

### 10.3. Compliance and Enforcement Policy

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| <b>ATTACHMENTS</b> | 1. DRAFT Compliance and Enforcement Policy [10.3.1 - 15 pages]     |
| <b>CSP LINK</b>    | 3. Our Innovative City<br>3.2 North Sydney is smart and innovative |

#### PURPOSE:

The purpose of this report is to seek Council’s endorsement of the draft Compliance and Enforcement Policy for public exhibition and comment.

#### EXECUTIVE SUMMARY:

- The North Sydney *Compliance and Enforcement Policy* has been in place since 2004. The last review and amendment occurred in 2022. The Policy has now been reviewed and revised.
- The structure and layout of the draft *Compliance and Enforcement Policy* has been updated to align with the NSW Ombudsman's *Compliance and Enforcement Guidelines*.
- The content of the draft Policy has been subject to minor housekeeping amendments to reference and reflect current legislation. The draft Policy is consistent with the current Policy.
- The draft Policy does not include modifications to the way that the Council officers investigate or act on compliance matters.

#### RECOMMENDATION:

- 1. THAT** Council endorse the draft *Compliance and Enforcement Policy* and place it on public exhibition for 28 days for public comment.
- 2. THAT** Council adopt the draft *Compliance and Enforcement Policy* at the end of the submission period if no submissions are received during that period.
- 3. THAT** should submissions be received during the exhibition period, a further report on the draft *Compliance and Enforcement Policy*, that includes consideration of submissions, will be provided to Council.

## Background

The draft *Compliance and Enforcement Policy* aims to ensure consistent compliance actions are achieved regarding food safety, public health, environmental, and development non-compliance.

The *Compliance and Enforcement Policy* has been in force since 2004. The Policy has been subject to multiple housekeeping amendments to align with current legislation. The last review/amendment was undertaken in 2022.

## Report

The NSW Ombudsman published the *Compliance and Enforcement Guidelines* for use by all Councils in New South Wales. The Guidelines are intended to represent best practice and provide consistency and transparency in decision-making processes. The NSW Ombudsman also published a *Model Compliance and Enforcement Policy* to supplement the Guidelines, which includes best practice examples from various Councils and relevant agencies.

Council's *Compliance and Enforcement Policy* was formulated based on the NSW Ombudsman's Guidelines, as is the draft Policy.

A review of the Compliance and Enforcement Policy has been undertaken to align with current legislation and NSW Ombudsman recommendations. As a result, the structure of the draft *Compliance and Enforcement Policy* has been updated to align with the NSW Ombudsman's *Model Compliance and Enforcement Policy*, which provides a standardised and effective framework for compliance and enforcement within the Council.

The draft Policy does not include amendments to the way that the Council officers investigate or act on compliance matters. The core approach to investigations and enforcement remains unchanged. Council officers will continue to investigate and act on compliance matters as per established protocols.

The following is a broad outline of the changes proposed.

### 1. Structural and layout changes

The draft Compliance and Enforcement Policy follows the structure recommended by the NSW Ombudsman to ensure consistency and transparency in compliance decision-making.

### 2. Legislative updates

Housekeeping updates to reference and reflect:

- re-structuring of the *Environmental Planning and Assessment Act 1979*;
- adoption of the *Environmental Planning and Assessment Regulation 2021*;
- adoption of the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*; and

- updates to the name and responsibilities of the respective NSW Government departments and agencies.

### **3. Clarification and process enhancements**

Incorporating clarification and guidance from the NSW Ombudsman recommendations:

- additional guidance on how compliance principles, including proportionality, consistency, accountability, transparency, and timeliness relate to practical actions;
- strengthened provisions on confidentiality of complainants, balancing transparency, and privacy;
- providing clearer factors that will be considered when deciding on the appropriate course of action, including legal action; and
- clarified roles and responsibilities in shared enforcement situations with other authorities and private certifiers.

### **Consultation requirements**

Community engagement will be undertaken in accordance with the Council's Community Engagement Protocol.

The draft *Compliance and Enforcement Policy* is to be placed on public exhibition, inviting submissions for 28 days including notification of the Precinct Committees and stakeholders like the Building Commission.

### **Financial/Resource Implications**

There is no direct financial or resource implications of this report.

### **Legislation**

Council is responsible under section 8 of the Local Government Act 1993 for ensuring its regulatory activities are done consistently and without bias.

The draft *Compliance and Enforcement Policy* will help achieve and maintain minimum standards for the operational duties, functions, and responsibilities of officers involved in enforcing and resolving all compliance activities.

**Policy Owner:**

**Category:** Operational

**Direction:** 3. Our Innovative City

**1. STATEMENT OF INTENT**

- 1.1 Council acknowledges it has an obligation under s 8 of the *Local Government Act 1993* to exercise its regulatory authority consistently and without bias.
- 1.2 This Policy aims to ensure consistent compliance actions regarding food safety, public health, environmental and development non-compliance are achieved, while respecting natural justice principles.
- 1.3 The purpose of this policy is to provide a structure for consistency and transparency in decision making, and to facilitate a proportional approach to compliance. It is also intended to assist Council staff to act promptly, effectively and consistently in response to allegations of unlawful activity.
- 1.4 This policy outlines matters to be considered at the various stages of the compliance process, including the receipt of a report alleging unlawful activity, investigation, what enforcement actions Council may consider and whether to commence criminal or civil proceedings.
- 1.5 Council will have shared enforcement responsibilities with other regulatory authorities in certain circumstances. This policy emphasises that Council will approach such matters in a collaborative and cooperative manner. Advice and guidance are also provided on the role of Council in building compliance matters involving a private certifier, and the role of councillors in enforcement.

**2. ELIGIBILITY**

- 2.1 This Policy applies to all persons and companies who carry out, or may have carried out, unlawful activities within the North Sydney Local Government Area.
- 2.2 Council staff and contractors carrying out works must do so in accordance with the law. It is recognised that Council has limited authority to take compliance action against its own employees or contractors. In such circumstances, resolution of these issues may be best handled under contractual terms and performance agreements, or by an external regulatory authority.
- 2.3 Council staff retain the discretion to exercise their official duties without limitations imposed by this Policy. The full circumstances and facts of each case need to be considered, and a decision will be made on merit. The compliance action taken will be dependent upon the circumstances of each case and consideration will be given to the various questions within Clause 4.6 of this Policy.

### 3. DEFINITIONS

| Term   | Meaning   |
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| Complaint  | A complaint is an expression of dissatisfaction made about Council services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required. For the purposes of this policy, a complaint does not include: <ul style="list-style-type: none"> <li>a) A report alleging unlawful activity (see definition below),</li> <li>b) A request for information about a Council policy or procedure,</li> <li>c) A request for an explanation of actions taken by Council,</li> <li>d) A request for internal review of a Council decision.</li> </ul>   |
| Compliance or enforcement action                                 | Actions taken in response to a confirmed contravention of the law.  |
| Delegations Manual and/ or Implementation of Delegated Authority | The Delegations Manual adopted by Council from time to time and any Implementation of Delegations adopted by Council from time to time.   |
| Regulation   | Using a variety of tools and strategies to influence and change behaviour to achieve the objectives of an Act, Regulation or other statutory instrument administered by Council.  |
| Report alleging unlawful activity                                | An expression of concern or a request for service in relation to alleged unlawful activity, where a response or resolution is explicitly or implicitly expected or legally required.  |
| Unlawful activity  | Any activity or work that has been or is being carried out contrary to the below and/or failure to take required action to be compliant with: <ul style="list-style-type: none"> <li>a) terms or conditions of a development consent, approval, permit or license,</li> <li>b) An environmental planning instrument that regulates the activities or work that can be carried out on particular land,</li> <li>c) a legislative provision regulating a particular activity or work,</li> <li>d) a required development consent, approval, permission or license,</li> <li>e) a law of New South Wales, in which Council is the regulatory authority.</li> </ul> |
| Unreasonable complainant conduct                                 | Any behaviour by a current or former complainant which, because of its nature or frequency raises substantial health, safety, resource or equity issues for Council staff, other service users and complainants or the complainant himself/herself.   |

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|  | <p>In accordance with Council's <i>Managing Unreasonable Complainant Conduct Policy</i>, this is grouped into five categories of conduct:</p> <ul style="list-style-type: none"> <li>a) Unreasonable persistence - is continued, incessant and unrelenting conduct by a complainant that has a disproportionate and unreasonable impact on Council staff, services, time and/or resources; and</li> <li>b) Unreasonable demands - are any demands (express or implied) that are made by a complainant that have a disproportionate and unreasonable impact on Council staff, services, time and/or resources; and</li> <li>c) Unreasonable lack of cooperation - is an unwillingness and/or inability by a complainant to cooperate with our organisation, staff, or complaints system and processes that result in a disproportionate and unreasonable use of Council services, time and/or resources; and</li> <li>d) Unreasonable arguments - include any arguments that are not based in reason or logic, that are incomprehensible, false or inflammatory, trivial or delirious and that disproportionately and unreasonably impact upon Council staff, services, time, and/or resources; and</li> <li>e) Unreasonable behaviours - is conduct that is unreasonable in all circumstances, regardless of how stressed, angry or frustrated that a complainant is, because it unreasonably compromises the health, safety and security of Council staff, other service users or the complainant.</li> </ul> |
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#### 4. PROVISIONS

##### 4.1 Policy objectives

4.1.1 The intent of this Policy is to establish clear guidelines for Council staff in the management of Council's compliance and enforcement activities.

4.1.2 The Policy provides workable guidelines on:

- a) responding to reports alleging unlawful activity,
- b) assessing whether reports alleging unlawful activity require investigation,
- c) deciding whether compliance action is warranted,
- d) options for dealing with confirmed cases of unlawful activity,
- e) taking legal action,
- f) implementing shared compliance responsibilities.

4.1.3 The policy also provides advice and guidance on:

- a) the role of the Principal Certifier,
- b) the role of Councillors in compliance.

## 4.2 Application

4.2.1 The policy applies to compliance matters within Council's area of responsibility including, but not limited to:

- a) development and building control,
- b) pollution control,
- c) environmental health,
- d) public health and safety,
- e) noxious weeds,
- f) septic systems,
- g) food safety,
- h) fire safety,
- i) tree preservation.

## 4.3 Compliance and enforcement principles

4.3.1 The following principles underpin Council's compliance and enforcement activities:

| Principle                   | Action   |
|-----------------------------|--|
| Accountable and transparent | <ul style="list-style-type: none"> <li>• Acting in the best interests of public health and safety, and the environment,</li> <li>• ensuring accountability for decisions to take or not act,</li> <li>• acting fairly and impartially and without bias or unlawful discrimination,</li> <li>• providing information about compliance priorities and reasons for decisions to improve understanding and certainty and promote trust by the community,</li> <li>• ensuring meaningful reasons for decisions are given to all relevant parties, particularly when there is a departure from this policy,</li> <li>• acting on any complaints or concerns about the conduct of compliance officers in accordance with Council's <i>Complaints Handling Policy</i>,</li> <li>• advising people and organisations subject to compliance action of any avenues available to seek an internal or external review of a decision (where required by legislation).</li> </ul> |
| Consistent                  | <ul style="list-style-type: none"> <li>• ensuring all compliance action is implemented consistently,</li> <li>• encouraging reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter.</li> </ul>  |
| Proportional                | <ul style="list-style-type: none"> <li>• ensuring the level of compliance action is proportionate to the level of risk and seriousness of the unlawful activity,</li> <li>• making cost-effective decisions about compliance action,</li> </ul>  |

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|        | <ul style="list-style-type: none"> <li>• taking action to address harm and deter future unlawful activity.</li> </ul>  |
| Timely | <ul style="list-style-type: none"> <li>• ensuring responses to reports alleging unlawful activity and decision making in relation to those is timely.</li> </ul> |

#### 4.4 Reports of alleged unlawful activity

##### 4.4.1 Reports of alleged unlawful activity to be resolved to the satisfaction of Council

Reports alleging unlawful activity will be resolved to the satisfaction of Council, not necessarily the person reporting the matter. Council staff will endeavour to manage the expectations of the people who make a report alleging unlawful activity.

##### 4.4.2 Confidentiality of people who report allegations of unlawful activity

People who report allegations of unlawful activity should not expect their identities will remain confidential from the subject of their report in all circumstances. Council may have to disclose information that identifies them in the following cases:

- a) the disclosure is necessary to investigate the matter,
- b) their identity has already been disclosed to the subject of their report directly or in a publicly available document,
- c) the individual was consulted following receipt of a *Government Information (Public Access) Act 2009* application and did not object to the disclosure,
- d) the individual consents in writing to their identity being disclosed,
- e) the disclosure is required to comply with principles of procedural fairness,
- f) the matter proceeds to court.

4.4.3 Council will take any concerns an individual may have about their physical safety being endangered because of making a report seriously. However, this may limit Council's ability to investigate or act in relation to the alleged unlawful activity.

##### 4.4.4 What Council expects from people who report allegations of unlawful activity

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

- a) providing a clear description of the problem (and the resolution sought, if relevant),
- b) giving all available and relevant information to Council, including any new information about the alleged unlawful activity that may become known to the person after making the report,
- c) not giving any information that is knowingly misleading or wrong,
- d) cooperating with Council's inquiries and giving timely responses to questions and requests for information,
- e) treating Council's staff with courtesy and respect,
- f) allowing the investigation to be completed without prematurely taking the matter to other agencies, unless referred to by Council.

4.4.5 If these expectations are not met, Council may set limits or conditions on the continuation of the investigation or may need to restrict further communication.

- 4.4.6 Any unreasonable conduct will be dealt with in accordance with the principles of the *NSW Ombudsman's Managing Unreasonable Complainant Conduct Manual 2012* and Council's *Managing Unreasonable Complainant Conduct Policy*.
- 4.4.7 What parties can expect from Council staff  
People who report alleged unlawful activity, as well as individuals or businesses that are the subject to an investigation or compliance action can expect that Council staff will:
- a) treat them with courtesy and respect,
  - b) advise them of the outcome of the alleged unlawful activity,
  - c) use plain English (where appropriate),
  - d) provide information about any relevant internal and external appeal processes, (where required to do so by law),
  - e) carefully assess any new information provided by any party after a decision has been made and advise whether further action will be taken.
- 4.4.8 Anonymous reports  
Anonymous reports will be recorded and assessed in accordance with the above requirements. However, the investigation may be inconclusive as it is not possible to seek clarification or additional information about an alleged unlawful activity.
- 4.4.9 Unlawful activity outside of business hours  
Unlawful activity can occur outside of Council's business hours. Council may receive reports about offensive noise or a failure to comply with a development consent during the night or weekend.
- 4.4.10 Due to resource and operational capability constraints, investigations into alleged unlawful activity outside of Council's business hours will be prioritised based on the risk of harm to health, welfare, safety, property or the environment, or if it deemed to be in the public interest.
- 4.4.11 Neighbour disputes  
Council may receive requests for assistance from parties involved in a neighbour dispute seeking its intervention. However, when a dispute between neighbours is a civil matter, Council often lacks the authority to resolve the matter.
- 4.4.12 Council staff will evaluate reports to identify evidence of any unlawful activity that requires Council action. Council staff will clarify which elements of the report that Council can assist with and which it cannot, along with the reasons. Where possible, individuals will be referred to mediation services such as Community Justice Centres to help resolve civil matters.
- 4.4.13 It is possible that one party will provide further information about a matter which changes Council's decision about whether it will become involved. In such circumstances, Council staff will carefully consider the matter before acting and document reasons for the new decision. Relevant parties will be advised of the decision and reasons why Council has changed its position on a matter.
- 4.4.14 A decision or position on a matter will not be altered solely in response to an individual's behaviour, such as making persistent demands or threats.

**4.5 Investigating alleged unlawful activity**

**4.5.1 How reports alleging unlawful activity will be dealt with by Council**

Council will record and assess every report alleging unlawful activity.

4.5.2 Council staff should acknowledge every report alleging unlawful activity within 5 working days, unless the person raising the matter indicates they do not wish to receive a response or the report is anonymous.

4.5.3 A preliminary assessment of all reports alleging unlawful activity will be undertaken to determine whether an investigation or other action is required. Not all reports alleging unlawful activity will warrant an investigation.

4.5.4 If there is insufficient information in the report to undertake a preliminary assessment, further information may need to be sought from the person who made the report, or an inspection undertaken. Council staff may need to consult Council records and other internal business units to understand the relevant history and context of a matter.

**4.5.5 Circumstances when no further action will be taken**

Council will take no further action, following a preliminary assessment, if it is identified that:

- a) Council does not have jurisdiction to investigate or is not the appropriate regulatory authority to act on the issues raised. Where there is another appropriate regulatory authority, Council may bring the matter to the attention of the authority or provide the contact details of the authority,
- b) the report substantially relates to a matter that has been previously determined by Council and no new or compelling information is presented which would cause Council to change its earlier decision. In this case, Council staff will acknowledge the report and advise that no further action will be taken as no new information had been provided (other than where the person has previously been advised they would receive no further response),
- c) the allegations relate to a lawful activity (eg. there is an existing approval, or the activity is permissible without Council approval),
- d) the report has no substance or is not supported by evidence,
- e) the relevant Manager, Director or the Chief Executive Officer determines an investigation, or other action would have an unreasonable impact on resources and/or is unlikely to achieve an outcome sufficient to justify the expenditure of resources.

4.5.6 Council staff are not limited in their use of discretion by these considerations and may decide to investigate or not investigate a matter based on these and other factors.

4.5.7 Any decision to not investigate an allegation of unlawful activity will be recorded and the reason clearly stated. The person making the report will be notified of the decision and reason for the decision.

4.5.8 Reports alleging unlawful activity that warrant an investigation or action

Matters will be prioritised based on risk to public safety, human health and the environment. Where a preliminary assessment determines an investigation is warranted, an investigation or action should be initiated within the following timeframes:

- a) Urgent or life threatening - as soon as possible, being either the day of receipt or the following day. Examples include building collapse, unauthorised demolition of heritage items or contributory items, unsafe building works, surcharging drains or serious incidents where public health or the environment is at risk.
- b) General matters – within 5 working days. Examples include works that are not in accordance with a development consent, unauthorised development, noise affecting multiple people and food safety.
- c) Nuisance matters – within 10 working days. Examples include overgrown land, domestic noise or matters where there is no immediate adverse health or safety impacts.
- d) Out of hours matters – Council’s Rangers will action the matter in the first instance and follow up action will be taken by Council’s Planning and Environment staff within 10 working days. Examples include out of hours works or noise matters.

4.5.9 All people who make a report alleging unlawful activity should receive communication from Council staff who are handling the matter within 21 working days. The communication will detail the action taken by Council or the action that Council plans to take.

4.5.10 In the event Council is unable to act on a report alleging unlawful activity, Council staff will explain why Council is unable to act on a matter, particularly when there is insufficient evidence of an unlawful activity.

4.5.11 Timeframes to acknowledge reports alleging unlawful activity, initiate an investigation/ action or provide a communication may vary depending on available resources.

4.5.12 An investigation of alleged unlawful activity may take a significant amount of time to complete, particularly where the issues are complex.

4.5.13 If a matter is not resolved within 21 working days, Council staff will provide regular feedback on the progress of the investigation to the person who reported the alleged unlawful activity. This does not mean the individual can expect to be given daily updates, details about every aspect of the investigation or information that would compromise the integrity of the investigation.

**4.6 Considerations for dealing with confirmed cases of unlawful activity**

- 4.6.1 When deciding whether to take enforcement action in relation to a confirmed case of unlawful activity, Council will consider the full circumstances of each matter and the public interest.
- 4.6.2 Council staff will use discretion to determine the most appropriate enforcement action in response to confirmed cases of unlawful activity, and more than one approach may be taken.
- 4.6.3 The following considerations will assist Council staff in determining whether to take enforcement action and the most appropriate enforcement action that is in the public interest:

Considerations about the alleged offence and impact

- a) Could the unlawful activity be carried out lawfully if Development Consent was sought? Consideration should be given to the impacts of the development and if Development Consent would have been approved.
- b) Is the unlawful activity technical or inconsequential in nature with no aggravating circumstances? Consideration should be given to the material implications that the contravention might have on the interests of any relevant party, as well as any negative impact on the amenity of the area or environment.
- c) Has the unlawful activity created a health, safety or environmental hazard? Consideration should be given to the degree of detriment or risk to the environment.
- d) Has the alleged activity occurred to a heritage item or in a heritage conservation area? Consideration should be given to the detriment to the natural or built environment.

Considerations about the alleged offender

- e) Have previous warnings been provided or is there is a compliance history? If previous warnings have been provided, formal enforcement action would be appropriate.
- f) Has the alleged offender been provided with an opportunity to make representations on the matter?
- g) Are there mitigating or aggravating circumstances demonstrated by the alleged offender?
- h) Has the alleged offender exhibited contrition for the contravention? Consideration should be given to the attitude of the person and their willingness to prevent a recurrence of the problem in some circumstances.

Considerations about the impact of any enforcement action

- i) How will the enforcement action deter any future unlawful activity? Consideration should be given to this specific site, and compliance matters throughout the Local Government Area in a broader sense.
- j) How long has the unlawful activity been occurring and is enforcement action statute barred? Consideration should be given to any time limit that may prevent Council from taking legal action.
- k) Is there any doubt over the evidence or offence? Consideration should be given to the reliability of the evidence and whether it clearly identifies an offence.
- l) What are the prospects of success if appealed? Consideration should be given to the likelihood of success if the decision is appealed in Court.
- m) Are the costs of enforcement likely to be prohibitive for the nature of the contravention? Consideration should be given to the relative costs and benefits of taking formal enforcement action in lieu of informal enforcement action. The enforcement action should be commensurate with the seriousness of the contravention.
- n) Is the condition of development consent that is not being complied with unreasonable or ambiguous? A condition of development consent that is unreasonable or ambiguous may not be enforceable.

Consideration about the potential remedy

- o) Could the unlawful activity be easily remedied by some action on the part of the person responsible? Consideration should be given to the actions of the person if they are actively and positively attempting to remedy the unlawful activity.
- p) Is there a Draft Planning Instrument (eg. Local Environmental Plan) that would make the contravention legal if adopted? Consideration should be given to deferring any enforcement action.

**4.7 Taking enforcement action**

- 4.7.1 Enforcement action will be taken with a minimal tolerance approach. Council staff may take informal enforcement action or formal enforcement action to prevent or remedy an unlawful activity.
- 4.7.2 Council staff will use discretion to determine the most appropriate enforcement action and may take more than one enforcement action.
- 4.7.3 The available enforcement action differs depending upon the relevant legislation; however, the principles of application should remain consistent.
- 4.7.4 If the compliance process is being used to delay enforcement action or there has been a blatant attempt to flout the law, appropriate enforcement action will be instigated without delay.

4.7.5 All enforcement action will be taken in accordance with the legislative processes and provide avenues for representation and appeal where required, to ensure the principles of natural justice are observed.

4.7.6 Informal enforcement action

Council staff may take informal enforcement action including:

- a) No further action based on no reliable evidence or other appropriate reason,
- b) Educating the person who carried out the unlawful activity,
- c) Negotiating with the person who carried out the unlawful activity to obtain an undertaking to address the issues of concern. For example, seeking an undertaking to cease the unauthorised land use until Development Consent is obtained,
- d) Requesting certain actions occur in lieu of commencing formal enforcement action. For example, requesting minor works occur so the unauthorised development aligns with the exempt development standards.

4.7.7 Formal enforcement action

Council staff may take formal enforcement actions including:

- a) Issuing Notices, Orders, and Directions requiring compliance with legislative requirements or an Environmental Planning Instrument,
- b) Issuing formal Warning Notices or Penalty Notices,
- c) Commencing civil proceedings (or seeking an injunction) in Court to either remedy or restrain the unlawful activity,
- d) Carrying out works specified in an Order, at the cost of the person served with the Order,
- e) Commencing criminal proceedings for an offence under the legislation.

4.7.8 All enforcement action will be monitored to ensure compliance.

4.7.9 Reports alleging continued unlawful activity, in contravention of an enforcement action, will be assessed and investigated. Further enforcement action will be taken as necessary.

4.7.10 Should the initial enforcement action be found to have been ineffective, Council staff will consider other enforcement actions.

**4.8 Taking legal action**

4.8.1 Council and delegated staff will be guided by legal advice in deciding whether to commence criminal or civil proceedings. The following will be considered:

- a) Whether there is sufficient evidence to establish a case to the required standard of proof,
- b) Whether there is reasonable prospect of success before a Court,
- c) Whether the public interest warrants legal action being pursued.

- 4.8.2 Sufficient evidence to establish a case to the required standard of proof  
Council considers the decision to take legal action a serious matter, and as such will only initiate and continue proceedings once it has been established that there is admissible, substantial and reliable evidence to the required standard of proof.
- 4.8.3 The basic requirement of any criminal prosecution is that the available evidence establishes a prima facie case. The prosecutor is required to prove the elements of the offence beyond reasonable doubt.
- 4.8.4 In civil enforcement proceedings, Council will require sufficient evidence to satisfy the Court that an actual or threatened breach has occurred on the balance of probabilities.
- 4.8.5 Reasonable prospects of success before a Court  
Given the expense of legal action Council will not take legal action unless there is a reasonable prospect of success before a Court. In making this assessment, Council staff will consider the availability, competence and credibility of witnesses, the admissibility of the evidence, possible defences, and any other factors which could affect the likelihood of a successful outcome.
- 4.8.6 Public interest requires legal action to be pursued  
The principal consideration in deciding whether to commence legal proceedings is whether to do so is in the public interest. In making this determination, the same factors to be considered when taking enforcement action apply.
- 4.8.7 The following considerations relate more specifically to the decision to commence legal proceedings and will assist Council and its delegated staff in making this determination:
- a) Possible length and expense of Court proceedings,
  - b) Any possible counter-productive outcomes of prosecution,
  - c) Effective sentencing options available to the Court in the event of conviction.
- 4.8.8 Time to commence proceedings  
Council staff must be aware of legislative time limits in which enforcement proceedings must be commenced. Sometimes legal action will be statute barred despite good evidence that an unlawful activity has occurred.
- 4.9 Shared enforcement responsibilities**
- 4.9.1 Some reports alleging unlawful activity will raise matters involving shared regulatory responsibilities between Council and other authorities including Transport for NSW, NSW Environment Protection Authority, NSW Police Force, Liquor & Gaming NSW, NSW Fair Trading, SafeWork NSW, Building Commission NSW, NSW Food Authority and Crown Lands.
- 4.9.2 Council recognises that collaborative and cooperative approach between authorities to address issues of shared responsibility is required. Where there are shared legislative responsibilities, Council staff will liaise with relevant authorities to establish:
- a) which authority will take the leading role on any joint investigation,
  - b) which activities each authority will carry out,
  - c) responsibilities to update an individual where relevant,
  - d) protocols for exchanging confidential information between relevant authorities.

4.9.3 Council will reasonably endeavour to respond to requests for information or assistance on joint compliance matters, where resources are available, in a timely manner.

**4.10 Role of council where there is a private certifier**

4.10.1 Council retains its regulatory role and compliance authority where a private certifier has been appointed the Principal Certifier.

4.10.2 Private certifiers have an obligation to issue a Written Direction Notice under Section 6.31 of the *Environmental Planning and Assessment Act, 1979* if they become aware of any non-compliance for any aspect of the development. The private certifier must issue the Written Direction Notice to the person responsible for carrying out that aspect of the development. The Written Direction Notice must:

- a) identify the matter that has resulted or would result in the non-compliance, and
- b) direct the person to take specified action within a specified period to remedy the matter.

4.10.3 If the person fails to comply with the Written Direction Notice within the specified period, the private certifier must send a copy of the Written Direction Notice to Council and notify Council that compliance has not been achieved.

4.10.4 From this point, Council becomes the appropriate regulatory authority for the non-compliance. The private certifier remains responsible for the remainder of the site and development.

4.10.5 In the event Council issues a Notice to give a Development Control Order in relation to building work or subdivision work where a private certifier has been appointed as the Principal Certifier, a copy of the Notice must be provided to the private certifier in accordance with Clause 9(2) of Schedule 5 of the *Environmental Planning and Assessment Act, 1979*.

**4.11 Role of councillors in compliance and enforcement**

4.11.1 Decision making relating to the investigation of reports alleging unlawful activity and taking enforcement action is the responsibility of appropriately authorised Council staff or the Council itself.

4.11.2 Individual councillors do not have the right to direct council staff in their day-to-day activities.

4.11.3 Councillors can help individuals who raise concerns with them by satisfying themselves that Council's policies are being carried out correctly, however they cannot ignore or alter a policy to satisfy the demands of special groups.

4.11.4 The Chief Executive Officer may present certain decisions to be ratified by the elected Council, if this is necessary or desirable, and the councillors may also have the right to call for a report about issues to a council meeting.

**4.12 Delegations**

4.12.1 Council staff delegations for acting under this policy are included in Council's Delegation Manual.

**5. RESPONSIBILITY / ACCOUNTABILITY**

5.1 Implementation of this Policy applies to all Council Planning and Environment staff, including Assessment Officers, Building Surveyors, Compliance Officers, Environmental Health Officers, Environmental Protection Officers and Rangers, where authorised to enforce legislation in accordance with Council's Delegations Manual and/ or Implementation of Delegated Authority.

5.2 Council's Manager People & Culture and Manager Environment and Building Compliance will ensure relevant staff are provided with access to training to ensure this Policy is implemented.

5.3 Council's Manager Environment & Building Compliance will review this Policy within 12 months after the declaration of the poll of a Council election, or as required by Council or the Chief Executive Officer.

5.4 Council's Environment and Building Compliance Department will prepare educational information regarding this Policy on Council's website.

**6. RELATED POLICIES/ LEGISLATION**

**6.1 Related policies**

6.1.1 This Policy should be read in consultation with the following Council policies and documents:

- a) Complaints Handling Policy
- b) Customer Service Policy
- c) Delegations Manual
- d) Managing Unreasonable Complaint Conduct Policy
- e) Mediation Policy

**6.2 Legislation**

6.2.1 The Policy should be read in conjunction with the following legislation:

- a) Boarding Houses Act, 2012
- b) Building and Development Certifiers Act, 2018
- c) Environmental Planning and Assessment Act, 1979
- d) Food Act, 2003
- e) Local Government Act, 1993
- f) Protection of the Environment Operations Act, 1997
- g) Public Health Act, 2010
- h) Swimming Pool Act, 1992

**6.3 Approval**

| Version | Date Approved     | Approved by | Resolution No. | Review Date |
|---------|-------------------|-------------|----------------|-------------|
| 1       | 2 August 2004     | Council     | 794            | 2008/09     |
| 2       | 16 February 2009  | Council     | 61             | 2012/13     |
| 3       | 18 February 2013  | Council     | 61             | 2016/17     |
| 4       | 25 June 2018      | Council     | 214            | 2020/21     |
| 5       | 26 September 2022 | Council     | 286            | 2024/25     |
| 6       | DRAFT             |             |                |             |