

Enforcement

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Author	Clem Rhoden
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Strategy	1.2.8 Provide effective regulatory, compliance and enforcement services for the community

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1. PREFACE

Clarence Valley Council is involved in a broad range of regulatory activities. In 2009 Council adopted Enforcement Policy 1.48 which established the principles upon which Council would respond to reports of unlawful activities. That policy was based on the 2002 NSW Ombudsman's Model Enforcement Policy and Model Enforcement Guidelines. Policy 1.48 was reviewed in 2012 and was due for further review in 2014.

This policy builds on previous policies providing clear guidelines to Council's authorised officers to carry out enforcement activities in a transparent, efficient, fair and consistent manner having regard to all the circumstances.

Appendix 1 provides an allocation of resources risk matrix as a guide to response times for certain unlawful activities based on their risk of harm.

2. PURPOSE

The purpose of this policy is to:

- Acknowledge Council's 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 compliance with legislation and/or condition/s of development consent, and
- Foster prompt, consistent and effective action by Council in response to allegations of unlawful activity whilst ensuring that the principles of natural justice are respected.

3. POLICY OBJECTIVES

The objectives of this policy are to:

- Establish clear guidelines for the exercise of discretion in dealing with customer service requests or complaints about unlawful activity.
- Provide workable guidelines on:
 - How to assess whether complaints of unlawful activity require investigation;
 - Options for dealing with unlawful activity;

4. ENFORCEMENT PRINCIPLES

Clarence Valley Council is committed to:

- Acting in the interest of protecting community health / safety and or the environment;
- Acting consistently, fairly and impartially;
- Appropriately exercising its discretion in deciding whether or not to initiate and/or continue enforcement action;
- Preventing discrimination on the basis of race, religion, sex, national origin, political association or other personal reason/s;
- Ensuring the proposed enforcement action is in keeping with the relative severity of the offence/s;
- 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;
- If required by the Court, disclosing all evidence relevant to the alleged offence/s;
- If required by the Court providing all necessary information whether or not that information is in favour of Council;
- Issuing cautions to the alleged offender/s, where necessary;
- Making cost effective decisions concerning enforcement action having regard to the likely outcome at court.

5. APPLICATION

This policy applies to the investigation and enforcement of all reports to Council about unlawful activity.

Council officers are responsible for enforcing environmental and other legislation in such diverse fields as illegal/defective buildings, unapproved land uses, vegetation removal, burning (wood fires and open burning), pollution, emissions, odours, noise, control over animals, litter, waste, abandoned vehicles, regulation of parking, erosion control, unauthorised development, public health, food premises, fire safety, encroachments onto reserves and unsightliness.

Nominated Council officers have delegations to initiate legal proceedings on behalf of Council as the appropriate regulatory authority under several environmental and planning statutes, best practice dictates that authorised officers have clear prosecuting guidelines.

Council staff with responsibility for investigating reports of unlawful activity shall investigate and act on them in accordance with this policy.

6. DEFINITIONS

“unlawful activity” includes any activity or work that is unlawful, prohibited or contrary to any Statute, Regulation or Planning Instrument that confers on Council rights, duties or the power to commence legal proceedings, whether against individuals or bodies corporate, either by way of criminal or civil proceedings, commenced by way of originating process, order, notice, injunction or the issue of infringement notice.

7. INVESTIGATING UNLAWFUL ACTIVITIES

Complaints or requests alleging unlawful activity will be accepted by council either verbally or in writing. In either case, the allegation will be recorded in Council’s Customer Request Management System (CRMS) and allocated a unique reference number and referred to relevant Council officers – who will decide based on the application of this policy whether an investigation is warranted.

7.1 Investigation

Not all reports will warrant investigation. All complaints and reports regarding unlawful activities will be reviewed by an Authorised officer to determine whether the matter requires counselling or further investigation. Further investigation will not be initiated where:

- The matter has already been investigated and resolved, or
- Council has no jurisdiction (for example, NSW WorkCover issues on building sites or amusement devices or an internal matter within strata buildings or where the Department of Environment and Conservation is the Appropriate Regulatory Authority etc.).
- The activity is determined to be lawful.
- The report is found to be trivial, frivolous or vexatious.
- The complaint is premature e.g. it relates to some unfinished aspect of approved work.
- It is determined that investigating the matter is not in the public interest.
- Too much time has elapsed since the events which are the subject of the complaint took place.
- The circumstances of the case do not warrant the use of resources.

If a decision is made not to investigate the reasons for this decision must be recorded and the complainant advised accordingly.

Prior to initiating further enquiry or investigation Council’s Authorised officer must confirm one or more of the following situations exist:

- The matter is within the jurisdiction of Council.
- The activity is prohibited, or permissible with consent, and no consent is in place and/or conditions of consent are not being complied with.
- The activity is having a significant detrimental effect on the environment and community wellbeing, and /or constitutes a risk to public safety.
- The complaint indicates the existence of a systemic problem e.g. if the complaint is one of a series, there is a pattern of conduct or a more widespread problem.
- There is a history of related complaints against this person or organisation.
- It is in the public interest to investigate the complaint.

Any decision to investigate a complaint must be recorded with the reasons for that decision and the complainant advised accordingly.

Council then has discretion in deciding whether or not to initiate enforcement action or initiation of legal proceedings

7.2 Responding to Complaints

Every effort will be made to ensure that all Customer Requests about alleged unlawful activity are actioned within the 'service standard' time allowed for resolving the category of complaint as indicated in the Customer Requests Management System. Any investigations into alleged unlawful activity will be initiated in accordance with this policy.

Action will be instigated within the following time frames (see Appendix 1: Allocation of resources risk matrix):

- Urgent and life threatening matters should be actioned as soon as possible following receipt of the complaint. Examples include menacing or dangerous dog complaints, unsafe building works, dangerous awnings, collapsed building/wall, serious pollution, food safety issues and public health and safety matters, etc. As a guide these matters should be dealt with on the day of the receipt of a complaint.
- General compliance matters will be dealt with on a priority basis having regard to the relative seriousness of the matter. Examples include works not in accordance with consent or construction without consent, illegal use, noise and food complaints.
- Nuisance matters should be actioned within fifteen working days. Examples include domestic noise matters, minor non-compliance such as overgrown land or other matters in which there are no likely immediate health or safety implications.

Note: Response times may vary depending on staff and other resources. However Council will acknowledge the complaint and keep the complainant informed in accordance with Council's service standards.

7.3 Confidentiality of Complaints

Council will respect the privacy and confidentiality of information received. However due to its statutory obligations and other requirements, confidentiality cannot always be guaranteed. In cases where the release of information is considered to be necessary the person who made the complaint will be consulted before such a decision is made.

The complainant's identity may be disclosed where:

- the person consents in writing to the disclosure of that information; or
- the principles of natural justice dictate that information be disclosed to the person who is the subject of the complaint, which may enable the complainant to be identified; or
- Council is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively.

8. OPTIONS FOR DEALING WITH CONFIRMED CASES OF NON COMPLIANCE

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

Approaches to be considered (in order of escalation) include:

8.1 Informal Action

- Advise complainant to discuss matter with the neighbour, or the person responsible for the source of the noise etc.
- Referring the complaint to an external agency for further investigation or prosecution.
- Taking no action on the basis of a lack of evidence or for some other appropriate reason.
- Counselling the subject of the investigation to educate them on the relevant Council requirements.
- Negotiating with the subject of the investigation and obtaining some undertakings to address the issues of concern arising from the investigation e.g. submitting a Building Certificate application.
- Referring the parties for mediation with the Community Justice Centre or alternatively for private mediation.
- Issuing a letter requiring work to be done or activity to cease in lieu of more formal action.

8.2 Formal Action

- Issuing a notice of intention to serve an order or notice under relevant legislation, followed by service of an appropriate order or notice (*Local Government Act* (LG Act) ss. 124-128, *Environmental Planning & Assessment Act* (EP&A Act) s. 121B, and *the Protection of the Environment Operations Act* (POEO Act) Pts 4.2-4.4 and 8.6).
- Starting proceedings in the Land & Environment Court for an order to remedy or restrain a breach of the relevant Act or Regulation (s.673 LG Act; s.123 EP&A Act).
- Seeking injunctions from the Land & Environment Court or the Supreme Court.
- Issuing a Court Attendance Notice in the local court.
- Issuing a penalty infringement notice.
- Taking proceedings for an offence against the relevant Act or Regulation (s. 691 LG Act, s.125 EP&A Act, Chapter 5 POEO Act).
- Carrying 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).

All enforcement action will be monitored and a decision made in relation to non-compliance within 2 weeks of any deadline imposed.

When deciding whether to take enforcement action, Council will consider the circumstances of the case. These include:

- Has the Council created an estoppel* situation? (* A bar preventing one from making an allegation or a denial that contradicts what one has previously stated as the truth).
- Is the breach a technical breach only?
- When was the unlawful activity carried out and for how long?

- How has the unlawful activity affected the natural or built environment and the health, safety and amenity of the area?
- Would consent have been given if it had been sought?
- Can the breach be easily remedied?
- Does the person in breach show contrition?
- Are there any particular circumstances of hardship affecting the complainant or the person the subject of the complaint?
- Has the person the subject of the complaint received a previous warning or other non-coercive approach or has formal legal action been taken?
- Would an educative approach be more appropriate than a coercive approach?
- What are the costs and benefits of taking formal enforcement action as opposed to taking informal or no action?
- Is there sufficient evidence to establish a prima facie case? Is there some doubt over the evidence or offence/s?
- Has Council staff acted appropriately in investigating the matter and were standard procedures followed including officers having appropriate authorisation and delegation?
- What are the chances of success if the proposed enforcement action was challenged in Court?
- Is there a draft planning instrument on exhibition that would make the unauthorised use legal?
- What action would be reasonable and proportionate in this case?
- Is it in the public interest including there being a reasonable prospect of success?
- Has the alleged offender been given an opportunity, if appropriate, to provide information as to why enforcement action should not be instituted?
- Has the alleged offender been advised, if appropriate, that no response to a show cause letter will result in the commencement of enforcement action?
- What is the likely length and net expense of the legal action.

9. TAKING ENFORCEMENT ACTION

Enforcement of unlawful activities will be undertaken in accordance with the following:

- Whoever is the subject of concern must know all the allegations in relation to their action
- All parties to the complaint must have the right to be heard;
- All relevant submissions and evidence must be considered;
- Matters which are not relevant must not be taken into account;
- The person who makes the complaint must not determine the matter;
- The decision-maker must be fair and just.

10. DELEGATIONS FOR ENFORCEMENT ACTION

Council staff has delegation to initiate various levels of enforcement action under a range of legislation. Staff delegations are available on Council's web page. Go to: About Council; then: Policies; then: Plans reports and documents; then Delegations. The legislation applicable to the delegations are as follows:

- The Australian Road Rules
- *Roads Act 1993*
- *Impounding Act 1993*



- *Companion Animals Act 1998*
- *Food Act 2003*
- *Public Health Act 1991*
- *Swimming Pools Act 1992*
- *Noxious Weeds Act 1993*
- *Rural Fires Act 1997*
- *Contaminated Land Management Act 1997*
- *Environmental Planning and Assessment Act 1979*
- *Local Government Act 1993*
- *Protection of the Environment Operations Act 1997* and the various Regulations made there under.

11. APPENDIX 1 – ALLOCATION OF RESOURCES RISK MATRIX

Key to response times
Extreme - Within 24 Hours
High - Within 7 Days
Medium - Within 14 Days
Minor – Advice only

Extreme - (Within 24 Hours) Offences listed in this section 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.	
24 Hours on call service	Legionella control - regulated systems
	Serious pollution incident
	Fire Safety
	Contamination of private/public water supply
	Dangerous building/ awning
	Dangerous Dog Order / Attacking Dog/ Restricted Dog
	Unsecured loads
	Swimming pool - safety
	Food Safety
	Livestock straying on main road

High - (Within 7 Days) As a guide offences listed in this section 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.

Within 7 Days - Investigations during normal business hours

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
Parking offences
Pollution incident – failure to notify
Remove and /or damage tree/s
Swimming Pool fencing / gates / open



High - (Within 7 Days) As a guide offences listed in this section 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.

Street trading without consent / approval
Unauthorised building works
Livestock straying
Skin penetration business
Squatters, abandoned/unsecure property
Asbestos
On Site Sewage Management Systems
Parking breach - safety issue
Public place - advertising signs structures oversized or dangerous
Public place - obstructions, abandoned articles or building materials
Water pollution
Public swimming - water quality
Health domestic sewer, surcharges & chokes

Medium - (Within 14 Days) As a guide offences listed in this section 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.

Within 14 Days - Investigations during normal business hours	Annual Fire Safety Statement- non submission by owner
	Advertising signs without approval or unsightly
	Air pollution
	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 <ul style="list-style-type: none"> • 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

Medium - (Within 14 Days) As a guide offences listed in this section 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.

	<p>Noise pollution</p> <ul style="list-style-type: none"> • Air conditioner* • Intruder alarm* • Musical instrument and sound equipment* • Power tools* • Motor vehicle on residential premises* • Use of refrigeration equipment fitted to motor vehicle* <p>* Mandatory warning required by legislation</p>
	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 (e.g. resuscitation chart not provided)
	Revocation of an approval (e.g. footpath dining/ place of public entertainment)
	Nuisance dogs
	Nuisance cats
	Barking dog (second complaint or subsequent enquiry)
	Brothel complaints - use of approved massage parlour as brothel
	Land use - family members living in sheds/garages/caravans
	Stormwater issues

Minor – Advice Only

No investigation - Information Only	Initial noise complaint
	Land use - signs in commercial zones (no safety or heritage impacts)
	Land use - dividing fences
	Land use - encroachment of buildings (historical or where development consent exists)
	Land use - home occupation/business/industry
	Animal & bird control (other than dogs & cats)
	Hair/skin/beauty - no skin penetration
	Domestic odour nuisance
	Cats attacking
	Dogs barking (initial complaint)
	Dogs defecating in public places

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