

REGULATORY SERVICES ENFORCEMENT POLICY

SCOPE

This Policy applies to the investigation and enforcement of identified unlawful activity or failure to comply with community and/or legislative standards.

This Policy applies to all Council staff, elected Council and any members of the public who are subject to a provision of this Policy.

LEGISLATION

Local Government Act 2009
Banana Shire Council Local Laws

OBJECTIVE

To establish clear protocols for the exercise of the Council's compliance and enforcement actions in the context of both proactive regulatory action taken and the investigation and pursuit of complaints relating to allegations of unlawful activity.

The Policy provides a legal and administrative framework to assist Council in making decisions in its enforcement functions and ensures that the enforcement process is conducted in a timely and efficient manner.

DEFINITIONS

Action	Means an action taken by a Council employee for the purpose of a service request. Examples of actions that could be taken are but not limited to: <ul style="list-style-type: none">• Calling a customer to obtain further information• Carrying out a site inspection• Issuing a Notice, Order or PIN etc
Appeal Process	Means all Council decisions including enforcement actions are reviewable where the legislation allows.
Authorised Officer	Means an employee of the Banana Shire Council, appointed by the Chief Executive Officer to carry out a compliance or enforcement function under legislation administered by the Banana Shire Council.
Best Community Outcomes	Include one or more of the following solutions: <ul style="list-style-type: none">• All parties agree and commit to a positive outcome• Social networks are enhanced• Community, health and safety is not compromised

- Built, social and environment amenity are enhanced
- Harm or nuisance is reduced or abated
- Legislative requirements are achieved

Complaints Process	Means the formal complaint management process as outlined in Council's Administrative Action Complaints Policy.
Compliance	Refers to a corporation or person meeting or taking steps to comply with relevant laws and regulations.
Enforcement	Means a range of procedures and actions taken by Council to ensure that a person or organisation complies with their statutory obligations.
Environmental Harm	Means any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value including environmental nuisance.
EPA	Means the <i>Environmental Protection Act 1994</i> .
Individual Responsibility	Means that the primary responsibility for compliance rests with individuals and corporations.
LGA	Means the <i>Local Government Act 2009</i> .
Offender	Means a person that does or it is alleged to have done something wrong, causes problems or commits or it is alleged to have committed an illegal act.
Penalty Infringement Notice (PIN)	<p>An infringement notice is a ticket issued either 'on the spot' or sent via email or post for offences such as parking, unauthorised work, unauthorised use or any other breaches of the legislation.</p> <p>The infringement notice may only be issued for prescribed offences and the value of the fine is also prescribed by legislation.</p> <p>The infringement notice contains information about the alleged offence and fine amount.</p>
Proportionality	Means relating enforcement action to the risks and costs of compliance. Council will be considerate of cost, as far as the law allows and will take into consideration the circumstances of the concern, behaviours and risk when deciding an action.
Prosecution	Means the institution and conduct of legal proceedings against a person or corporation, as defined in Law, for alleged unlawful activity.
Public Interest Test	Require assessment of the seriousness of the offence, any mitigating circumstances, age, health, special infirmity of the offender, background, culture or availability of other alternate courses of action.
Respondent	Means the party against whom civil proceedings are brought in a legal proceeding.

Reviewable Decision	Means a decision that is capable of being the subject of judicial review.
Risk	Means a potential impact that may cause physical, financial, environmental or other harm resulting in loss of value of goods, loss of life or loss of amenity.
Statutory Obligation	Means an obligation that does not rise from a contractual relationship but is created under a law.
Sufficiency of Evidence Test	Involves determining the existence of a prima facie case, admissibility and reliability of evidence, possible defences, competency and availability of witnesses.
Unlawful Activity	Means any activity or work that has been or is being carried out:- <ul style="list-style-type: none"> contrary to the terms or conditions of a licence, permit, (including a development permit issued under the <i>Planning Act 2016</i> or previous/subsequent planning legislation), registration, approval, permission, statutory authority or other written authorisation from Council contrary to a legislative provision regulating a particular activity or work contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land without a relevant licence, permit, (including a development permit issued under the <i>Planning Act 2016</i> or previous/subsequent planning legislation), registration, approval, permission, statutory authority or other written authorisation or the like

POLICY

The policy provides clarity as to what individuals or businesses may expect from Council, if subject to enforcement action.

Enforcement action is generally the least preferred method of achieving compliance and is generally to be applied only after there has been a breakdown of negotiated outcomes between the parties or where urgent remedial action is necessary.

The policy ensures that Council's enforcement practices are lawful, justified, fair, practical and consistent and that Council discharges its statutory obligations in the investigation and enforcement of unlawful activities.

The policy also acknowledges the contribution of the Queensland Ombudsman's Office in providing guidance to good decision making and administrative practices in its publication "Tips and Traps for Regulators, October 2009".

The Chief Executive Officer will determine whether enforcement action is to be undertaken and the extent and form of enforcement action.

Principles of Achieving Effective Compliance and Enforcement

Council advocates firm but fair regulation that provides positive community outcomes. The underlying principles in achieving this objective are:-

- applying proportionality in the application of the law and in securing compliance
- being consistent in approach
- displaying transparency in what individuals and corporations may expect from Council if they default; and
- that any enforcement action is considerate of risk

Incidents requiring regulatory intervention may differ. In assessing the most appropriate enforcement action, authorised persons are to take into account:-

- risk (potential to cause physical, financial, environment or other harm and the consequences of it happening)
- cost (value of time and resources to obtain a positive and beneficial outcome)
- evidence (facts or observations presented in support of an assertion)
- behaviour (the way in which a person or corporation responds to a situation considerate of circumstance and exerting a positive demeanour)
- circumstances (Facts that surround a situation or event that should be kept in mind when making a decision)
- public interest (the outcome is considerate of the benefits offered to the entire community, or group within the community or individuals); and/or
- law (the objectives and intent of the relevant legislation applicable to the matter under investigation)

Consistency and transparency are integral to Councils aim in regulating fairly. These values assist those who are regulated to understand what is expected of them and why Council intends to take enforcement action. In addition, the principles of natural justice are followed in any investigation to ensure a fair decision is reached.

Voluntary Compliance Principles

Council assumes there are high levels of voluntary compliance with legislation across the community and will direct its resources to investigating activities where non-compliance has been identified.

To achieve its compliance objectives, Council uses a range of flexible and targeted measures, Including:-

- communication and education activities
- timely provision of information and advice
- persuasion
- cooperative assistance
- routine monitoring and inspection programs
- auditing
- risk management
- performance feedback
- community workshops; and/or

- access to information via the internet and other media outlets

Information is available from Council that encourages voluntary compliance and assists customers in their enquiries. The methodology includes circulating or making available both targeted and general advice that define the type of risk that can arise from an activity.

Council also advocates voluntary compliance by working with stakeholders to tailor audit and inspection regimes (i.e. spot checks, re-visits or letters of advice).

Council regularly reviews its compliance and enforcement activities and incorporate lessons learned into the policy, operating procedures, broader compliance tools and the legislative process.

The Codes of Conduct for Councillors and Employees, as well as an understanding of the general principles for managing conflicts of interest, should be understood and read in conjunction with this policy.

Council will liaise with other external agencies to minimise duplication, avoid inconsistencies and to ensure that any proceedings instituted are for the most appropriate offence (for example Queensland Police Service, Queensland Building Construction Commission, Environment & Heritage Protection Department and Queensland Health etc).

Application

Council has a broad range of statutory instruments to assist in the -

- monitoring of compliance with conditions of any approval, licence, permit conditions; regulation of unlawful activities
- management of development activities; and
- protection of public funds and resources

All enforcement activities are carried out in accordance with the relevant legislation and with due regard to sensitivity. Allegations of unlawful activity are acknowledged within prescribed timeframes and where necessary a report provided on what action Council has taken or plans to take.

The regulatory effort is primarily directed towards those whose activities give rise either to the most significant harm to our community or risk of serious environmental harm. Enforcement action is primarily focused on those directly responsible for the risk and who are best placed to manage it.

Investigation – No Action

Council takes no action where an investigation identifies -

- the legislation is not applicable in the circumstances
- there is insufficient evidence
- another agency has taken action and issues of duplicity arise
- the statutory time limit has expired
- an exemption, exception or defence available under relevant legislation is clearly applicable in the circumstances; and
- public interest factor(s) dictate that no action is the appropriate response

Where action is not undertaken, education will be provided to ensure that the relevant person fully understands their responsibilities.

Informal Action

Where remedial action is necessary and the unlawful activity has a relatively inconsequential impact, Council officers clearly explain why remedial action is needed. The circumstances in which informal action may be appropriate include:

- the offence was of a trivial or minor nature; or
- the matter is a first nuisance complaint; or
- the subject has received no previous warnings concerning the unlawful activity; or
- where confidence in the individual/other body to achieve compliance is high; or
- the consequences of non-compliance will not pose a significant risk; or
- informal action may prove more effective than a formal approach
- Informal actions may include the issue of a—
 - caution (verbal advice); and/or
 - advisory letter (where advice is being confirmed); and/or
 - written request, warning or reminder

Where remedial action is required (i.e. where there is an urgent requirement to protect community health, safety or amenity including environmental harm) Council officers will clearly explain why the action is necessary and provide an opportunity to discuss what is required to comply with the law, before formal enforcement action commences.

Formal Action

Where informal action has not resulted in the desired outcome and/or urgent action is required, enforcement tools exist to expedite an immediate and effective response, with written explanation provided about any rights of appeal against formal enforcement action. Various pieces of legislation specify the procedures which Council must follow, in order to:

- advise of the intention to issue a legislative notice
- invite submissions with respect to the matter
- order a person to do or refrain from doing a thing under specified circumstances; and
- issue directions specifying how the legislative notice may be complied with

Formal actions can include the issue of a -

- verbal warning; and/or
- warning/enforcement letter; and/or
- Compliance Notice (including relevant Information Notice where required); and/or
- Direction Notice; and/or
- Enforcement Notice; and/or
- Show Cause Notice; and/or
- Environmental Protection Order; and/or
- Penalty Infringement Notice (fine)

Prosecution

Prosecution is an important and sometimes necessary part of an enforcement program. Council recognises that the commencement of a prosecution is a serious consequence and it is only to be pursued after full consideration of its implications and the outcomes sought.

Decisions concerning prosecution trigger a process that elevate the status of the investigation and requires consultation between Senior Management, Chief Executive Officer and Executive Management Team.

As a preventative strategy to alleviate the risk of a legislative breach or inappropriate behaviour, Council will consider the wider public interest where enforcement action may lead to prosecution.

Prosecutions do not commence unless there is sufficient, admissible and reliable evidence that an offence has been committed and that there is a realistic prospect of a successful prosecution.

If an allegation does not pass the sufficiency of evidence test, no further action will be taken, regardless of how important or serious the allegation may be. Where there is sufficient evidence, a prosecution may not commence unless it is in the public interest.

Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender and whether, through the conviction of the offender, others may be deterred from similar failures to comply with the law.

Where an offence passes both the evidential and public interest test, Council may prosecute in any of the following circumstances:

- the offence involves a failure to comply in full or part with the requirement of a statutory obligation or notice; or
- there is a history of similar offences in relation to the non-compliance with a statutory obligation or notice; or
- the offence has the potential for serious consequence for community health, safety, amenity or environmental harm; or
- there has been excessive or persistent breaches of regulatory requirements; or
- there has been failure to provide information without reasonable excuse or knowingly supplying false or misleading information; or
- there has been obstruction of Council staff in carrying out their duties

Alternatives to Prosecution

In cases where prosecution is not the most appropriate course of action other alternatives are considered (i.e. counselling, written warning, issue of a Compliance Notice, Direction Notice, Enforcement Notice, Show Cause Notice, Penalty Infringement Notice or a combination of the above).

Council keeps a record of all directions and, where necessary, they can be referred to in subsequent dealings. Council may also utilise the services of other external agencies in facilitating remedial action (i.e. Community Justice Program).

Injunctions

An injunction or Court Order may be sought where there are sufficient grounds and in particular where the circumstances present a potential and/or immediate threat to community health, safety, amenity, environmental harm or are causing extreme distress. Consideration at this time will be given to the possibility that Council may face a damages claim in the event that the eventual prosecution is not proven.

Works in Default

Under some legislation Council may execute works in default instead of, or as well as, taking legal action. In such cases the expenses of default work may be recovered by Council and can be charged against

the land, or, in the case of a negotiated cost, be met by the defaulter on completion of the works. Where Council takes such action it will take all reasonable steps to notify the interested parties.

Council may also consider exercising its work in default power where it is legally possible, reasonably practicable and there is a will on behalf of the defaulter for Council to do the work. For example, in the interest of community health, safety, amenity or environmental harm, Council may consider an immediate remedy by agreement, or by seeking compliance without prosecution. Where Council takes such action it will notify the interested parties, seek agreement where possible and carry out the works.

Enforcement Decisions

In the majority of cases, decisions about the most appropriate course of enforcement action are made by authorised persons or other officers of Council authorised to make those decisions. Decisions are made following referral to policy guidelines, operational manuals, standard operating procedures, professional judgment, legal guidelines, statutory codes of practice and priorities set by Council.

The role of the authorised person / delegated officer is to mitigate, guide, educate and enforce compliance in order to uphold community standards and reflect the values and culture of Council in accordance with this policy. The primary duty of Council is to govern in the wider public interest of the community as a whole.

For serious offences (where the nature of the offence points towards prosecution or seizure), decisions about enforcement action are collaborative.

Reviewable Decisions and Complaints

Should an individual or corporation have a concern about an enforcement action or the way the investigation has been managed, they may have their concerns investigated in a range of ways;

General Complaints Management System

Council has adopted a Complaints Management Policy which can be found on Council's website.

Written Representation

Any person may take up their complaint with the Chief Executive Officer of Council.

Reviewable Decision

Most legislation that Council enforces has a reviewable decision provision that provides for review processes to be outlined in written decision notifications. Individual review processes should be followed as outlined.

Queensland Ombudsman's Office

A core function of the Queensland Ombudsman's Office is to investigate complaints about decisions and actions of public agencies (including local governments).

The Ombudsman's office encourages persons to try to resolve their complaint with Council first. Applicants should approach Council and genuinely try to have the problem resolved. The Ombudsman's office advocates that applicants keep a record of their discussions with Council and copies of letters or emails between the parties.

If an individual or corporation is not satisfied with Council's response or there is undue delay in the addressing of a complaint, individuals or corporations may complain to the Queensland Ombudsman Office.

Right to Information

The *Right to Information Act 2009* (RTI) provides a mechanism for persons to have access to information in the possession or under the control of Council. The *Right to Information Act 2009* enhances government accountability and promotes discussion of public affairs.

The Act includes certain grounds for refusing access to documents held by Council where it is contrary to the public interest to give the access. An application for access to documents under the *Right to Information Act 2009* must be made in writing and:

- provide sufficient information concerning the information requested to enable Council's RTI Officers to identify the document/s; and
- be accompanied by the current application fee

Crime and Corruption Commission

If an individual or corporation suspects a Council officer of misconduct, they should first refer their concerns to Council. If the internal investigation is deemed unsatisfactory then the matter should be referred to the Queensland Crime and Corruption Commission (CCC) for investigation.

Delegations for Enforcement Action

A number of Council employees are delegated powers to initiate various levels of compliance and enforcement action. Council's delegation register lists those officers that have the decision making power to issue a Compliance Notice (including relevant Information Notice), Direction Notice, Enforcement Notice, Show Cause Notice, Penalty Infringement Notice or to initiate legal proceedings.

Legislation

The following Acts and Regulations are the guiding legislation for regulatory matters. They include but are not limited to:

Animal Management (Cats and Dogs) Act 2008

Biosecurity Act 2014

Building Act 1975

Environmental Protection Act 1994

Food Act 2006

Local Government Act 2009

Planning Act 2016

Plumbing and Drainage Act 2018

Public Health Act 2005

Public Health (Infection Control for Personal Appearance Services) Act 2003

Residential Tenancies and Rooming Accommodation Act 2008

State Penalties Enforcement Act 1999

Stock Route Management Act 2002

Transport Operations (Road use Management) Act 1995

Waste Reduction and Recycling Act 2011

PROCEDURE

Procedures as approved and issued by the Chief Executive Officer, and subject to further revision, amendment and issue under the authority of the Chief Executive Officer.

CERTIFICATION



CHIEF EXECUTIVE OFFICER
BANANA SHIRE COUNCIL

21/10/21

DATE