

8.1 Review of Planning and Assessment Services Compliance and Enforcement Policy

EXECUTIVE SUMMARY

Purpose

To consider suggested amendments to Council's Compliance and Enforcement Policy and to place the reviewed document on public exhibition for 28 days.

Summary

Council authorised and adopted the PAS Compliance and Enforcement Policy (PAS-PL-120) at its meeting of 14 February 2006. In the 17 months since being adopted by Council there have been several significant changes in statute and case law, as well as new Directions regarding our processes. These matters are outlined in the report and are considered significant enough to warrant review of the Policy.

Financial Impact

There is no direct impact on the budget.

Policy Impact

The changes suggested to the Policy will also be aligned with a review of Council's Prosecution and Legal Action Policy currently being considered in Legal Services.

RECOMMENDATION OF DIRECTOR PLANNING AND ASSESSMENT SERVICES

1. That the Amended Compliance and Enforcement Policy be placed on public exhibition for a period of 28 days.
 2. That following the exhibition period, the Amended Compliance and Enforcement Policy and any public submissions, be referred back to Council for consideration.
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REPORT

Background

Council authorised and adopted the PAS Compliance and Enforcement Policy (PAS-PL-120) at its meeting of 14 February 2006. Each person has a responsibility under the Policy to ensure its principles are considered and complied with in the interests of providing an effective, consistent and fair service to our community.

In the 17 months since being adopted by Council there have been several significant changes in statute and case law, as well as new Directions regarding our processes, all of which makes some of the Policy provisions in need of updating. For example:

- Significant amendments to the Companion Animals Act 1998 in relation to dangerous and restricted breed dogs;
- Changes to Roads Transport legislation in relation to heavy vehicle requirements and enforcement;
- Changes to the Environmental Planning & Assessment Act 1979 in relation to retrospective construction certificates;
- Changes to Council's position and legal advice in relation to various components of activities under the Environmental Planning and Assessment Act 1979, including Building Certificates issued under section 149D, applications to modify Development Consents under section 96 and the use of Orders provisions under section 121B;
- Changes to the Food Act 2003 in terms of Council's responsibilities as a proposed Category B enforcement agency;
- Changes to Council's inspections and approval programs such as the On-site sewage Management Strategy and Program;
- Difficulties in achieving turnaround times with limited resources; and
- Inflexible requirements and duplication within the Adjudication Panel Charter attached to the Policy.

These matters are considered significant enough to warrant review of the Policy. In this regard it is appropriate to review all provisions to see whether changes need to be made.



Proposed Amendments following Policy review

Section 3 Principles

Existing Policy provision

Existing Policy section	Extract of existing Policy terminology	Suggested amendments	Reason for amendment
Section 3.1 Responding to complaints of alleged unlawful activity.	In the first paragraph of the section: “Complaints and notifications will be recorded as Customer Action Requests and some form of action will be taken within 15 days (although the specific issue may not be resolved within that time).”	Complaints and notifications will be recorded as Customer Action Requests and some form of action will be taken within 10 days (although the specific issue may not be resolved within that time).	A new approach introduced by the General Manager has made it clear that some response must be made to a customer or complainant within 10 working days. That response may be via phone with notes put on the records system or in writing.
	There is no existing terminology. The suggested amendment is an addition.	Insert the following bullet point addition to Priority 1: Urgent and Life Threatening matters: <ul style="list-style-type: none"> • Asbestos on public or private land 	This is to reflect concerns from staff and community that asbestos matters are a significant cause of concern and should be investigated as soon as possible and that priority be given to ensure it occur.
	Priority 2: General compliance matters are usually investigated within 5 days but up to 10 working days. Examples would include: Priority 3: Nuisance matters are actioned within 10 days but up to 15 working days. Examples may be;	Priority 2: General compliance matters are usually investigated within 10 days but up to 15 working days. Examples would include: Priority 3: Nuisance matters are actioned within 15 days but up to 20 working days. Examples may be;	The changes reflect the realities of turnaround times. Staff resources prevent general matters from being investigated within 5-10 day periods and also nuisance matters being investigated within a 10-15 day period.
	There is no existing terminology.	Insert additional paragraph to state:	The suggested amendment was

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	The suggested amendment is an addition.	<p><i>Anonymous Complaints</i></p> <p>Council will accept anonymous complaints, however will not normally investigate an anonymous complaint unless it raises a serious matter and there is enough information in the complaint to make out a prima facie case and/or carry out an investigation.</p>	raised by staff submissions. Submissions raised the operational burden and volume of anonymous complaints which have been received that do not provide accurate detail and effects turnaround times as a result. On review, the suggested amendment reflects the policy regarding anonymous complaints of the NSW Ombudsman. It is therefore considered appropriate to include this in the Policy to ensure consistency with other government complaints investigation bodies.
Section 3.2 Investigating Unlawful Activity	There is no existing terminology. The suggested amendment is an addition.	<p>Insert additional bullet point to state:</p> <ul style="list-style-type: none"> The complaint is anonymous and there is insufficient information to support a prima facie case or investigation. 	This suggested amendment is included for the same reasons as outlined in the proposed amendment to Section 3.1.
Section 3.6.1.1 Case Law and Building Compliance	Delete the following provision: “(b) Marvan Properties Pty Limited and Another v Randwick City Council [2005] NSWLEC 9 (11 January 2005)	Delete existing provision (b) and replace with the following heading and text: <i>(b) Amendments to Part 4A of the Environmental Planning & Assessment Act 1979 – prohibition on retrospective</i>	These amendments are required to reflect changes in statute law, relevant case law, legal opinion and the use of discretion afforded both under the Policy and the legislation.

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	<p>In this case, Justice Talbot considered “<i>Whether the council may lawfully issue a Construction Certificate pursuant to s. 109F of the Environmental Planning and Assessment Act 1979 after the work has been carried out in the circumstances that pertain in this case.</i>”</p> <p>The applicants appealed the Council’s refusal to issue a construction certificate after the building works had already been completed.</p> <p>Justice Talbot concluded “<i>that a construction certificate may be lawfully issued pursuant to section 109F of the EP&A Act notwithstanding that the work has been commenced. This conclusion does not absolve the applicant from any civil or criminal sanction that may arise as a consequence of a breach of section 81A(2) that prohibits commencement of the erection of a building until a construction certificate for the building work has been issued. Nor does it any way legitimise work carried out otherwise than in</i></p>	<p><i>Construction Certificates</i></p> <p>Following a decision by Justice Talbot in the Land and Environment Court in <i>Marvan Properties Pty Limited and Another v Randwick City Council</i> [2005] NSWLEC 9 (11 January 2005), the NSW Government has amended the legislative provisions to prevent construction certificates being issued for works already carried out.</p> <p><i>(c) Unauthorised works and applications to modify development consent under section 96 of the Environmental Planning & Assessment Act 1979 versus the use of Orders issued under section 121B.</i></p> <p>Where unauthorised works have been carried out outside the terms of an ‘in force’ development consent, (and by implication outside the terms of a valid construction certificate). It may be prudent to advise or encourage the land owner to apply for a section 96 application to modify the development consent.</p> <p>This is consistent with the decision of Justice Talbot of the Land and Environment Court in <i>Windy Dropdown v Warringah Council</i> [2000] NSWLEC</p>	

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	<p><i>accordance with the EP&A Act and the EP&A Regulation.”</i></p> <p>Notwithstanding each particular case may be different, Council will apply the principles of compliance and enforcement outlined in this policy against any applicant or person who commences or completes building works without a construction certificate being issued.”</p>	<p>240 (17 November 2000).</p> <p>This approach does not preclude Council from taking enforcement action accordance with the principles outlines in section 3.4 Enforcement.</p> <p>Where unlawful works have been carried out without an ‘in force’ development consent, Council’s approach will be to commence a compliance process in accordance with Section 3.4 of this Policy.</p> <p>Any course of action is determined under discretionary authority conferred by legislation and this Policy.</p> <p><i>(d) Modification of Construction Certificates</i></p> <p>Clause 148 of the Environmental Planning & Assessment Regulation 2000 recognises that an application may be made to modify and existing construction certificate to incorporate changes to the building works. The circumstances where such an application may be appropriate includes where a retrospective section 96 application to modify the consent has</p>	

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		<p>been determined by approval.</p> <p>The issue of a modified construction certificate under those circumstances is reasonable and permissible and would allow the issue of an Occupation Certificate on completion of the works.</p>	
<p>Section 3.6.2 Building Certificate Applications under section 149D of the Environmental planning & Assessment Act 1979</p>	<p>There is no existing terminology. The suggested amendment is an addition</p>	<p>Insert additional paragraph after existing paragraph 2 as follows:</p> <p>“The test for whether a building certificate should be issued is to ask whether development consent would have been granted had it been applied for initially.</p> <p>On some occasions, however, it is prudent and appropriate for Council to encourage the submission of a building certificate application to regularise a breach of the Environmental Planning and Assessment Act 1979. Authority for this approach is to be found in the decision of Justice Bignold of the Land and Environment Court in Ireland v Cessnock City Council [1999] NSWLEC 153.”</p>	<p>This addition is to reflect a balanced approach to the purpose of building certificates following case law and legal opinion and the use of discretion afforded both under the Policy and the legislation.</p>
<p>Section 3.6.4 Places of Public Entertainment</p>	<p>Council’s Building Surveyors and Fire Safety Specialist as well as Environmental Health Officers, are authorised under the Local</p>	<p>Council’s Compliance and Planning Staff are authorised to assess applications and issue approvals in relation to Places of Public</p>	<p>The provisions for approvals and regulation of Places of Public Entertainment is currently being transferred from the Local</p>

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	<p>Government Act 1993 (the Act) to assess applications for approval under section 68 of the Act.</p> <p>It is Council's approach that in issuing approvals, we are then obliged to follow up to ensure compliance with that approval. This involves authorised staff carrying out inspections and taking action where non-compliance is identified.</p> <p>Failure to comply with an approval is an offence under section 627 of the Act. Failure to obtain the approval in the first instance before operating a Place of Public Entertainment is an offence under section 626 of the Act.</p> <p>The general principles in terms of enforcement and compliance action outlined in section 3.4 <i>Enforcement</i> of this policy apply where offences are committed.</p>	<p>Entertainment. The provisions for Place of Public Entertainment approvals have transferred from the Local Government Act 1993 into the Environmental Planning & Assessment Act 1979.</p> <p>It is Council's approach that in issuing approvals, Council is then obliged to follow up to ensure compliance with that approval. This involves authorised staff carrying out inspections and taking action where non-compliance is identified.</p> <p>The general principles in terms of enforcement and compliance action outlined in section 3.4 <i>Enforcement</i> of this policy apply where offences are committed</p>	<p>Government Act 1993 into the Environmental Planning and Assessment Act 1979 as a State Environmental Planning Policy.</p> <p>The transfer must be recognised in the Policy, however, the Policy principle is broad because specific provisions have not been endorsed by Parliament or gazetted at the time of this review.</p>
Section 3.7.1 Food Safety Compliance Policy	<p>The first sentence of paragraph 3 currently states: "Council's authorized Environmental Health Officers will continue to carry out food safety inspections in over</p>	<p>Amend the first sentence as follows: "Council's authorised Environmental Health Officers will continue to carry out food safety inspections in all food</p>	<p>This suggested amendment is to reflect changes in the Food Act 2003 and our role under the legislation.</p>

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	610 food premises at least once annually.”	premises at least once annually. This is to ensure we fulfil the requirements of a Category B Enforcement Agency under the Food Act 2003.”	
	The fourth bullet point in the second last paragraph currently states: <ul style="list-style-type: none"> • “prohibition notices” 	The amendment must state: <ul style="list-style-type: none"> • “Prohibition Orders” 	This is to ensure accurate reflection of terminology used in the Food Act 2003.
Section 3.7.1.1 Food Poisoning Incidents	The existing section is as follows : <p>“All food borne illness complaints are reported to the NSW Food Authority in the first instance. The NSW Food Authority is responsible for investigating complaints of this nature. The Food Authority may request assistance from Council in the investigation where the complaint was made in the Warringah Local Government area. Therefore, Council will cooperate where required in any investigation carried out by the NSW Food Authority.</p> <p>Often All food borne illness is reported to the NSW Food Authority in the first instance. The NSW Food Authority may</p>	Delete the existing section and replace with the following: <p>“Council will investigate complaints about food poisoning in the retail and food service sector according to responsibilities under the NSW Food Authority “ Food Complaint Referral and Feedback Protocol” and the “Single-case food borne illness complaint protocol.”</p> <p>Action taken will be in accordance with principles outlined in this Policy and in consultation with the NSW Food Authority as required.</p>	There have been changes to the relationships between Council and the NSW Food Authority. The changes reflect the work Council’s already do in accepting complaints and investigating food borne illness. The amendment reflects those changes and recognises the protocols developed by the NSW Food Authority in consultation with NSW Local Council’s.

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	<p>be the first Authority will to investigate serious incidents of this nature. Council may be requested to assist at the request of the NSW Food Authority. Council will therefore co-operate with the Authority in any investigation carried out by the Authority.”</p>		
<p>Section 3.7.4 On-site Sewage Management Systems</p>	<p>There is no existing terminology. The suggested amendment is an addition</p>	<p>Suggestion to add a last paragraph to the section as follows:</p> <p>Council acknowledges that the On-site sewage Strategy was adopted in February 2007 and as such educational and advisory strategies will be used in the first instance of non-compliance or where systems are failing to meet standards.”</p>	<p>This suggested amendment recognises that the strategy is new and that it may in fact be difficult for system owners to comply given some systems pre-date the current legislation and requirements and that Council had no previous program in place until February 2007 despite the requirement to do so being implemented in 1998.</p>
<p>New section: 3.7.5 Brothels</p>	<p>There is no existing section or terminology. The suggested amendment is an addition</p>	<p>Suggestion to add the following section and terminology:</p> <p>“Council acknowledges that there are certain localities where it is permissible under Council’s Local Environmental Plan for these premises to exist and operate lawfully.</p> <p>It is also apparent that certain practices carried out at these premises can increase the risk of sexually transmitted</p>	<p>This is to reflect industry codes of practice and new legislation designed to facilitate the closure of illegal brothels.</p>

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		<p>diseases, particularly where safe practices and industry codes of practice are not followed.</p> <p>Council will keep a register of premises for the purposes of conducting inspections to monitor compliance with development consents and planning guidelines including "Sex Services Premises Planning Guidelines 2004. Council will also alert operators to health standards including the "Health and Safety Guidelines for Brothels in NSW" published by WorkCover NSW.</p> <p>Complaints regarding public health issues at Brothels are in fact investigated by the NSW Department of Health.</p> <p>Complaints regarding unlawful brothels will be investigated by Council in accordance with the Community Protection (Closure of Illegal Brothels) Bill 2006 will amend the Environmental Planning and Assessment Act 1979 to enable Council to order the closure of illegal brothels within 48 hours, and also give Councils the power to enforce the order and prevent persons from entering the premises in the event the Order is not being complied with. However, it will remain difficult for</p>	

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		<p>Councils to obtain proof that some illegal brothels are conducting sex services.</p> <p>Council will involve other agencies of Government where necessary to investigate and close illegal brothels. The principles of enforcement outlined in this Policy will still apply to action taken.</p>	
<p>New section: 3.7.6 Residential Swimming Pool fencing</p>	<p>There is no existing section or terminology. The suggested amendment is an addition</p>	<p>Suggest adding the following section and terminology:</p> <p>Section 3.7.6 Residential swimming Pool Fencing</p> <p>Council acknowledges the immediate safety risk that unfenced or inadequately fences swimming pools pose to children and other persons.</p> <p>Council's authorised officers will carry out inspections on complaint or where incidents of non-compliance are brought to Council's attention through proactive inspection programs or development consents being issued for pools.</p> <p>Given the risk to life safety posed by unfenced or inadequately fenced pools, a strict policy of inspection and compliance action is required to be</p>	<p>The previous policy gave no reference to swimming pools which is one of our most common complaints where life safety is at risk where there is non-compliance. It is considered prudent to include brief provisions to give guidance to Council and the Community on the provisions relevant to the matter.</p>

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		<p>taken in instances of non-compliance. The Swimming Pools Act 1992 provides procedural fairness provisions and this will be implemented by Council in the processes followed to ensure compliance.</p>	
<p>New Section: 3.7.7 Asbestos and its removal</p>	<p>There is no existing section or terminology. The suggested amendment is an addition</p>	<p>Suggest the following section be added:</p> <p>Section 3.7.7 Asbestos and its removal. Council frequently investigates matters involving alleged unlawful asbestos removal. The removal of Asbestos is of concern in the community due to perceive immediate threats to health. There are several different types of asbestos and Council will educate complaints on process and types to help ease concerns where such an approach is required.</p> <p>However, the Occupational health and Safety Act 2001 regulates the safe removal of asbestos. This Act is enforced by WorkCover NSW. WorkCover Guidelines outlines when an asbestos removal licence is required and the required steps which must be followed to ensure safe removal.</p> <p>However, Council will still investigate all complaints received in relation to</p>	<p>This section is required to allay community fears and provide guidance about Council's role in the investigation and regulation of asbestos removal. It is also suggested for addition to be consistent with the recommended changes to section 3.1.</p>

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		<p>asbestos removal in accordance with a precautionary principle approach. If a Council investigation reveals a licence is required due to the nature, type or volume of asbestos to be removed, we will immediately notify WorkCover as licenced removal is regulated by that agency. Where a licence is not required for removal, Council will take the required actions to ensure safe removal according to codes of practice and safe work practices. The Local Government Act 1993 Orders provisions can permit Council to issue orders to ensure premises are placed or kept in a health and safe condition. These provisions will be used where needed in accordance with this Policy.</p>	
Section 3.8.1 Water Pollution generally	There is no existing terminology. The suggested amendment is an addition	<p>Suggest to add the following terminology as paragraph 3:</p> <p>Council will consider the NSW Department of Environment and Climate Change Guidelines; “Considering Environmental Values of Water When issuing Prevention Notices” prior to taking any required action.</p>	This suggestion is to reflect up to date guidelines regarding regulation of water pollution.
Annexure: Adjudication	Adjudication determination Panel Charter (under the main heading)	Delete.	This is a duplication as the heading clearly states the document is “Adjudication Panel Charter” rather

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Panel Charter			than Adjudication determination Charter.
	All references within the Charter to "IPB" or "Infringement Processing Bureau"	Replace references with "SDRO" or "State Debt Recovery Office".	This change reflects the IPB is now part of the State Debt Recovery Office.
Section 4: Functions	(d) Adjudication Panel will meet on Tuesday of every week at 9.30 a.m.	Delete provision	The provision is duplicated within the document. It is also proposed to introduce more flexibility in meeting times.
Section 6: Functions	(b) Agendas shall be made available to Panel Members and staff on the Friday prior to the meeting.	Suggest amendment to : (b) The agenda for the Panel meeting shall be made available to Panel members at least the day prior to the meeting.	This is to make the meeting times more flexible and also recognises the reduced size of the agenda following the execution of an agreement with the SDRO which has seen reduced numbers of penalty notices to determine.
	(d) Panel meetings will be held at 9.30am on Tuesday of every week. The location of the meeting will be identified on the Agenda.	Suggest amendment to: (d) Panel meetings should be held each Tuesday at 9.30am unless prior arrangement for a more suitable time has been made. The day and time is flexible, however, a Panel meeting must be held at least once each week.	This is to reflect competing priorities of panel members and introduce more flexibility in meeting times following a review of the Panel performance.

Consultation

Staff and Management with responsibilities under the Policy were invited to provide submissions on the current Policy as part of the review. Those comments, where applicable, are incorporated into the suggested amendments as part of the review.

External consultation is proposed in accordance with the community consultation framework. It is proposed that comments already considered by Council during the adoption of the Policy in February 2006⁵ will not be revisited. Rather, public comments on the amendments will be sought and considered during a 28 day exhibition period.

Timing

The proposed timeframe is outlined as follows:

- Internal consultation with Staff and Management 15 May to 11 July 2007 – completed
- First report to Council with suggested amendments following review of Policy and consideration of internal submissions – 31 July 2007.
- Public exhibition for minimum 28 days from date of formal adoption of first report to Council – August 2007
- Consideration of public and any further internal submissions - August/September 2007
- Second report to Council recommending adoption of Amended Policy – proposed for 11 September 2007
- Updating Council's Policy Register and notification of outcome to those who made submissions – within 28 days of adoption of Policy

Policy Impact

The purpose of the review and amendment is to ensure the Policy is up to date and valid in terms of legislation and changes to case law. The impact is considered to be favourable in that regard.

Financial Impact

There is no direct financial impact by amending the Policy. However, there will be consistent application of policy directives and this should mean improvement in the way services are provided. This will ensure compliance and enforcement actions are supportable on appeal or during legal proceedings and may lead to cost savings.

Conclusion

The review and suggested additional and amendments to the Compliance and Enforcement Policy may now be considered by Council. Adopting the suggested amendments and additions will see the document updated to reflect changing case law and statute law. It will also ensure Council and the Community are given accurate guidance in matters of compliance and enforcement.

Manager Compliance Services

