

Policy Number:	G25
Relevant Delegation:	Various
Adoption Details:	22 February 2016
Last Review Details:	25 November 2019

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### **POLICY OBJECTIVE:**

To:

- provide consistency in enforcement action in matters of non-compliance.
- ensure transparency, procedural fairness and natural justice principles are applied.
- ensure that enforcement action is proportionate to the alleged offence in each case.

### **POLICY SCOPE:**

This policy applies to all enforcement activities under all legislation, including:

- enforcement of conditions set as part of a town planning or development approval.
- Environmental health.
- emergency management.
- responding to inquiries and complaints.

### **POLICY STATEMENT:**

#### **INTRODUCTION**

Local government is charged with legislative responsibilities which protect individuals and the community as a whole. The Shire's customers include both those on whom the law places a duty and those whom the law protects. While it is ultimately the responsibility of individuals and other bodies to comply with the law, Council staff are required to carry out activities which enforce compliance.

This policy is an 'umbrella policy' which outlines the Council's approach to enforcement matters and provides staff with direction about the manner in which enforcement activities are to be undertaken.

The Council adopts a broad definition of enforcement which combines the provision of advice and assisting compliance with formal action where necessary. This is intended to encourage higher level of voluntary compliance with legal requirements by individuals, businesses and other bodies.

This policy should be read in conjunction with the Comprehensive Complaints Response Policy (G 5).

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## PRINCIPLES

- (a) A 'good enforcement' philosophy underpins Council enforcement actions. This includes the following:
  - (i) Proportionality. This means the nature of the enforcement response is in scale to the seriousness of any breach.
  - (ii) Consistency: this means there is a similar approach taken in similar cases to achieve similar outcomes.
  - (iii) Transparency. This means that the Council is open about the enforcement actions it takes and why.
- (b) Notwithstanding (a) immediate action is taken when required to ensure public health and safety and/or to protect the environment.
- (c) Firm action will be taken against those who act unlawfully when circumstances warrant.
- (d) Enforcement powers will never be used as a mechanism to address matters which are external to an enforcement matter.

## PROVISIONS

### 1. THE PRINCIPLES OF GOOD ENFORCEMENT

#### **Proportionality**

- 1.1 The Council's enforcement actions will be scaled to the seriousness of the breach. The Council recognises that most individuals want to comply with the law and will assist compliance by being open and helpful, offering informal advice and providing the chance to discuss compliance problems.
- 1.2 Attention will be focused on those whose activities give rise to the most serious risks, or where potential hazards are least well-controlled. Depending on the seriousness and persistence of the infringement, Council will minimise the costs to the person or body infringing the law by enforcing minimum action necessary to secure future compliance.

#### **Consistency**

- 1.3 A similar approach will be taken in similar cases to achieve similar outcomes.
- 1.4 Where decisions on enforcement require the use of professional judgement and discretion to assess varying circumstances, officers will:
  - (a) follow standard operating procedures where applicable.
  - (b) ensure fair, equitable and non-discriminatory treatment.
  - (c) record any deviation from standard operating procedures along with the reasons for the deviation.

#### **Transparency**

- 1.5 The Council will be open and transparent about the manner in which it undertakes enforcement and the law it enforces. Where practicable it will give notice of its intent to commence formal action. It will point out what action is required to achieve compliance and the timeframe for undertaking that action. Advice will be provided on the process for seeking a review of, or how to appeal against that decision.
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- 1.6 Where it is not practicable to give notice, the reasons why will be recorded in accordance with the Shire's records management protocols. Complainants will be advised on what action has been taken and why that action has been taken.

## **2. Authorisation of Actions**

- 2.1 Only officers competent by training, qualification and/ or experience will be authorised to take enforcement action. Officers will also have sufficient training and understanding of Council's policies and procedures to ensure a consistent approach to their duties.
- 2.2 Any decision to act other than in accordance with this policy must have approval from the relevant Manager and the reasons given for action recorded in accordance with the Council's Records Management protocols.
- 2.3 Officers are required to show their authorisations on demand or as required by the specific Act they are administering.

## **3. Decision-making**

- 3.1 Where non-compliance is discovered as a result of enforcement activities, options available to the Council to seek or promote compliance include:
- (a) explaining legal requirements and, where appropriate, the means to achieve compliance.
  - (b) providing an opportunity to discuss points of issue where appropriate.
  - (c) allowing reasonable timeframes to achieve compliance.
  - (d) facilitating mediation between parties.
  - (e) issuing a verbal or written warning.
  - (f) enforcement actions such as issuing an infringement, a notice or prosecution.
- 3.2 Enforcement decisions must be fair, consistent, balanced and relate to common standards that ensure the public is adequately protected. Where a decision is made not to investigate a complaint, the decision and reasons, will be recorded in accordance with the Council's Records Management protocols and the complainant will be advised in writing.
- In coming to a decision on the most appropriate means of enforcement, the officer shall consider, amongst other relevant factors:
- (a) the seriousness of the offence.
  - (b) the degree of wilfulness involved.
  - (c) past history.
  - (d) the consequences of non-compliance, including consequences to the integrity of the regulatory framework such as local planning schemes.
  - (e) the likely effectiveness of various enforcement options.
  - (f) Deterrence.
  - (g) the effect on the community and other people.
  - (h) consistency of approach to similar breaches and offences.
- 3.3 The following factors are to be ignored when choosing an enforcement strategy:
- (a) any element of discrimination or bias against the person such as ethnicity, nationality, political association, religion, gender, sexual orientation, beliefs.
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- (b) possible political advantage or disadvantage to a government, person holding (or a candidate for) public office, or any party of political group.
  - (c) previous interactions between the person alleged to be in breach and the Council and Shire administration on any matter other than enforcement matters.

3.4 Where a personal association or relationship with the alleged offender or any other person involved exists:

- (a) an alternative person will make decisions where possible.
- (b) the facts about any/ conflict/ relationship will be recorded in accordance with Council's record Management protocols and applicable statutory requirements.

#### **4. Documentation**

4.1 Written documentation will:

- (a) include all information necessary to make clear what needs to be done to comply with legal requirements.
- (b) the required time-frame.  
and if necessary:
- (c) the reasons for these actions and the potential penalties for failing to comply with the request.
- (d) include the legislation contravened, measures necessary to ensure compliance and the consequences of non-compliance; and clearly differentiate between legal requirements and recommendations of good practice.

#### **5. Enforcement Options**

##### **No Action**

5.1 No action will be taken when, after investigation, no breaches of the legislation are discovered. It may also be appropriate to take no action when:

- (a) the complaint is frivolous, vexatious, or trivial in nature.
- (b) the alleged offence is outside Council's area of authority.
- (c) taking action may prejudice other major investigations.

##### **Informal Action**

5.2 Informal action to achieve compliance with legislation may include:

- (a) offering verbal or written advice.
- (b) verbal warnings and requests for action.
- (c) written warnings.

5.3 Advice from officers will be put clearly and simply and will be confirmed in writing.

5.4 The circumstances in which informal action may be appropriate include:

- (a) the act or omission is not serious enough to warrant formal action.
  - (b) the duty –holder's past history reasonably suggests that informal action will secure compliance.
  - (c) confidence in the individual/ other body is high.
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(d) the consequences of non-compliance will not pose a significant risk.

(e) where informal action may prove more effective than a formal approach.

- 5.5 Where statutory action is not possible, but it would be beneficial in a wider public safety context to urge a particular outcome, such an action will be taken by a senior officer of Council and the reasons recorded in accordance with Council's Record Management protocols. The recipient will be made aware the requested actions are not legally enforceable.

### **Mediation**

- 5.6 Where practical, Council will make mediation available. Mediation is a possible alternative where, after investigation, an officer determines that the problems being complained of are incapable of resolution through formal or informal means. The use of mediation services may also be appropriate where an aggrieved individual has no wish to pursue action to resolve a complaint by legal means.

### **Formal Action- Service of Orders, Notices and Directions**

Various statutes specify the procedures which must be followed in order to:

- Advise of the intention to issue an Order or Notice.
- Invite submissions with respect to the matter.
- Order a person to do or refrain from doing a thing under specified circumstances.
- Issue direction specifying how an Order or Notice can be complied with.

- 5.7 Council officers will use professional judgement and discretion to assess the variables relating to each matter under consideration, including the reasonableness of the actions required by an Order or Notice and the timeframe to comply.

- 5.8 Only in circumstances such as a threat to life, a threat to public health or safety will an Order or Notice be made without giving notice of intention. In these circumstances immediate compliance to resolve a situation can be required.

- 5.9 In most cases, the person receiving the Order or Notice has a right of appeal to the State Administrative Tribunal or in some cases, the courts. If an Order or Notice is served for which an appeal is possible, the Council will advise the recipient in writing of the right to appeal and relevant legal provisions at the time of serving the Order or Notice.

- 5.10 Where there is evidence that an offence has been committed, the Council may issue an Order or Notice, or launch a prosecution in addition to serving an Order or Notice. This will only be done when the conduct of the recipient justifies taking both steps.

### **Action in Regard to Default**

- 5.11 Failure to comply with an Order or Notice will incur further enforcement actions such as launch of a prosecution.

- 5.12 Where action in regard to a default is provided for by legislation and the necessary work has not been carried out in the time allowed without good reason, the Council may undertake the required work. Before doing the work, the Council will consider whether there is realistic prospect that the person responsible will complete the work within a reasonable time. Where work is undertaken, the Council will seek to recover all costs over a fair period, using all statutory means available.

- 5.13 The decision to carry out action in default will be made by the Chief Executive Officer.
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5.14 Where an offence has been committed, the Council may issue an Order or Notice, or launch a prosecution, in addition to taking action to fulfil an Order or Notice. This will only be done where the conduct of the recipient justifies taking such steps. Factors such as giving false information, the obstruction of Council staff and the harm, or risk of harm caused by the recipient's delay will be considered in determining additional enforcement actions.

### **Serving an Infringement Notice**

A person who has received an Infringement Notice is entitled to elect to have the matter determined by the Courts (i.e. elect to be prosecuted for the alleged offence) Hence, there must be substantive, reliable and admissible evidence that an identifiable person or organisation has committed the alleged offence. In other words, there must be sufficient evidence on the face of it to enable a conclusion to be reached that there is a reasonable prospect of being able to prove an offence beyond reasonable doubt.

5.15 The following circumstances are likely to warrant an Infringement Notice:

- certain breaches of the legislation administered by the Council.
- failure to correct an identified problem after having been given a reasonable opportunity to do so by the Authorised Officer.
- failure to comply with the requirements of a written or verbal direction.
- confidence in the individual/ organisation is low.
- a written warning or caution has been given for the same or similar offence.

### **Prosecution**

5.16 A prosecution will only proceed where there is a reasonable prospect that an offence can be proved beyond reasonable doubt.

5.17 The following circumstances are likely to warrant a prosecution:

- A flagrant breach of the laws such that public health, safety and welfare have been put at risk.
- A flagrant breach of the laws such that the integrity of significant provisions in a regulatory document is put at risk.
- an alleged breach is too serious or the risk too great to be dealt with by means of expiation.
- a failure to correct an identified serious problem after having been given reasonable opportunity to do so.
- a failure to comply with the requirements of an Order or Notice.
- an established and recorded history of similar offences.
- an unwillingness on the part of the individual or organisation or other body to prevent a recurrence of the problem.
- the recovery of costs of the investigation or remedial work or financial compensation that are required by the Council or an aggrieved party.

5.18 Where circumstances warrant a prosecution all relevant evidence and information will be considered to enable a consistent, fair and objective decision to be made.

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- 5.19 Before a prosecution is recommended there must be substantive, reliable and admissible evidence that an identifiable person or organisation has committed the offence.
- 5.20 A decision to prosecute must be in the public interest. In considering whether prosecution is the public interest, the following additional factors will be considered:
- whether the offence was premeditated.
  - the need to influence the offender’s future behaviour.
  - the effect on the offender’s or witness’s physical or mental health, balanced against the seriousness of the offence.
  - the availability and efficacy of any alternatives to prosecution.
  - the prevalence of the alleged offence and the need for deterrence, both persona and general.
  - the likely length and outcome of a trial.
- 5.21 The final decision to prosecute will be made by the Chief Executive Officer.

**6. Monitoring of Compliance and Enforcement Action**

- 6.1 A report will be made annually to Council on the breaches occurring in the previous year across all statutory enforcement areas summarising the nature of the response taken for each breach ranging from no action through to prosecution (if any) according to the categories set out in Section 5. A commentary will be provided on the overall approach taken.
- 6.2 The annual report on enforcement will be used as information in any Integrated Planning and Reporting process and review to assess resourcing requirements in the short and long term.
- 6.3 The Chief Executive Officer (CEO) will provide a confidential monthly summary at the CEO’s regular briefing to Councillors of all prosecution actions taken or proposed to be taken (if any).

**PENALTIES:**

Not applicable.

**KEY TERMS/DEFINITIONS:**

Not applicable.

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Responsible Officer: Chief Executive Officer

Contact Officer: Executive Manager Infrastructure & Development Services

Relevant Legislation: Various

Review History:

<b>Date Review Adopted:</b>	<b>Resolution Number</b>
Adopted – 22 February 2016	
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