



# Council Policy Manual

## ENFORCEMENT

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## 1. Preface

An increase in the number of offences that can be expeditiously and cost effectively dealt with by the Council by the issuing of a penalty infringement notice has meant that the vast majority of enforcement action by the Council is by the use of such infringement notices rather than in Court.

In recognition of the increase in the regulatory role of all Councils, the NSW Ombudsman in June 2002 published "Enforcement Guidelines for Councils" including a Model Enforcement Policy for all councils.

This Enforcement Policy forms the basis of this Brewarrina Shire Council Policy, is based primarily on the Ombudsman's model policy with some modifications to reflect local situations.

The Enforcement Policy reflects the need for the decision making process of the Council's authorised officers to be carried out in a transparent, efficient, fair and consistent manner having regard to all the circumstances.

The inclusion of Appendices A and B at the rear of the policy can be interpreted as a guide to indicate the relative level of seriousness of some offences and therefore, from a consistency viewpoint, to determine whether or not the Council may issue a warning prior to some level of formal action.

## 2. Title

This policy ("the policy") is called the Brewarrina Shire Council Enforcement Policy.

## 3. Purpose

The purpose of this policy is to:

- Enable the Council to acknowledge its obligation under Section 8 of the Local Government Act 1993 to ensure that the regulatory powers are carried out in a consistent manner and without bias, and
- Provide a proactive policy statement regarding the enforcement of compliance with legislation and/or condition/s of development consent, and
- Foster prompt, consistent and effective action by the Council in response to allegations of unlawful activity whilst ensuring that the principles of natural justice are respected.

## 4. Objectives and Coverage of the Policy

### 4.1 Definitions

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



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- Contrary to the terms or conditions of a development consent, approval, permit or other written authorisation from the Council;
- Contrary to an environmental planning instrument that regulates the activities or work that can
- be carried out on particular land;
- Contrary to a legislative provision regulating a particular work activity or work;
- Without a required development consent, approval, permit or the like;
- Contrary to legislation for which the Council is the appropriate regulatory authority.
- Unlawful activity also includes any activity, place or structure which is a risk to public health and safety.

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## 4.2. Policy Objectives

The key objective of this policy is to establish clear guidelines for the exercise of the Council's discretion in the context of proactive regulatory action taken and the investigation and pursuit of complaints about unlawful activity. It provides workable guidelines on:

- How to assess whether complaints alleging unlawful activity require investigation;
- Options available to Council for dealing with unlawful activity; and
- How to decide whether enforcement action is warranted and what type of enforcement action is appropriate in the particular circumstances.

## 4.3. Enforcement Principles

Warrumbungle Shire Council is committed to:

- Acting in the best interests of protecting public health, safety and the environment;
- Ensuring all actions are consistent, fair and impartial;
- Ensuring all actions are without unlawful discrimination;
- Ensuring all enforcement action is in keeping with the relative severity of the offence;
- Ensuring enforcement action is taken against the right person for the correct offence;
- Ensuring that any actual or potential conflict of interest situations are managed in a fair, consistent and impartial manner;
- Disclosing all evidence relevant to the alleged offence, including assisting the Court by providing all necessary information whether or not that information is in favour of Council's case;
- Issuing cautions to the alleged offenders where necessary and appropriate;
- Making cost effective decisions concerning enforcement action having regard to the likely outcome at court;
- Ensuring action is instigated within any relevant specified time frames.

## 4.4. Responsibility

All Council staff who deal with written and verbal action requests or complaints alleging unlawful activity and those officers who are involved in the enforcement of relevant legislation are responsible for implementing this policy.



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## 5. Unlawful Activity and Enforcement Action

### 5.1. Responding to Complaints

Council will make every effort to ensure that all Customer Service Requests or complaints about alleged unlawful activity are recorded and actioned in a timely manner by the appropriate staff.

Confidentiality of information will be dealt with in accordance with Council's Privacy Management Plan and all relevant legislation including the Privacy and Personal Information Protection Act 1998 and the Government Information (Public Access) Act 2009.

### 5.2. Investigating Unlawful Activities

All matters regarding alleged unlawful activity will be reviewed to determine whether the matter requires enquiry or investigation. Further enquiries or investigation will not be undertaken where:

- The matter has already been investigated and resolved or it has been determined that no further action will be taken in the absence of new information;
- The Council has no jurisdiction in relation to the matter. In relation to such matters it may be appropriate for Council to bring the matter to the attention of the appropriate regulatory authority.
- For example NSW WorkCover in relation to workplace safety issues on building sites or the Department of Environment, Climate Change and Water in relation to environmental offences;
- The activity is identified as being lawful without the need for an investigation;
- The Council is not the appropriate regulatory authority.

When considering whether a complaint will warrant enquiry or investigation Council will consider a range of factors including:

- Is the complaint premature? Does it relate to some unfinished aspect of work still in progress?;
- On the basis of the information available, is the activity permissible without consent or approval?
- If the activity is permissible with consent, is there a consent in place and have all conditions been complied with?
- Has a development application, building certificate application or other appropriate application been lodged in relation to the activity?
- Is the complaint trivial, frivolous or vexatious?
- What is the extent of the delay between events referred to by the complainant and their notification to Council and reasons given for such delay?
- Is the activity having a significant detrimental effect on the environment or does it constitute a risk to public health, safety and amenity?
- Have there been previous complaints about the subject premises or this person or organisation?



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- Does the complaint have special significance in relation to the priorities of Council?
- Given the particular circumstances of the complaint, are there significant resource implications in relation to any investigation and any subsequent enforcement action?
- Overall, is it in the public interest to investigate the complaint?

Where a decision is made not to investigate a complaint, this decision should be recorded along with the reasons for that decision. The complainant should be advised of the decision and the reasons for making that decision unless such notification is impossible, for example and anonymous complaint.

### **5.3. Taking Enforcement Action**

When determining whether to take enforcement action and the level of enforcement action that is appropriate, in relation to a particular case of verified unlawful activity, officers should consider all the circumstances of the case including:

- The seriousness of the breach, including whether the breach is merely technical or “trivial” in nature;
- When the unlawful activity was carried out and for how long, including whether the breach is continuing;
- The harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity;
- Would consent have been given if it had been sought;
- The need for general and specific deterrence;
- Whether the breach can be easily remedied;
- Any particular circumstances of hardship affecting the complainant or the person the subject of the complaint;
- Any mitigating or aggravating circumstances;
- Any prior warnings that have been issued to the person or previous enforcement action taken against the person;
- The degree of culpability of the alleged offender;
- Whether an educative approach would be more appropriate than a coercive approach;
- The costs and benefits of taking formal enforcement action as opposed to taking informal or no action;
- The prospects of success if the proposed enforcement action were challenged in court;
- What action would be proportionate and reasonable;
- If a criminal prosecution is contemplated that there is the existence of a prima facie case
- What would be in the public interest;
- Any precedent which may be set by not taking enforcement action.

Prior to taking enforcement action, officers should always consider the criteria outlined above in undertaking an objective consideration of the evidence that has been gathered during the course of their investigation. Officers must never allow their actions to be used purely to pursue the agendas of external parties or



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interest groups and enforcement action must never be undertaken purely as a means of appeasing a virulent complainant in circumstances where that application of the criteria in the Enforcement Policy would otherwise indicate that enforcement action should not be taken.

## **5.4. Options for Dealing with Unlawful Activity**

Where an investigation has been undertaken and that investigation has confirmed an instance of unlawful activity there are a number of options Council can take including but not limited to the following:

- Taking no action on the basis of a lack of evidence or because it is appropriate having regard to the matters set out in this policy;
- Warning or counselling the person the subject of the investigation to educate them as to the relevant legal requirements;
- Obtaining undertakings from the appropriate person that steps will be taken to address the concerns, for example, the lodging of a development application, within a reasonable period;
- Issue a warning letter indicating that unless certain action is taken, for example certain work is done or activities cease, more formal enforcement action will be taken by Council;
- Serving a notice of intention, followed by an order where appropriate, under relevant legislation requiring works to be done or for a use to cease or to otherwise address the unlawful activity;
- Issue a formal caution in relation to a penalty notice offence under s19A of the Fines Act 1996 and in accordance with the Caution Guidelines;
- Issue a Penalty Infringement Notice, where available;
- Issue a Court Attendance Notice alleging that an offence has been committed against nominated legislation for determination in the Local Court
- Commence proceedings in the Land and Environment Court to remedy or restrain a breach of legislation, including enforcement action seeking compliance with a statutory order or the commencement of injunctive proceedings where necessary;
- Commence proceedings in the Land and Environment Court for the prosecution of a criminal offence in Class 5 of the court's jurisdiction;
- Carrying out the works specified in an order under the Local Government Act 1993 or the Environmental Planning and Assessment Act 1979 at the cost of the person served with the order.

The options outlined above are not mutually exclusive. The approach adopted will be entirely dependant on the individual circumstances of the particular matter, with public safety being the primary concern at all times.

## **5.5. Enforcement Priorities**

From time to time different functions of Council will be identified as having the need for enforcement or regulatory action to be focussed on that area. Where a Director in consultation with relevant stakeholders, considers it necessary to identify particular enforcement priorities for their department, he or she may develop a list of proposed enforcement priorities and/or guidelines for



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enforcement action in relation to particular types of unlawful activity.

## 6. LEGISLATIVE REQUIREMENTS

### 6.1. Delegations

Council staff may be delegated to initiate various levels of enforcement action under the following Acts and associated Regulations made under these Acts:

- Environmental Planning and Assessment Act 1979
- Local Government Act 1993
- Protection of the Environment Operations Act 1997
- Impounding Act 1993
- Companion Animals Act 1998
- Roads Act 1993
- Food Act 2003
- Public Health Act ????
- Swimming Pools Act 1992
- Contaminated Land Management Act 1997
- Noxious Weeds Act 1993





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## APPENDIX A

As a guide the following offences may result in a prior warning being given before any enforcement action in the form of the service of an order or notice or penalty infringement notice or court action is undertaken.

- Annual Fire Safety Statement- non submission by owner
- Advertising signs without approval or unsightly
- Air pollution – smoky chimney
- Barking / Roaming dog, unregistered dog
- Commercial swimming pool not properly maintained
- Development / Activity without consent or not in accordance with a condition/s of consent
  - Minor development or old unauthorised development
  - Minor breach of consent condition/s
- Erosion & sediment control matters (owner builder / no prior warning) involving no imminent risk of pollution.
- Fire hazard of a less serious nature.
- Food safety/hygiene matters of a less serious nature
- Noise pollution
  - Air conditioner\*
  - Intruder alarm\*
  - Musical instrument and sound equipment\*
  - Power tools\*
  - Motor vehicle on residential premises\*
  - Use of refrigeration equipment fitted to motor vehicle\*
- Non compliance with an Order/Notice/Direction- work partly done or other mitigating circumstances
- Obstruction of Public Place / Road – (minor matters)
- Residential swimming pool issue not serious (eg resuscitation chart not provided)
- Revocation of an approval (eg footpath dining/ place of public entertainment).

*\* Mandatory warning required by legislation*

Note that the above list of offences is an indication only and any offences not listed will be considered on their individual merits.



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## APPENDIX B

As a guide the following offences may result in **NO prior warning** being given before any enforcement action in the form of the service of an order or notice or penalty infringement notice or court action is undertaken.

- Dangerous Dog Order / Attacking Dog/ Restricted Dog
- Dangerous building/ awning
- Dangerous waterhole
- Deposit litter from vehicle.
- Development not in accordance with consent / risk to health & safety/bush fire protection/ notice of Intention issued by PCA
- Deposit litter / Dumped Rubbish
- Development without consent – unsatisfactory explanation / no explanation / repeat offender / prohibited development / risk to health & safety or environment
- Dilapidated building
- *Environmental damage of a significant nature*
- Erosion & sediment control matters
- Fire hazard threatening an asset.
- Food safety matters of a serious nature
- Failure to pay Clean Up / Prevention Notice fee
- Failure to comply with order / notice / cease use of premises / failure to comply with order regarding development consent / demolish remove unlawful building / threatening life / public safety / environment / amenity protection/ fence land / keeping of birds and animals/ remove object from public place/ contravene noise control notice/ noise pollution.
- *Land clearing of a significant nature*
- Littering
- Noise abatement direction
- Noise pollution generally after prescribed mandatory warning
- Not comply with condition of development consent/approval to operate
- Nuisance Dog Order
- Obstruction of road / public place involving safety.
- Obstruction / intimidation/ assault of a Council officer
- Open burning without approval *or not in accordance with an approval or cause excessive smoke.*
- Pollute Waters
- Parking offences
- Pollution Incident – Failure to notify
- Remove and /or damage tree/s
- Swimming Pool fencing / gates / open
- Street Trading without consent / approval

Note that the above list of offences is an indication only and any offences not listed will be considered on their individual merits.