

POLICY NAME: ENFORCEMENT

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1. INTRODUCTION

1.1 Policy Statement

Council is strongly opposed to unlawful activity at any time or under any circumstances. Council will initiate enforcement action in accordance with this policy document.

1.2 Policy Objective

The objective of this policy is to establish clear guidelines for the exercise of the discretion the Council must use in dealing with unlawful activity, taking into account all relevant information including the available evidence, cost to the community, the circumstances of the individual case, and public policy and precedent considerations.

This policy:

1. Provides legal and administrative framework to assist Council in making decisions in its enforcement functions
2. Specifies the criteria which the Council will take into consideration when deciding if enforcement action is necessary and the most appropriate type of action for Council to instigate
3. Provides information to the public about the Council's role and policy on enforcement; and
4. Ensures that the enforcement process is conducted, as available resources allow.

1.3 Application

This policy applies to the investigation and enforcement of unlawful activity or failure to comply with terms or conditions of approvals, licenses, orders, directives and public signage. While it is primarily directed at the regulation of development activity, the policy may also be applied to other matters such as pollution control, regulation of parking and public places, streets and reserves as well as animal control, where applicable.

Whilst it is always preferred that co-operation is firstly sought and provided from landowners and occupants who may not be complying with Council's requirements, there will be instances where some form of enforcement action is required to achieve compliance. In these instances, each case will be assessed on its merits and an appropriate level of action will be taken.

Each complaint is reviewed, and priority given to matters that may result in death or serious injury to persons or major damage to property or a serious impact on public health or the environment.

1.4 Related Documents

This policy should be read in conjunction with:

- Environmental Planning and Assessment Act 1979 (NSW)
- Environmental Planning and Assessment Regs 2021 (NSW)
- Local Government Act 1993 (NSW)
- Protection of the Environment Operations Act 1997 (NSW)
- NSW Ombudsman - Enforcement Guidelines for Local Councils (December 2015), Model Policy (December 2015)
- EPA Prosecution Guidelines (2022)
- NSW Office of the Director of Public Prosecutions - Prosecution Guidelines (2007)

1.5 Definitions

The following defined terms are used in the policy:

Applicant In relation to legal proceedings, the person who is applying for the Court to commence proceedings.

In relation to development consents, the person lodging an application for Council to consider.

CAN Court Attendance Notice.

A CAN is issued and filed in the Local or Magistrates Court in accordance with the Criminal Procedure Act 1986 (NSW). A CAN may be used to commence proceedings in a summary jurisdiction. A CAN must specify the offence and its essential particulars as well as the address of the Court where the matter is to be heard. If a person does not attend Court on the day specified in a CAN, a warrant may be issued for the arrest of the person or the matter may be dealt with in the absence of the person (also known as *ex parte* proceedings).

Council Ballina Shire Council or an employee of Ballina Shire Council.

Defendant The person against whom the report has been lodged or the accused person against whom criminal proceedings are brought.

EP&A The Environmental Planning and Assessment Act 1979 (NSW).

ICAC Independent Commission Against Corruption.

LGA The Local Government Act 1993 (NSW).

Fine Fines are authorised by subordinate Regulations to the principal legislation (the Acts themselves) and are administered by the Fines Act 1996 (NSW) and the State Debt Recovery Office, a Department of the NSW Office of State Revenue.

Fines can only be issued for prescribed offences and the amount of the fine is also prescribed by legislation.

POEO Protection of the Environment Operations Act 1997 (NSW).

Respondent The person or company against whom civil proceedings are brought in Land & Environment Court proceedings.

Standard of Proof The level of proof required proving a charge before a Court of Law.

There are two distinct standards of proof, namely:

- Criminal Standard of Proof. Also called “Beyond Reasonable Doubt”. The standard definition of beyond reasonable doubt is “*guilt should not only be a rational inference but should be the only rational inference that can be drawn from the circumstances*” *North Sydney Council v Moline; North Sydney Council v Tomkinson (No 2) [2008] NSWLEC 169 (Justice Preston)*. This is the standard of proof

required for any criminal prosecution in any Court within Australia and the level of proof to be established by Council should it seek a punitive penalty (monetary fine) through either the Land and Environment Court (known as Class 5 Proceedings) or the Local or Magistrates Court;

- Civil Standard of Proof. Also called the “Balance of Probabilities”. The standard definition of balance of probabilities is “*if the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain*” [Briginshaw v Briginshaw (1938) HCA 34]. This is the standard of proof for any civil proceedings within any Court within Australia and is the level of proof to be established by Council in any proceedings in the Land and Environment Court in Class 1, 2, 3 and 4 Proceedings).

Unlawful activity

Any activity or work that has been or is being carried out:

- contrary to a legislative provision (Act or Regulation of Parliament) regulating a particular activity or work; or
- contrary to an environmental planning instrument (e.g. State Environmental Planning Policy, Regional or Local Environmental Plan) that regulates the activities or work that can be carried out on particular land; or
- without a required development consent, approval, permit or license; or
- contrary to the terms or conditions of a development consent, approval, permit or license; or
- contrary to the terms and conditions of consents, construction certificates, approvals, licenses, planning instruments or applicable legislation; or
- contrary to any signage erected by Council under the provisions of the Local Government Act 1993 (NSW); or
- illegal, whether prohibited or merely unauthorised.

2. BACKGROUND

Council becomes aware of unlawful and unapproved activities in a variety of ways, from the proactive actions of Council staff to the receipt of customer requests from members of the public.

When Council is appointed the Principal Certifier for development and building works, Council staff will identify breaches of consent and unauthorised building work and uses. In our environmental protection or public health roles, Council may discover pollution incidents, unhealthy premises and damage to Council's reserves and assets that require enforcement action. Furthermore, Rangers and Compliance Officers issue fine for parking, companion animal, pollution, public reserve, development and building site offences.

Council officers who are not involved directly in enforcement matters will also commonly identify potential unlawful activities and report them for investigation and action pursuant to this policy. Nevertheless, while Council is proactive in the detection of unlawful activities, not all offences are readily discernible and early detection can only be achieved with support and direct advice from our local community.

2.1 Submitting requests

Customer requests alleging unlawful activity can be submitted to Council either in writing or verbally. All requests received by Council will be actioned in accordance with Council's internal customer request management procedures.

2.1.1 Anonymous Complaints

Anonymous reports will be recorded and assessed in accordance with the above requirements. However, because it is not possible to seek clarification or additional information about a matter, it may be more difficult to evaluate the allegations and therefore these reports are less likely to warrant investigation.

2.1.2 Unlawful activity outside business hours

Unlawful activity can occur outside business hours. In particular Council may receive reports about matters such as offensive noise and failure to comply with limitations on hours of operation during nights and weekends.

Due to resource and operational capability restraints on Council, investigations into alleged unlawful activity outside business hours will be assessed on the basis of risk of harm to health, welfare, safety, property of the environment or it is otherwise in the public interest to take such action.

In some instances, Council may be required to rely on the evidence of witnesses or attending Police Officers to substantiate such allegations.

2.1.3 Neighbour disputes

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

Council staff will thoroughly assess such reports to determine whether there is evidence of any possible unlawful activity requiring action by council. Care will be taken to explain which aspects of a report council can deal with and which cannot be dealt with and why. Where possible, individuals

will be provided with information about how to resolve neighbour disputes including referral information resources such as LawAccess NSW and Community Justice Centres.

2.2 Procedural Fairness and Natural Justice

There is an overriding duty on the Council to act fairly, consistently, professionally and to ensure the principles of procedural fairness and natural justice are adhered to.

In this regard Council will:

- Provide information on the substance of the matter to the alleged offender. This may not occur until an appropriate stage in the investigation; and
- Provide an opportunity for the alleged offender to put their case. This will not be necessary if there is a serious risk of personal or public safety or risk of serious environmental harm; and
- Consider any submission put forward by any of the parties to the matter; and
- Make reasonable inquiries or investigations prior to making a decision; and
- Ensure no person decides a case in which they have an interest; and
- Act fairly and without bias.

2.3 Options for dealing with unlawful activity

When dealing with any unlawful activity, there are two distinct areas for Council to consider. The first area for consideration is the actual activity itself whilst the second area for consideration is the remedy for that unlawful activity.

Council firstly needs to assess the actual unlawful activity itself and any resultant action that may be required due to the carrying out of that unlawful activity. This is also known as the criminality of the unlawful activity. Council has discretion in deciding the level of enforcement action taken in relation to the actual act itself based on the available evidence and the circumstances of the individual case.

At the conclusion of an investigation, Council may have a number of options available to deal with any unlawful activity. Some of these options are:

- Take no action
- Counsel/educate the alleged offender
- Issue a formal letter of warning
- Retention of any bank guarantee or bond to fund repairs
- Carrying out of required works and subsequent invoicing for cost of works to landowner
- Commence civil proceedings and
- Commence criminal proceedings.

Council may take one or more of the above options.

While Council does have the legal authority to exercise discretion in any instance in which an unlawful activity has been detected, considerable care needs to be taken by all representatives of Council, to ensure that the use of discretion does not lead to corrupt conduct. These matters need to be considered in connection with Council's Code of Conduct.

Council also needs to ensure that where an unlawful activity has been detected and a decision has been made to remedy this unlawful activity, the decision reached will stand up to an independent investigation. Council will also need to assess the broader picture rather than just the individual

instance of the unlawful activity.

2.3.1 The Act causing the Unlawful Activity

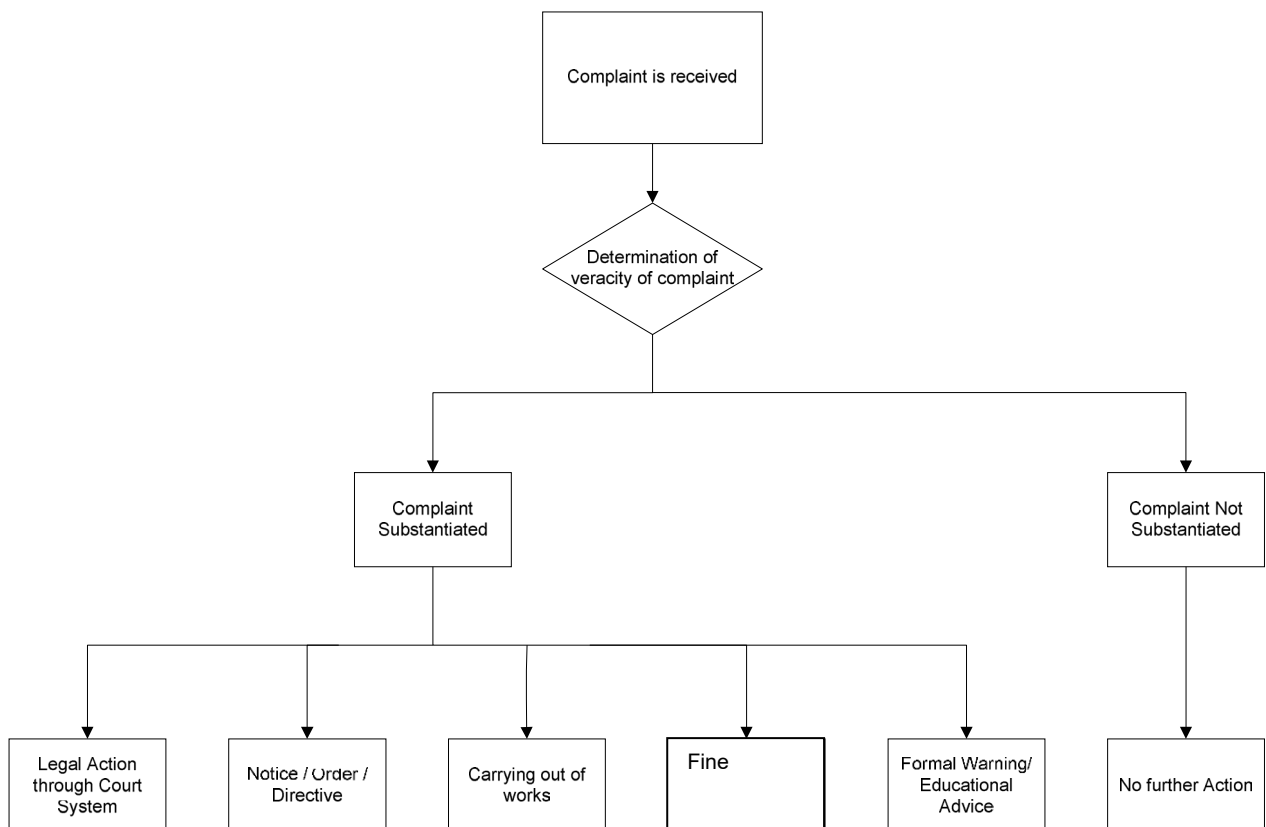
When considering the cost/benefit of taking enforcement action, Council must not only assess the individual costs and benefits but should also consider indirect costs and benefits. For example, the direct cost in taking no action is minimal, but the indirect cost of that same act of taking no action is that broader levels of compliance may fall and there may be a general increase in the demands on the Council to intervene.

Conversely, the indirect benefit of formal proceedings is the educative and deterrent effect of a successful prosecution.

When any investigation provides sufficient evidence to substantiate that an unlawful activity has occurred, this Policy does not allow Council to elect not to take some form of action in relation to that unlawful activity.

This Policy requires, in respect to the act itself, that some form of action is taken, however, this Policy does not seek to specify the level of that action as each individual instance needs to be assessed fairly, consistently, professionally and to ensure the principles of procedural fairness and natural justice are adhered to.

2.3.1.1 Flow Chart of the Act of Unlawful Activity



2.3.2 Remedy of Unlawful Activity

Council also needs to determine the course of action required to remedy an unlawful activity, which is quite separate from any action for the carrying out of the unlawful activity. It may be appropriate for Council to commence some form of enforcement action for the carrying out of the unlawful activity, but not take any enforcement action to remedy the resulting effects of the unlawful activity.

2.3.3 Take No Action

It is not appropriate that, on determining that an unlawful activity has occurred, a decision is made that no action will be taken. This policy does not seek to provide a regulated framework to identify the type of action that must be taken.

Council can however, elect to take no action to seek a remedy for the results of that unlawful activity in line with this Policy. For example, Council may issue educational advice or a formal warning for the unlawful placement of building waste on a rural property but not require the removal from the property of that same building waste.

Any decision by Council not to seek remedy for an unlawful activity is subject to a number of criteria more fully described in Part 3 of this policy.

2.3.4 Carrying out of works and retention of deposits and bonds

Council may determine that, in the interests of public safety and/or expedience in remedying an unlawful activity, to exercise powers under the relevant legislation to enter onto premises and undertake works to bring about compliance with Council requirements. Any works of this nature could be exercised on both public land and on private property.

Whilst Council is the owner and/or custodian of public land within Ballina Shire, Council does issue permits and approvals for the occupation and use of public lands for some commercial activities, including footpath displays, roadside stalls, commercial use of reserves (fitness classes etc) and use of Council reserves for access for building projects. In most circumstances, Council requires the payment of a bond for potential damage to publicly owned land.

When an unlawful activity or a failure to comply with a permit or approval on public land has been detected, Council may elect to carry out the works required to remedy the situation utilising the bond as payment or may seek costs for reinstatement of the public land by way of a debt owed to Council.

Similarly, Council does have the legal authority under legislation to serve Notices, Orders and Directives to carry out works on private property and if the Order or Directive is not complied with, to enter onto private property and undertake the works and recover the costs as a debt owed to Council.

2.3.5 Requirements for discretionary decisions

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

- The power of discretion must be used for a proper purpose; and
- The decision-maker must give proper, genuine and realistic consideration to the merits of the particular case; and
- The decision-maker must consider only relevant considerations and must not consider irrelevant considerations in reaching a decision; and
- The decision-maker must give adequate weight to a matter of great importance but not give excessive weight to a relevant factor of no great importance; and
- The decision-maker must not exercise discretion in a way that is so unreasonable that no reasonable person could have exercised the power; and
- The decision-maker must not make a decision that is arbitrary, vague or fanciful; and
- The decision-maker must exercise a discretion independently and not act under the dictation

or at the behest of any third person or body; and

- The decision-maker must not fetter its discretion by, for example, adopting a policy that prescribes its decision-making in certain circumstances; and
- The decision-maker must observe the basic rules of procedural fairness or natural justice; and
- The decision-maker must not act in a way that is biased or conveys a reasonable perception of bias.

2.3.6 Civil Proceedings

The objective of civil proceedings is to rectify the consequences of, or restrain an unlawful activity, by requiring the offender to do or refrain from doing something. Civil proceedings include the following;

- Notices, orders and directives issued by Council pursuant to various legislation; and
- Class 4 proceedings before the Land & Environment Court, seeking an order of the Court to remedy or restrain a breach of the EP & A, the LGA, the POEO, or any other Act, if the breach is causing or is likely to cause harm to the environment or public safety; and
- Interlocutory relief for matters causing, or with the reasonable potential to cause, serious environmental harm. In such proceedings it is likely the Council would be required to provide an undertaking as to damages.

For civil proceedings to be successful Council must prove the breach on the balance of probabilities. This is a less onerous burden of proof than is required in a criminal prosecution. However, even if the breach is established, the Court has a wide discretion and may determine not to make any order even if the case is proven.

Council must therefore be in a position to provide evidence that could reasonably persuade the Court that an order to remedy or restrain the breach should be made.

Civil proceedings can be held over to provide the person responsible for the unlawful activity with an opportunity to lodge any required application and have it determined or otherwise to cease or remedy the breach voluntarily.

2.3.7 Criminal Proceedings

Criminal proceedings are punitive. The sentence which a Court may impose if an offence is proven is usually a fine. The amount of a fine imposed by a Court will be based on the need for specific deterrence and the rehabilitation of the offender, the need for general deterrence of similar offences by other members of the community, and any aggravating or mitigating circumstances.

The types of criminal proceedings available to Council include;

- Issuing a fine;
- Prosecuting the offence in the Local Court in a summary jurisdiction by issuing a CAN; and
- Prosecuting the offence in the Land & Environment Court in its summary or indictable jurisdiction (Class 5 Proceedings)

In criminal proceedings, Council must prove any charge or offence to the criminal standard of proof, which is 'beyond reasonable doubt'.

Council can currently issue a number of fines for varying offences under a number of pieces of

legislation. Fines can vary significantly in value (i.e. \$75 to \$15,000).

Any person who receives a fine from Council can pay the amount stated on a fine, seek a review of the fine or elect to have the matter heard before the Local or Magistrates Court.

Any subsequent payment of a fine is not classed as an admission of guilt and normally the payment of the fine will not result in a criminal record being created. However, some on-street parking offences do carry demerit points as well as the monetary penalty and payment of those fines will incur a loss of driver's license points for the registered owner of the motor vehicle or the nominated driver of that motor vehicle.

Where Council elects to take prosecution action rather than the issuing of a fine, the maximum penalty for any offence is considerably higher than the value of the fine. For example, the maximum penalty for an offence under the EP & A is the amount specified or, if no penalty is specified for the particular offence, 10,000 penalty units and a further daily penalty not exceeding 1,000 penalty units.

In criminal proceedings for offences against the EP & A there is often no provision which enables the Court to order the offender to remedy the breach or restrain the unlawful activity. Accordingly, should Council elect to seek remedy of the unlawful activity as well as punitive punishment for the unlawful activity, Council would need to commence two separate legal actions.

2.3.8 Criminal or Civil?

Deciding whether to commence criminal or civil proceedings depends on the outcome that is being sought. If Council were willing, retrospectively, to accept the results of the unlawful activity or if the unlawful activity cannot be undone or is not ongoing and Council wishes to punish the offender, criminal proceedings may be preferred subject to the considerations detailed below.

Conversely, if Council is not willing to accept the unlawful activity (and particularly for alleged offences against the EP & A where the Court may not have any jurisdiction to make an ancillary order requiring rectification of the unlawful activity), it is often more appropriate for Council to commence civil proceedings.

Council also may elect to commence both criminal and civil proceedings for an unlawful activity. In this instance, any criminal proceedings must be completed prior to civil enforcement proceedings being commenced.

If Council decides not to commence proceedings under the EP & A or POEO, it should be noted that **any person** may commence their own proceedings for an order to remedy or restrain a relevant breach. Further, Council may also be named as a Respondent in any proceedings commenced by that person or body.

2.3.9 Shared Enforcement Responsibility

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

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

- which authority will take the leading role on any joint investigation

- which activities each authority will carry out
- responsibilities for updating an individual where relevant
- protocols for exchanging confidential information between the relevant authorities.

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

2.4 When Council isn't the Certifier

Council retains its regulatory role and enforcement powers where a private certifier has been appointed the principal certifier. However, if a principal certifier is appointed, it is not Council's primary responsibility to ensure building and construction compliance. Principal certifiers have limited enforcement powers however if a non-compliance is brought to their attention, they must issue a written direction to comply. If the non-compliance continues, the certifier must refer the matter to the council. Initial customer requests in relation to non-compliances shall be raised with the principal certifier and not Council.

2.5 When Customers are unhappy with enforcement actions taken by Council

It is understood that customers will not always be happy with the decisions made and action taken by Council in relation to matters they have raised. In these instances, customers have a number of options available to them including.

- Ask for a review of the decision
- Contact the Community Justice Centre to request mediation with the other party
- Contact LawAccess to seek free legal advice
- Take their own action as available by legislation i.e. section 219 of POEO or seeking Noise Abatement Orders etc.
- Report the matter to the NSW Ombudsman for an independent review.

3. WHEN WILL COUNCIL COMMENCE ENFORCEMENT ACTION?

The basic pre-requisite of any enforcement action is that the available evidence establishes an appropriate standard of proof to enable that prosecution to be commenced. Council will decide whether to take enforcement action after it has considered, among other things, the following matters:

3.1 Is there an estoppel?

Estoppel is a legal rule which prevents a person from later denying conduct or words which have been relied, and acted, upon by another person to their detriment. The issue is whether the conduct of the Council could lead to an expectation that it will not take action in a particular circumstance or that it is not concerned about the conduct in question. For example:

- Has the owner/occupier previously been notified that the Council would not be taking action?
- Has the matter previously been brought to the attention of the Council yet no action taken?
- Has the Council contributed to the owner/occupier acting upon a reasonable expectation that no action would be taken?

3.2 Is the breach a technical breach only?

A breach of a technical condition, license or inconsequential changes to approved plans during construction, in the absence of any other aggravating factor, will generally not warrant a decision to take action to remedy or restrain the breach. Council needs to consider whether there are any material implications to the interests of any party or any detrimental effect on the amenity of the area or the environment generally.

3.3 When was the unlawful activity carried out and for how long?

Time limits frequently apply and sometimes prosecution will be statute barred despite sound evidence that unlawful activity has taken place. Courts generally look unkindly on delays in taking action to prevent or prohibit unlawful activity, so evidence of Council's failure to take action in the required time may be an obstacle to successful prosecution. Whether the offending activity is ongoing or has ceased will also be a relevant consideration.

3.4 How has the unlawful activity affected the natural or built environment and the health, safety and amenity of the area?

If there is actual or potential detriment to the natural or built environment, to the health or safety of residents or the amenity of an area, this would normally warrant a decision to take action to remedy or restrain the breach.

Examples of situations where there is a significant risk of detriment include serious noise, air or water pollution, unsafe building work (especially in occupied buildings), dangerous dogs, seriously unhealthy food premises and detriment existing in or threatening any public place.

Other examples will be matters which are specifically negotiated by Council at DA stage to address neighbourhood amenity issues and community concerns. The issue that the Council will consider is the degree of detriment or risk to the environment. There may also be cases where the unlawful activity will have a positive or beneficial impact on the environment or amenity of the locality.

3.5 Would consent have been given if it had been sought?

In the absence of aggravating circumstances, Council should be less inclined to proceed with legal action if the unlawful activity could be carried out lawfully if consent had been sought. In these

circumstances, Council might consider deferring action to allow the owner time to lodge an application for assessment.

Similarly, if an unauthorised use comes to Council's attention only because the owner has sought approval, it is reasonable to defer action until the application is determined. If an owner actively and positively attempts to regularise an unauthorised use by lodging an application, Council should take this conduct into account in determining whether to take action against them.

However, if there has been a blatant attempt to flout the law or the person is just using the application process as a delaying action, deferral would not be appropriate.

3.6 Can any unauthorised works or failure to comply with conditions be easily remedied?

If there is evidence of a significant issue of non-compliance and that matter can be easily remedied, by some action on the part of the person, there is a less compelling case for enforcement action. An example would be if, because of a measurement error, the parking spaces available in a development are insufficient to comply with the approval.

Strict compliance might involve further excavation or be impossible due to site constraints and subsequent works. In such a case, other options might be considered to remedy the breach such as a monetary contribution or the provision of off-site spaces to make up the shortfall. These options would achieve Council's objective in imposing the condition while still permitting the development to proceed without prejudicial expense and delay.

There is a need to balance the public interest in enforcing the law with whether it is possible to remedy a breach and, if so, how expensive and inconvenient this would be. Discretion may be more readily used in the case of a static development (such as when a building has already been erected) rather than when there is a continuing, easily remedied breach. Importantly there are no hard and fast rules and it is important that discretion is exercised on a case by case basis.

3.7 Does the person the subject to the report of unlawful activity show due contrition?

In some cases, the person will have acted appropriately by acknowledging their wrongdoing and submitting to the rule of law. In such cases, it may be that the public interest would not be best served by prosecuting the offender, especially if the offending conduct or work has been remedied.

3.8 Are there any particular circumstances of hardship affecting the person subject to the report of unlawful activity?

If the unlawful activity is minor and primarily offends a private interest rather than the general amenity of the area, Council should not take action where an appropriate alternative remedy, such as civil action, is available. However, if the matter falls within the Council's jurisdiction and there are particular hardship factors that make it unreasonable to expect the person to pursue alternative redress, it may be appropriate for the Council to intervene.

Similarly, if enforcement action would cause particular hardship to a person the subject of the report and the impact of the unlawful activity is not otherwise severe, the Council may consider taking informal action or taking no action. For example, if action in relation to a particular breach would impede progress of a major development and seriously prejudice the rights of the developer in terms of delays and costs, Council should consider whether there are acceptable alternatives to enforcement action.

3.9 Are there existing use rights?

Hardship may also be caused to the person the subject of the report if the onus of proof is difficult or impossible to discharge. For example, the onus at law to prove existing use rights falls upon the

person asserting that right. If an existing use is long established, say over 20 years, it may not be reasonable to require the owner to produce documentary evidence of the use at a particular date if, for example, the business has changed hands several times or fire/flood has destroyed documents.

A heavier responsibility may fall upon the person asserting an existing use right to prove the existence of that right in relation to larger scale developments and those with significant environmental impacts such as quarrying.

3.10 Has the person the subject of the report of the unlawful activity received a previous warning?

It is essential that Council continues to monitor situations where it decides not to take formal enforcement action despite evidence of unlawful activity. If monitoring reveals that the unlawful activity is not resolved or Council subsequently receives fresh reports, then a more formal and coercive approach would appear more appropriate.

3.11 Would an educative approach be more appropriate than a coercive approach?

When deciding to take an educative rather than a coercive approach, Council needs to consider issues such as the level of contrition shown by the person, whether they have previously been warned or dealt with as a result of this or similar behaviour, and the level of intent shown.

3.12 What are the chances of success if challenged?

Council can validly take into consideration the likelihood that a Court challenge to the contemplated action would be successful. In such situations, Council would need to identify the *causes of that likelihood and address them in the particular case or as a general issue.*

3.13 What are the relative costs and benefits of taking formal enforcement action as opposed to taking no action or taking informal action?

Some Councils dislike taking formal legal action beyond issuing orders under the existing legislation because of the cost of legal proceedings. When considering the cost/benefit of the options open to the Council, it should assess costs and benefits broadly and remember to consider indirect costs and benefits.

For example, the indirect cost of taking no action is that broader levels of compliance may fall and there may be a general increase in the demands on Council to intervene. Conversely, the indirect benefit of formal proceedings is the educative and deterrent effect of a successful prosecution.

3.14 Would a draft local environmental plan make an unauthorised use legal?

If there is a draft local environment plan (LEP) on exhibition that would make the unauthorised use legal, Council could consider deferring any enforcement action until after the LEP is made and the owner given time to apply for approval.

3.15 What about reasonableness and proportionality?

Council should always act in ways that are reasonable in the particular circumstances that apply. This includes a reasonable proportionality between the ends to be achieved and the means used to achieve them. Where decisions are based on technical advice (e.g. engineering or legal advice), Council should also make sure that non-technical issues, such as the reasonableness of the conduct and the effect of possible decisions, are not ignored.

The obligation to comply with the law does not relieve Council of the moral obligation to take lawful

steps to mitigate the effects of rigid adherence to the letter of the law if that results in, or is likely to result in, manifestly inequitable or unreasonable treatment of an individual or organisation.

Considerations such as the impact of the breach on other people, whether there are other acceptable options available to address the breach, and the attitude of the offender should be assessed. If the breach is not a structural breach likely to result in an unsafe development, Council might consider negotiating a settlement with the developer and resolving variations through, for example, the use of building certificates.

3.16 What would be in the public interest?

While decisions to take enforcement action are discretionary and Council is generally under no legal obligation to act in any particular case, Council does have obligations to uphold the law and to act in the public interest.

While there is no concise definition of the 'public interest', some of the issues Council should consider are:

- Are the circumstances outlined in the report of unlawful activity likely to affect a significant number of people?
- Will the circumstances impact on certain population groups, particularly disadvantaged or marginalised groups e.g. elderly residents?
- Is the activity indicative of a systemic flaw — the result of a deficiency in policy or procedures?
- Does the activity raise an issue that is individual in nature but occurs unreasonably often?
- Has the activity attracted sustained public controversy and no alternative resolution has been proposed or is likely?

4. DECIDING ON THE METHOD OF ENFORCEMENT

When deciding on the action to be employed, the Council will consider the matters explained above in Section 2.3 – ‘Options for Dealing with Unlawful Activity’ and the outcome being sought.

4.1 Fines-

Fines will be issued for offences of a minor nature, where it is considered a small monetary penalty may prevent a recurrence of the unlawful activity or stop the unlawful activity from continuing. A fine will only be issued where a decision has been made not to commence other criminal proceedings and if the Council has obtained or could obtain sufficient evidence in admissible form to prove the offence beyond reasonable doubt in any subsequent criminal proceedings.

A fine can only be issued where it appears to the issuer that the defendant has committed the relevant offence. Fines should be issued as soon as possible after the conclusion of an investigation and may be used in conjunction with other enforcement action, as permitted by the applicable legislation.

4.2 Consents, Orders, Directives and Building Certificates

Consideration will be given to whether a breach can be rectified by a consent or building certificate or whether enforcement can occur by way of an order, notice or directive under the EP & A, LGA, POEO or other Act.

The Orders provisions of the EP & A, LGA and POEO are described as “*self-help*” provisions that provide Council with a formal cost-effective mechanism to direct landowners and occupiers to do or refrain from doing something. They generally operate on the ‘principles of natural justice’ and, where appropriate, should be used prior to the commencement of civil proceedings in the Land & Environment Court.

Enforcement action of this nature may occur in conjunction with criminal proceedings, where it is considered appropriate and necessary for punitive action to also be taken, having regard to the restrictions provided under the EP & A.

4.3 Land & Environment Court Proceedings

Council will give preference to civil proceedings in the Land & Environment Court over criminal prosecution in either the Local Court or the Land & Environment Court where Council requires the offender to do or refrain from doing something, such as comply with a development consent or demolish unauthorised works.

Generally civil proceedings in the Land & Environment Court will be preceded by formal notices and/or orders, unless the circumstances warrant the immediate commencement of court proceedings.

The following matters will be considered in determining whether to commence civil or criminal proceedings in the Land & Environment Court:

- Is there a liable respondent; and
- Does Council have sufficient evidence to prove its case either on the ‘balance of probabilities’ (civil standard) or ‘beyond a reasonable doubt’ (criminal standard); and
- Does Council require an order from the Court restraining the respondent from doing something or ordering the respondent to remedy the breach; and
- Is an interlocutory injunction required because the unlawful activity is causing serious, or has

the potential to cause, serious environmental harm; and

- Is the matter urgent; and
- The severity of the alleged offence; and
- Is the respondent a repeat offender; and
- The cost of proceedings; and
- Does the development breach conditions of consent?

4.4 Local Court Proceedings

The following matters will be considered in determining whether to commence criminal proceedings in the Local Court:

- Is there a liable defendant; and
- Is a monetary penalty all that is required in this circumstance; and
- Does Council have sufficient evidence to prove its case 'beyond a reasonable doubt'; and
- Are works proceeding; and
- The severity of the offence; and
- Is the defendant a repeat offender; and
- The cost of proceedings.

4.5 Escalation of Enforcement Proceedings

Council will create and maintain a record of offences and offenders with a view to identifying repeat or recalcitrant offenders. Notwithstanding the above criteria for any decision on legal enforcement matters, should it become evident that a person or company continues to act unlawfully despite previous enforcement history, Council will consider escalating any proposed enforcement against that person or company. Any escalation of proceedings would not only apply to a particular parcel of land, but also to the person or company responsible for the unlawful activity.

For example, a decision is made that a certain course of action would result in a formal warning being issued, however the person subject of that proposed warning has previously received a formal warning for a similar offence. This formal warning was issued for a separate property within Ballina Shire.

Council may wish to take the view that the previous warning was not a suitably effective enforcement deterrent and that it may be prudent to escalate any enforcement proceedings against that person and a fine may be issued for the offence instead of a formal warning.

As a general rule, Council would prefer to educate, not litigate in the first instance and any escalation of enforcement proceedings should follow a course of action:

1. Education
2. Warning
3. Fine
4. Local Court Prosecution
5. Land and Environment Court Prosecution.

Nothing in this escalation of enforcement proceedings restricts or requires Council to follow this

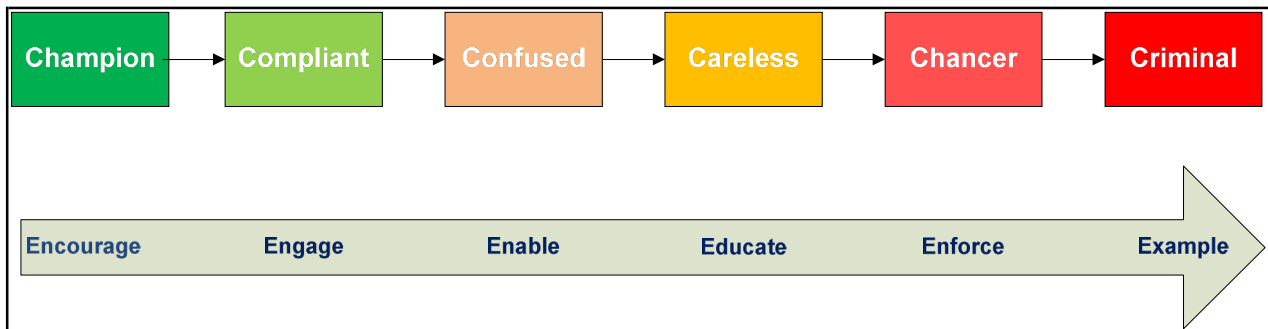
escalation procedure. All enforcement matters should be assessed in line with this policy as a whole and the appropriate course of action taken. This may include a matter proceeding from a warning to Land and Environment Court prosecution should the circumstances of the case permit.

When seeking to determine the level of proceedings that should be undertaken in any given circumstance, the level of compliance or non-compliance should be identified. The level of compliance or non-compliance can be broken down into the Six C's of Compliance, namely:

- a) **Champion** – Someone who does everything that Council requires and takes that “extra step” to be the best possible example;
- b) **Compliant** – Someone who does what is needed and nothing more;
- c) **Confused** – Someone who is not sure of what they are supposed to do and does what they think is correct;
- d) **Careless** – Someone who believes that “close enough is good enough”;
- e) **Chancer** – Someone who takes the opportunity to do something wrong to their own benefit and hopes they are not caught; and
- f) **Criminal** – Someone who sets out to deliberately and methodically break the law, regardless of the ramifications either for themselves, others or the environment.

Once Council has identified the level of compliance or non-compliance, the level of proceedings can be easily established. For example, a “Champion” should be encouraged and rewarded, with recognition of a “Champion” in Council correspondence and pamphlets as a good example. This often encourages that person to continue with their efforts as well as providing a benchmark for others to achieve. A “Criminal” on the other hand is someone who deserves to be made example of, with legal action and resulting publicity which not only is in line with community expectations but provides a deterrent to others.

4.5.1 Table of Compliance



5. RECOVERY OF LEGAL COSTS

Council's policy for recovery of its costs in the Land and Environment Court is:

- That the Council will seek to recover its fair and reasonable costs in all matters where costs are reasonably recoverable, either by consent or by order of the Court; and
- The Council will seek to recover the penalty imposed by the Court where such penalty is imposed; and
- The Council will adopt the recommendations of its solicitors to accept a lesser amount than the full legal costs incurred by the Council if, in the circumstances, the acceptance of such an offer will result in the Council not incurring further and unnecessary legal costs.

The Council's policy for recovery of costs in the Local Court is:

- That the Council will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the Court; and
- The Council will seek to recover the penalty imposed by the Court where such penalty is imposed.

6. REVIEW

The Enforcement Policy is to be reviewed every four years.