that may assist you in responding and understanding the process.

If this matter is not addressed we may be forced to consider further action regarding the issues highlighted, and accordingly your co-operation within the time specified would be much appreciated..

If you are unsure of any of the above issues or information, require any clarification of this letter, or wish to explore alternative options, please do not hesitate to contact **[insert name of officer#####]** on 1300 87 83 87, Monday to Friday.

Yours faithfully

[NAME#####]
[TITLE#####]

