



<b>Policy Title</b>	Enforcement Policy
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### 1. STRATEGIC PURPOSE

To assist Council employees to act promptly, consistently and effectively in response to allegations of, or confirmed incidents of unlawful activity.

### 2. POLICY STATEMENT

To establish clear guidelines for the exercise of discretion in dealing with allegations of, or confirmed incidents of unlawful activity. It provides guidelines on:

- How to assess whether allegations of unlawful activity require investigation.
- Options for dealing with unlawful activity.
- How to decide whether enforcement action is warranted.

This Policy applies to the investigation and enforcement of allegations and/or confirmed incidents of unlawful activity, including failure to comply with the terms or conditions of approvals and orders.

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### 3. DEFINITIONS

**Unlawful activity** - is an activity that has been or is being carried out:

- Contrary to the terms or conditions of a Development Consent, Construction Certificate, approval, permission or licence
- Without a required Development Consent, Construction Certificate, approval or licence.
- Contrary to an Environmental Planning Instrument that regulates the activities or work that can be carried out on particular land.
- Contrary to a legislative or Local Government provision regulating a particular activity or work.

### 4. CONTENT

#### 4.1 INVESTIGATING UNLAWFUL ACTIVITY

Not all complaints will warrant investigation. Council will consider a range of factors when deciding whether to investigate. These include but are not limited to:

- Is the matter within the jurisdiction of Council?
- Is the complaint premature e.g. does it relate to some unfinished aspect of work that is still in progress?
- Is the activity or work permissible with or without consent?
- If the activity is permissible with consent, is there a consent in place?
- Is it possible to determine from the information available to Council whether the activity or work is permissible without consent and /or whether all conditions of consent are being complied with?
- Is the complaint trivial or vexatious?
- Has too much time elapsed since the event, the subject of the complaint, took place?
- Is there another body that is a more appropriate agency to investigate and deal with the matter?
- Is the activity having a significant detrimental effect on the environment or does it constitute a risk to public health?
- Does the complaint indicate the existence of a systemic problem e.g. if the complaint is one of a series, could there be a pattern of conduct or a more widespread problem?
- Has the person or organisation complained of being the subject of previous complaints?
- Does the complaint have special significance in terms of Council's existing priorities?
- Are there significant resource implications in relation to an investigation and any subsequent enforcement action?
- Is it in the public interest to investigate the complaint?

If a decision is made not to investigate a complaint, this decision must be recorded with the reasons for that decision.

#### 4.2 RESPONDING TO COMPLAINTS

The timeframe for responding to action requests or complaints about alleged unlawful activity will be dependent upon the seriousness of the matter and available employee resources at the time.

As a general guide, priority/critical or matters presenting a clear and present potentially harmful situation to public health and safety should be investigated immediately or as soon possible

but within 2 hours, serious matters should be investigated within 24 hours, if not sooner. All other matters should be investigated within 5 working days.

In the interest of good public relations, complainants should be advised of the action taken by Council to resolve the matter.

#### **4.3 OPTIONS FOR DEALING WITH CONFIRMED CASES OF UNLAWFUL ACTIVITY**

Council will attempt to use the quickest and most informal option to deal with unlawful activity wherever possible, unless there is little likelihood of compliance with such options.

Approaches to be considered will include:

- Refer the complaint to an external agency for further investigation.
- Take no action on the base of a lack of evidence or for some other appropriate reason.
- Inform them of the relevant Council requirements.
- Negotiate with them and obtain an undertaking to address the issue of concern.
- Issue a letter requiring work to be done or activity to cease, in lieu of legal action.
- Issue a Notice of Intention to serve an Order. Refer to Council's Local Orders Policy for further guidance on this matter.
- Serve an Order requiring work to be done under relevant Legislation.
- Commence proceedings in the Land and Environment Court for an Order to remedy or restrain a breach of the relevant legislation (S.673 LG Act, S.123 EPA Act).
- Seek injunction from the Land and Environment Court or the Supreme Court.
- Issue a summons in the Local Court.
- Issue a Penalty Infringement Notice. This may be the immediate result for offences regarding parking, companion animals and Illegal rubbish dumping/littering
- Take proceedings for an offence against the relevant legislation (S.691 LG Act, S.125 EPA Act, Cl.5 PEO Act).
- Carry out the works specified in an Order under the LG Act at the cost of the person served with the Order (S.678 LG Act).
- Other actions that may be appropriate to the individual situation as outlined in the relevant legislation

All enforcement action must be monitored and a decision made in relation to non-compliance within 2 weeks of any deadline imposed, unless stipulated in legislation.

#### **4.4 COMPLIANCE AND ENFORCEMENT PRINCIPLES**

- As regulators we will endeavour to:
- act in the public interest;
- act consistently, impartially and fairly according to law;
- promote consistency through effective liaison with field staff and the adherence to policies and procedures;
- ensure we do not discriminate on the basis of race, religion, sex, national origin or political association;
- ensure that enforcement action is taken against the correct person for the correct offence;
- ensure that all relevant evidence is documented and available should it be required to be placed before courts or appeal tribunals;
- ensure individuals, groups, businesses etc are aware of their legal obligations through the widest possible dissemination of information;

- explain the benefits of compliance with legislation and discuss specific compliance failures or problems;
- provide advice on mechanisms that can be used to improve compliance or meet minimum compliance standards/requirements;
- confirm in writing, what action has been taken and when requested or applicable, provide written advice in a clear and simple manner, ensuring legal requirements are explained what and why any remedial action by the offender is to be undertaken and over what time scale and;
- advise those we regulate of their right of appeal where provided by law; provide alleged offenders with an opportunity to discuss the circumstances of their case

#### **4.5 TAKING ENFORCEMENT ACTION**

When deciding whether to take enforcement action, Council will consider the circumstances of the case. These circumstances and considerations include but not restricted to:

##### **4.5.1 Has Council created an estoppel situation?**

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 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 person previously been notified that Council would not be taking action?
- Has the matter previously been brought to Council's attention yet no action taken?
- Has Council contributed to the person acting upon a reasonable expectation that no action would be taken?

##### **4.5.2 Is the breach a technical one only?**

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

##### **4.5.3 When was the unlawful activity carried out and for how long?**

Time limits frequently apply and sometimes prosecution will be statute barred despite good 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 a Council's failure to take action, after becoming aware of the breach or unlawful activity, in the required time may be an obstacle to successful prosecution.

Whether the offending activity is on-going or has ceased will also be a relevant consideration.

##### **4.5.4 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 warranted a decision to take action to remedy or restrain the breach.

There may also be cases where the unlawful activity will have a positive impact on the environment or amenity of the locality. This may only warrant a discussion to clarify with the offender(s) that such an action, although beneficial, would in the future require the appropriate permissions/consents etc. but no punitive action taken.

#### **4.5.5 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, and take the lodging into account in the determination of whether or not to take any 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 of Council action would not be appropriate.

#### **4.5.6 Can the breach 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, the subject of the complaint, there is a less compelling case for enforcement action.

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.

There are no hard and fast rules and it is important that discretion is exercised on a case by case basis.

#### **4.5.7 Does the person in breach show contrition?**

In some cases, the person the subject of the complaint may have acted appropriately by acknowledging their wrong-doing and submitting to the rule of the 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.

#### **4.5.8 Are there any particular circumstances of hardship affecting the complainant or the person, the subject of the complaint?**

If the offending 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 to the complainant. However, if the matter falls within Council's jurisdiction and there are particular hardship factors that make it unreasonable to expect the complainant to pursue alternative redress, it may be appropriate for Council to intervene.

Similarly, if enforcement action would cause particular hardship to a person, the subject of the complaint, and the impact of the unlawful activity is not otherwise severe, Council may consider taking informal action or no action.

#### **4.5.9 Are there existing use rights?**

Hardship may also be caused to the person, the subject of the complaint, if the onus of proof of existing use-rights is difficult or impossible to obtain. 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, a business has changed hands several times.

#### **4.5.10 Has the person in breach received a previous warning or been previously subject of legal action?**

It is essential that Council continue to monitor and document situations where they decide not to take formal enforcement action, despite evidence of unlawful activity. If monitoring reveals that the unlawful activity is not resolved or you receive fresh complaints, then a more formal approach would be appropriate.

#### **4.5.11 Would an educative approach be more appropriate than a legal approach?**

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

#### **4.5.12 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 cases, Council would need to identify the causes of that likelihood and address them.

#### **4.5.13 What are the relative costs and benefits of taking formal enforcement action, as opposed to taking no action or informal action?**

Council dislikes taking legal action beyond issuing Penalty Infringement Notices and Orders under the relevant Legislation and, as a general rule, will only do so as a last resort.

When undertaking a cost-benefit analysis, the indirect costs and benefits should also be considered. For example, the indirect cost of taking no action is that broader levels of compliance may fall and there may be a greater increase in the demands on Council to intervene. Conversely, the indirect benefit of formal proceedings is the deterrent effect of a successful prosecution.

#### **4.5.14 What about reasonableness and proportionality?**

Council should always act in ways that are reasonable in the particular circumstances. This includes a reasonable proportionality between the ends to be achieved and the means used to achieve them.

When decisions are based on technical matters, you should also ensure that non-technical matters, 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 unreasonable treatment of an individual or organization.

#### **4.5.15 What would be in the public interest?**

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

If laws are not upheld, equal justice may not be secured. Particular individuals may gain private advantage that others cannot enjoy and the environment may be damaged.

#### 4.5.16 Decision Making Criteria

Each case will be considered individually and the appropriate enforcement or punitive action will be taken determined on the particular circumstances of the case.

The following issues need to be considered and balanced in making a decision as to the type of enforcement action, if any, that is applied:

- Clear identification of the breach of legislation.  
The knowledge of the alleged offender as to the consequences of their action such as any previous warnings or actions of a similar nature or breach by the offender.
- The degree of care taken by the alleged offender to ensure that they did not commit an offence.
- Minimum legal requirements for compliance.
- The age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender;
- The alleged offender's antecedents including culture and language ability;
- The degree of care taken by the alleged offender to ensure they did not commit or contribute to the offence;
- The openness, honesty and cooperation demonstrated by the alleged offender;
- The contrition demonstrated by the alleged offender;
- Any mitigating or aggravating circumstances;
- The culpability of the alleged offender and role played by other parties that may have contributed to the offence;
- The duration and magnitude of the offence;
- The totality of offences that may have been committed;
- The proportionality of the selected enforcement option so that the action will not be unduly harsh or oppressive;
- The prevalence of the alleged offence and consideration for the need of a deterrent effect;
- The difficulty and resources expended by Council in investigating and proving the elements of the particular offence or the type of offence;
- The efficiency and cost to Council of the compliance and enforcement option that is used;
- Is the enforcement action required to achieve the objectives of the applicable Act;
- Whether or not the enforcement action would be counterproductive e.g by bringing the law into disrepute;
- Whether or not the alleged offence is of considerable general public concern;
- The necessity to maintain public confidence in the enforcement of Legislated Acts requiring compliance enforcements;
- The existence of any risk to public health and the nature and extent of that risk;

#### 4.6. FOOD ACT

Enforcement of the Food Act is essential for the effective management of food safety risks and the prevention of misleading conduct in connection with the sale of food. Accordingly Council is committed to ensuring there is a high level of compliance with the Food Act and Regulations.

The policy recognises that most food businesses want to comply with the law and produce food that is safe; correctly described; labelled and advertised. The compliance and enforcement role of Council is to protect consumers from the minority, who flout the law or act irresponsibly.



Breaches of the NSW Food Act, 2003 are classified as criminal offences and subject to severe penalties and/or imprisonment. The range of offences under the Act and Regulations vary greatly in their seriousness and accordingly a variable range of penalties and enforcement options are available. This options that are available and details of appropriate action that will be considered in their application toward achieving the objects of the Food Act, 2003 can be found in Councils *Food Inspection Management Plan*.

This policy sets out the principles Council will apply in its compliance and enforcement activities of Food Act. Compliance and Enforcement actions and options are detailed in Council's Food Safety Procedures

#### **4.7. COMPANION ANIMALS ACT AND REGULATION**

Enforcement of the Companion Animals Act (CAA) is essential to achieve high levels of responsible pet ownership and is an integral part of companion animal management along with consultation and education. The ultimate objective is to manage and enforce companion animal issues with the community that leads to a higher quality of life for both human and companion animal inhabitants within the local government area.

Council and the community benefit from common sense standardised procedures regarding enforcement of the CAA as detailed in Council's Companion Animal Management Plan. The policy recognises that companion animal owners must meet the minimum legal requirements of ownership and is thus designed to ensure a fair and consistent application of the enforcement of CAA legislation by Council officers in the decision making process. It is acknowledged that each Companion Animal case is different however; many of the variables regarding common breaches of legislation are similar. Thus, within the guidelines outlined in the Companion Animal management Plan, Council employees have some flexibility to act based on the merits of the case.

This policy sets out the principles Council will apply in its compliance and enforcement activities of the Companion Animals Act. Compliance and Enforcement actions and options are detailed in Council's Companion Animals Management plan.

#### **4.8. ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

The Environmental Planning & Assessment Act is an essential document for the building construction and development issues under the delegated authority of Council to regulate and enforce. Council is committed to ensuring there is a high level of compliance with the EP&A Act and associated Regulations.

The policy recognises that most individuals/business/corporate entities wish to comply with the law and development requirements and relevant standards applicable to the associated activity and the compliance and enforcement role of Council is to ensure those standards are met as well as protect the public from the minority, who flout the law or act irresponsibly.

Breaches of the EP&A Act are classified as criminal offences and can be subject to severe penalties and/or imprisonment. The range of offences under the Act and Regulations vary greatly in their seriousness and accordingly a variable range of penalties and enforcement options are available.

This policy sets out the principles Council will apply in its compliance and enforcement activities of the EP& A Act. The EP&A Act clearly describes specific breeches and associate penalties as well as some guidelines for enforcement. Further guidelines on appropriate

enforcement action are found in the Ombudsman's Guidelines to the EP&A Act and *Council's EP&A Procedures*.

#### **4.9. LOCAL GOVERNMENT ACT AND OTHER ACTS**

Council is also the designated legal authority for the compliance and regulatory functions of numerous acts, a role which is essential in many aspects of compliance. These include but are not limited to the Local Government Act, Swimming Pools Act, Water Management Act, Roads Act, Impounding Act and associated Regulations. Inspection, regulating and enforcement of compliance with the terms of these Acts is an essential role of Council to ensure public safety and maintenance of amenities and quality of life in the local government area to identify only a few. The delegated authority of Council to regulate and enforce these Acts and Regulations comes from the Local Government Act and Council is committed to ensuring there is a high level of compliance with all the Acts and Regulations to which it has the authority.

The policy recognises that most individuals/business/corporate entities wish to comply with the local and State laws, and the relevant standards applicable to associated activities to which it has a legislated regulatory role. Council seeks to ensure those standards are met as well as protect the public from the minority, who flout the law or act irresponsibly.

Breaches of the EP&A Act are classified as criminal offences and can be subject to severe penalties and/or imprisonment. The range of offences under the Act and Regulations vary greatly in their seriousness and accordingly a variable range of penalties and enforcement options are available.

This policy sets out the principles Council will apply in its compliance and enforcement activities of the various Acts and Regulations to which it has regulatory authority. Specific breaches and associated penalties as well as some guidelines for enforcement are detailed in the Acts or may be further detailed in a related Council Policy for a specific activity, (for example Alcohol Free Zones). Further guidelines on appropriate enforcement action are normally found in the Department of Local Government Guidelines related to the activity and/or associated Council Procedures.

#### **4.10. RECOGNISING AND AVOIDING CONFLICTS OF INTEREST AND BIAS**

All investigations must be conducted in an impartial and objective manner. The investigator must not have, and must not be perceived to have, any conflict of interest in relation to the complaint, the complainant, the people or conduct being investigated.

#### **4.11. CONFIDENTIALITY**

All complaints must be investigated in the strictest confidentiality.

The *Privacy and Personal Information Protection Act 1998* makes it an offence for a public official to intentionally disclose any personal information about another person to which the official has, or had access, in the exercise of his or her official functions, otherwise than in connection with the lawful exercise of his or her official functions (S.62)

#### **4.12. RECORD KEEPING**

It is extremely important to keep good, clear records of investigations. Notes should include:

- Date and time of investigation.

- Precise details of where you went, what you saw, who you spoke to and what was said.
- Any other information you obtained, including a record of any photographs taken, documents or other physical evidence obtained.

All records, such as evidence notebooks, inspection diaries which may not be subject to inclusion in Council's electronic document management system must be kept in archive hard copy for a minimum of seven (7) years after the investigation has completed in accordance with section 6.5.1 of The GA39.

#### **4.13. COMMUNITY EDUCATION**

Providing education and information to the general community encourages involuntary compliance.

Council will endeavour to raise community awareness about legislative requirements, the benefits of complying and the potential consequences of not complying. Some of the avenues that will be used by Council to achieve this include:

- Council Corner' in local newspaper.
- Community Radio.
- Developer Information Sheets.
- Builders Newsletter (twice yearly).
- Builders Forum (annually).
- Food Safety Seminar (annually)
- Council's website.

#### **4.14. USE OF DISCRETION**

This policy has no legal status and is not legally binding on Council.

The policy cannot be used to limit the discretion of Council to take any enforcement action.

The policy is only to be interpreted as general guidance on how Council will undertake enforcement action.

Use of discretion guidelines is detailed in some legislation and/or relevant activity associated guidelines from the Department of Local Government, NSW Food Authority, NSW Ombudsman or other relevant oversight government bodies.

#### **4.15. RESPONSIBILITY**

All Council employee authorised to deal with allegations of unlawful activity are responsible for implementing this Policy.

All notifications of alleged unlawful activity must be logged in Council's electronic customer action request system and directed to the responsible person for action, or, when the authorised officer is directly contacted, properly recorded in his/her evidence notebook and all result actions/letters issued properly recorded in the Council document management system.

### **5. ASSOCIATED LEGISLATION**

NSW Ombudsman Enforcement Guidelines for Councils).  
Department of Local Government Enforcement Guidelines (various)

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Adopted:  
Reviewed:

Compliance Policy – Department of Natural Resources, 2006.  
 NSW Food Authority Compliance & Enforcement Policy, October 2006.  
 Environmental Planning and Assessment Act 1979  
 The States Record Act 1998

## 6. ASSOCIATED COUNCIL DOCUMENTS

Snowy Valley's Council Code of Conduct  
 Food Safety Procedures  
 Companion Animal Management Policy SVC-ENV-PO-107  
 Companion Animal Procedure SVC-ENV-PR-064

## 7. HISTORY

Date	Action	Name	Policy Number	Resolution Date	Resolution Number
14/10/2019	Superseded	Enforcement Policy (Former Tumut Shire council)	Reg.08 v1.5		