
8.6 Compliance and Enforcement

PART A - Policy

Objective

The objective of this Policy is to:

- Ensure there is a consistent, efficient and proportionate approach in the undertaking of compliance and enforcement action by the Shire.
- Ensure transparency, procedural fairness and that the principles of natural justice are preserved.
- Use compliance and enforcement strategies in such a way as to best achieve legislated objectives and provide for the good government of the community.

Policy Statements

1. The Shire is responsible for the local administration of a wide variety of legislation providing for the safety, health and amenity of the community, environmental protection and the legitimate interests of local business, consumers, workers and residents.
2. The Shire acknowledges that the enforcement of legislation is an administrative function for which statutory responsibility rests with the Chief Executive Officer.
3. The primary purpose of the Shire's compliance and enforcement function is to achieve regulatory compliance and prevent offences through education and incentives, including formal action where necessary.
4. The Shire undertakes enforcement actions on behalf of and in the interests of the community, not in pursuit of the interests or benefit of any individual or group.
5. Complaints will be prioritised for investigation based upon the seriousness of the alleged breach or offence when assessed against criteria established in the Management Procedures of the policy.
6. The Shire may refuse to investigate a complaint where the Shire has formed the opinion that the compliance issue is either minor or unreasonable as described in the *Ombudsman Western Australia Managing unreasonable complainant conduct: Practice Manual*.
7. Each compliance investigation undertaken by the Shire will be assessed case by case on its merits.
8. Where investigation indicates an offence outside the Shire's authority, the matter will be referred to the appropriate authority / agency, and information shared according to legislative requirements and existing protocols.
9. The enforcement measures applied will be those considered by the CEO or delegate to be most appropriate to achieve compliance with the law and serves the public interest.
10. Enforcement action will be commensurate with the seriousness of the alleged breach or offence assessed against criteria established in the Management Procedures of the policy and consistent with legal requirements.

11. In general, officers will favour the minimum level and type of enforcement action consistent with addressing the matters above and with the Shire's authority under the relevant legislation.
12. Prior to deciding whether to commence prosecution: the authorised prosecutor will consider the information provided by the investigating officer, the presence of a prima facie case, the likelihood of securing a conviction and deterrent penalty, and other matters of public interest as described in the Management Procedures of the policy.
13. In addition to enforcement action provided by law and the prosecution of statutory offences, the Shire may, where legislation authorises it to do so:
 - a. undertake works on private property where the owner, occupier or other responsible person has failed to undertake remedial works specified in a written notice or order, and recover the reasonable costs of such work;
 - b. take legal action to seek restitution from the offender for the fair value of any public property damaged as a result of regulatory non-compliance, and any remediation costs incurred by the Shire to the extent that the law allows;
 - c. refer unpaid fines to the Fines Enforcement Registry.

PART B - Management Procedures

PART 1

1. Policy Application - Compliance and Enforcement

1.1 Objective

The objective of these Procedures and the Policy is to provide guidelines for a consistent approach to all Compliance and Enforcement activities for the Shire of Dandaragan.

1.2 Scope

The Shire's approach to compliance and enforcement reflects its responsibilities under relevant Acts, Regulations and local laws and conforms to the Director of Public Prosecutions - Statement of Prosecution and Policy Guidelines. These guidelines apply to staff appointed as an Authorised Officer under the Local Government Act 1995, or another Act or Regulation of Parliament, to enforce that legislation.

1.3 Application

This policy applies to the investigation and resolution of:

- Offences for breaches of legislation for which the Shire is responsible for administering; or
- Failure to comply with the terms or conditions of approvals and orders. It also applies to any appeals arising out of proceedings brought by the Shire.

1.4 Principles

The Shire will undertake its statutory compliance and enforcement responsibilities under the applicable legislation in accordance with the following principles:

- a. Consistent, fair, unbiased and equitable compliance and enforcement action will be taken in the interests of public health, safety, order, and amenity.
- b. Graduated and proportionate enforcement responses will be commensurate with the seriousness of the alleged non-compliance assessed against public interest criteria established in the Compliance and Enforcement Guidelines and will be consistent with legal requirements and the responsible use of available resources.
- c. Transparent and accountable processes will be used in dealing with non-compliance including:
 - i. investigations following the rules of evidence
 - ii. warnings, notices and directions explain why an action is non-compliant, identify remedial action required where appropriate, allow reasonable timeframes for achieving compliance and provide for review.
- d. Natural justice will be respected by considering all available evidence, allowing alleged offenders to have their arguments heard, and advising people affected by compliance and enforcement action of the options open to them, including objection and review mechanisms.

- e. Outcome-focused enforcement action will be based on risk management and the efficient use of public resources. Accordingly, the pursuit of minor instances of non-compliance with negligible consequences may be deferred or discontinued.

1.5 Compliance

The Shire encourages the community to act in accordance with legislation administered by the Shire through measures such as targeted communication and education activities, timely provision of information and advice, persuasion, cooperative assistance and collaboration.

1.6 Complaints

- a. All complaints in relation to compliance issues should include the following information:
 - i. Name, address and phone number or email address of the complainant.
 - ii. Address of the property to which the complaint relates.
 - iii. Details of the alleged offence.
 - iv. Details of how the matter is affecting the complainant.
- b. Where a complaint relates to breaches of legislation for which the Shire is responsible for administering, the Shire may require those complaints to be made in writing.
- c. Complaints will be prioritised for investigation based upon the seriousness of the alleged offence when assessed against the criteria prescribed in this policy.
- d. The Shire acknowledges that some complaints received in relation to compliance issues are largely as a result of neighbourhood disputes. The Shire may refuse to investigate a complaint where the compliance issue is considered minor and it can be reasonably deduced from the circumstances that the complaint has been made primarily as a result of a neighbourhood dispute.
- e. Complaints about alleged non-compliance with laws which the Shire administers will not be pursued in cases where based on the information available to it, the Shire has formed the opinion that:
 - i. the alleged non-compliance is trivial and inconsequential.
 - ii. the complaint is frivolous, vexatious or unreasonable as described in the Ombudsman Western Australia Managing Unreasonable Complainant Conduct: Practice Manual.
 - iii. the complaint is unsubstantiated or contains insufficient verifiable evidence to enable an investigation to be undertaken.
 - iv. the complaint is part of a series of complaints made in the course of a known ongoing neighbourhood dispute where the previous complaints have been unsubstantiated, and another investigation may be perceived as harassment of the subject of the complaint.
 - v. the Shire is not the appropriate authority to investigate the matter.
- f. Where the Shire has resolved to initiate further action against an alleged offender, the Shire will, where and as soon as practicable, and where the proposed action against the alleged offender is consequent on an initial complaint:
 - i. advise the complainant of the nature of the initial further actions e.g. planning/building orders and/or prosecution, to be taken; and

- ii. advise the complainant of the first date upon which the action in (a) above results in an attendance of the matter before a Court, Tribunal or external body or agency, where applicable.

1.7 Enforcement

- a. Council recognises the need for the separation of powers in respect of the adoption of regulation and the enforcement thereof, acknowledging that the enforcement of regulations is an administrative function for which statutory responsibility rests with the Chief Executive Officer.
- b. Where voluntary compliance cannot be achieved, in deciding whether enforcement action is appropriate and what measures should be used, the Shire applies the following principles:
 - i. Enforcement action will be in proportion to the seriousness of the alleged offence and consistent with legal requirements.
 - ii. The investigation of compliance issues will be prioritised based upon the seriousness of the alleged offence.
 - iii. In determining the seriousness of an alleged offence, the Shire will have regard to:
 - the potential harm caused by, or effect of, the breach on other people, the environment (built and natural) or the amenity of the district;
 - whether or not it is in the public interest for the Shire to take action; and
 - the penalty prescribed in the relevant legislation for the alleged breach or offence.
 - iv. The enforcement measures applied will be those considered most likely to achieve the desired outcome.
 - v. Prosecution where it is the appropriate response given all of the circumstances applicable to the compliance issue.
 - vi. The Shire is unable to condone or authorise the continuation of an offence once detected. However, given the Shire's limited resources, the Shire's compliance efforts are targeted at addressing issues that are both unlawful and likely to cause harm to other people, the environment (built and natural) or the amenity of the district. This may mean that the investigation of trivial or relatively minor instances of non-compliance is delayed.

1.8 Enforcement Criteria

- a. Decisions on the most appropriate enforcement action should be taken in accordance with the following considerations:
 - i. Whether there has been a failure to comply with any formal request, lawful direction or notice given by an authorised person;
 - ii. The seriousness of the matter having regard to the actual or potential impact on the health, safety and amenity of others or on the environment;
 - iii. The accessibility and adequacy of public information concerning the relevant compliance requirements;
 - iv. The cooperation of the offender with the Shire in rectifying or committing to rectify the non-compliance when advised of it;

- v. The length of time since the incident and the subsequent behaviour of the alleged offender and any statutory time limits;
- vi. Whether the breach or offence was committed deliberately or inadvertently;
- vii. Any mitigating or aggravating circumstances;
- viii. Whether the offender belongs to a recognised category of vulnerable persons with limited legal capacity or communication difficulties;
- ix. Any demonstrated history of non-compliance of the offender with respect to similar types of offences, and whether the alleged offender has been educated, requested to comply, issued warnings or notices to comply and has failed to do so without reasonable excuse;
- x. The level of public concern or interest in that type of offence;
- xi. The potential consequences of non-compliance;
- xii. The likelihood that the enforcement action will provide an adequate incentive to remedy the non-compliance and deter subsequent non-compliance, considering the level of financial or other benefit that the alleged offender could expect to derive from the non-compliance; and
- xiii. The precedent which may be set by any failure to take enforcement action.

1.9 Enforcement Options

- a. The Shire will apply a graduated and proportionate approach to compliance and enforcement. Enforcement action may only be initiated by officers with relevant delegated authority or authorisation.
- b. At the conclusion of an investigation, officers shall use the most appropriate action which may include one or more of the following enforcement options (listed in order of severity):
 - i. Pursue no further action
 - ii. Informal action
 - iii. Formal warning
 - iv. Infringements
 - v. Statutory notices
 - vi. Prosecution and injunctions.

1.10 Initiation of a Prosecution

- a. Prosecution is one of the enforcement options that may be used when there are reasonable grounds for suspecting that an offence against an Act, Regulation or local law has been committed.
- b. A decision on whether to initiate a prosecution for an alleged offence should have regard to any or all of the following considerations:
 - i. The prospects of conviction based on prima facie evidence to prove the case beyond reasonable doubt including but not limited to written or verbal admissions and witness statements.
 - ii. Whether the prosecution is in the public interest.
 - iii. The seriousness and the type of the offence.
 - iv. Any evidence of contempt or disregard for the law.
 - v. Any prior convictions or history of the alleged offender relevant to the offence.
 - vi. The statutory timeframes relating to the relevant legislation.
 - vii. Whether the alleged offender had prior knowledge or industry experience relating to the offence.

- viii. The potential legal consequences or reputation impact on the Shire if no action is taken.
 - ix. The Shire's statutory responsibilities to enforce legislative provisions under its administrative control.
 - x. Legal advice received from the Shire's legal representatives.
- c. The Shire may also become involved in prosecution proceedings if the alleged offender elects to go to Court in relation to an infringement or if the matter is escalated to the Supreme Court in response to a court or State Administrative Tribunal decision.

1.11 Discontinuance of a prosecution

- a. If, following the commencement, but prior to the conclusion of prosecution action, an alleged offender complies with any prior order that gave rise to the prosecution, or submits any application for approval; the Shire will not discontinue the prosecution.
- b. A prosecution is only to be discontinued if —
 - i. The prosecution complaint is wrong at law;
 - ii. The prosecution involves a mistake of fact;
 - iii. The alleged offender is deceased, cannot be located or is declared bankrupt; or
 - iv. Upon legal advice.
- c. The decision to discontinue a prosecution may only be made by an officer with relevant delegated authority or authorisation.

1.12 Injunctions

In instances of serious non-compliance with legislation and where efforts to resolve that non-compliance have proven ineffective, the Shire may seek an injunction requiring a person not to breach, or to cease breaching, a statute. Decisions on whether to seek an injunction shall be made at the discretion of the Chief Executive Officer.

1.13 Recovery of legal costs

The Shire will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by a charge on the land, consent or by order of the Court. The Shire will also seek to recover any penalty imposed by a Court.

1.14 Rectification Works

- a. Where the Shire successfully prosecutes an offender, the Shire may complete the rectification works to ascertain compliance if the:
 - i. person responsible for the non-compliance has not completed the required work within a specified timeframe; and
 - ii. relevant legislation enables the Shire to complete the rectification work.
- b. Where the Shire completes rectification work to ascertain compliance, the Shire will seek to recover its costs in a court of competent jurisdiction.
- c. Where a Court order has been issued in favour of the Shire in relation to the completion of rectification works, the Shire may lodge a caveat over the land to

which the costs relate. Such caveat shall only be withdrawn where the Shire has received payment of its costs in accordance with the Court order.

1.15 Disclosure of Information

- a. Requests for information from members of the public in relation to compliance or enforcement matters will be handled in accordance with the Shire's Freedom of Information Statement (available on the Shire's website).
- b. Requests for information relating to compliance or enforcement matters made pursuant to the Freedom of Information Act 1992 (FOI Act) will be handled in accordance with the processes set out in the FOI Act. Any decision to release or refuse to release information will be considered on a case-by-case basis in accordance with the provisions of the FOI Act.
- c. Staff may not release information on specific compliance and enforcement activities, such as active investigations, to the public unless it is absolutely necessary or required by the investigative process. Information may be shared with co-regulators and police.
- d. Councillors are entitled to request information relating to the investigation of compliance matters, however, any information provided is to be treated as confidential and may not be revealed to third parties as doing so may compromise investigations or disclose evidence the Shire may subsequently seek to rely upon in Court.

PART 2

2. Compliance and Enforcement Guidelines

2.1 Objective

These guidelines set out the principles adopted by the Shire in relation to compliance and enforcement matters and provide clear guidance for staff when dealing with unlawful activity.

2.2 Scope

These guidelines apply to staff appointed as an Authorised Officer under the Local Government Act 1995, or another Act or Regulation of Parliament, to enforce that legislation.

2.3 Decision to take action

A decision to take action must not be influenced by:

- a. The race, religion, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- b. Personal feelings concerning the alleged offender or their legal representative;
- c. Possible advantage or disadvantage to any group or party; and/or
- d. The possible effect of the decision on the personal or professional circumstances of those responsible for authorising or enforcing the decision.

2.4 Compliance

The Shire provides information and support to the community to promote voluntary compliance through targeted communication and education activities. This helps to:

- a. Raise awareness of the benefits of complying with the legislation and the potential consequences of non-compliance;
- b. Remove barriers to compliance (e.g. lack of knowledge regarding legislative requirements, or how to comply);
- c. Promote the objectives of legislation; and
- d. Overcome factors that encourage non-compliance (e.g. lack of public support for, or misunderstanding of, legislative objectives).

2.5 Enforcement

Enforcement is a valuable tool in regulating activities and obtaining compliance with statutory requirements. A range of enforcement mechanisms are available to manage compliance, depending on the circumstances. The compliance options available to the Shire are:

- a. Informal action
- b. Formal warnings
- c. Infringements
- d. Statutory notices and injunctions
- e. Prosecution.

2.5.1 Informal Action

The Shire uses a variety of informal actions to ensure compliance prior to taking further action. This includes offering advice, verbal warnings and the use of letters. Informal action is appropriate in the following circumstances:

- a. The act is not serious enough to warrant formal action;
- b. From the individual's past history it is reasonable to expect that informal action will achieve compliance;
- c. Confidence in the individual to manage the situation; and/or
- d. Consequences of non-compliance will not pose a significant issue to the Shire.

Even when some of the above criteria are not met, there may be circumstances in which informal action may be more effective than a formal approach.

2.5.2 Formal Warning

A formal warning is a written notice given to a person who has contravened legislation, local laws or Shire policy. Formal warnings are recorded and may be taken into consideration in any future investigation and in any future decision concerning prosecution.

Formal warnings should only be issued if the following preconditions have been met:

- a. There must be sufficient evidence to establish a prima facie case;
- b. The allegation must be put to the person and the person must be afforded an opportunity to respond to the allegation; and
- c. The public interest must be protected sufficiently by the issuing of a formal warning.

It is appropriate to use formal warnings in the following circumstances:

- a. There has been a contravention of legislation;
- b. There is a lack of confidence in the individual to respond to an informal approach;
- c. There is a history of non-compliance with informal action; and/or
- d. A written warning is likely to be a sufficient deterrent.

A formal warning can only be issued if there is sufficient evidence to support a prosecution as failure to comply with a formal warning may result in the implementation of a more serious enforcement option. Where there are several offences on one occasion or a series of offences within a relatively short period of time, formal warnings may not be appropriate. The totality of the offences should be considered in deciding the appropriate course of action. Where significant non-compliance is evident, a more severe enforcement action is appropriate.

Warning letters are to be followed up within 48 hours of the time specified for compliance to ensure the required action has been undertaken.

2.5.3 Infringements

An Infringement Notice is a written notice that attracts a modified penalty and is issued to people or companies under State Acts or local laws. Infringement Notices require the payment of a fine or alternatively, the offender may elect to have the matter heard in court. If an Infringement Notice is deemed appropriate, it should be issued promptly.

The payment of an Infringement Notice is not to be regarded as an admission of liability for the purpose of any civil claim, action or proceeding arising out of the

same occurrence. Additionally, they do not result in criminal convictions being recorded against alleged offenders.

However, if an alleged offender fails to pay the fine, the Infringement Notice will be registered with Fines Enforcement Registry and their driver's licence, or vehicle licence may be suspended until the amount is paid in full.

If the alleged offender elects to have the matter heard in court, the matter will be prosecuted and heard in a Magistrates Court.

Infringement Notices cannot be issued nor allowed to proceed unless:

- a. The legislation or local law prescribes that an Infringement Notice may be Issued for the alleged offence;
- b. There is prima facie case that the offence was committed; and
- c. It is likely that a court will find the alleged offender guilty of an offence if the matter proceeds to trial.

It may be appropriate to issue an Infringement Notice when:

- a. The alleged offence is minor in nature and is able to be remedied within a short timeframe;
- b. The alleged offence is a "one off" occurrence;
- c. The alleged offence resulted from an oversight; and/or
- d. The Infringement Notice is likely to deter the recipient from engaging in similar conduct again.

Infringement notices should be issued as soon as possible with no more than two infringement notices being issued at any one time. For more than two offences, prosecution action should be commenced.

2.5.4 Statutory Notices and Injunctions

a. Statutory notices

Some legislation provides for a statutory notice, such as an improvement notice or direction notice, requiring a particular action to be undertaken. Failure to comply with such a notice constitutes an offence, or if an offence has already been committed, a further offence.

The date of compliance in a notice may be extended at the discretion of an authorised officer in consultation with their immediate manager. However, it is Compliance and Enforcement Guidelines Relating to the Policy recommended that extensions are only provided when the date of compliance has not expired and there are exceptional circumstances to do so.

Follow up inspections are to occur at the timeframe nominated in a notice. In the event that full compliance is not achieved within the period stipulated by the notice, the Shire will initiate legal action against the alleged offender. Legal action is to be commenced after any relevant review period in the State Administrative Tribunal has ended.

b. Injunctions

Where urgent action is required, or in instances of serious non-compliance with legislation and efforts to resolve that non-compliance have proved ineffective,

an injunction may be obtained from a Court ordering an individual or business to undertake or refrain from a certain action.

An injunction does not prevent the Shire from taking further enforcement action in relation to the same incident. The decision whether to seek an injunction shall be at the discretion of the Chief Executive Officer.

2.5.5 Using Multiple Enforcement Options

Unless legislation prevents otherwise, an infringement notice and a statutory notice directing an alleged offender to cease the activity and/or make good any activity undertaken without approval, can be issued simultaneously.

2.5.6 Prosecution

Prosecution is an enforcement tool to be employed where it is the appropriate response in the circumstances and is not an enforcement option to be applied only as a last resort.

A decision to prosecute should only be taken when there is sufficient evidence to support the prosecution. In deciding to prosecute, the following two elements need to be considered:

- a. Whether sufficient evidence exists to justify the prosecution, that is the existence of a prima facie case in conjunction with a reasonable prospect of securing a conviction.
- b. Whether the prosecution is in the public interest.

Consideration of the second element is not necessary until the first element has been satisfied.

Generally, decisions to prosecute are made in cases where the conduct giving rise to the offence is serious (or has serious consequences) and/or in cases where the Shire wishes to target an undesirable practice.

a. Prima facie case

A prima facie case is where, on the available material, there is sufficient evidence to conclude beyond a reasonable doubt, that all the elements of the offence have been established. Where the available material does not support a prima facie case, the prosecution should not proceed under any circumstances.

b. Reasonable prospect of a conviction

It is not in the public interest to proceed with a prosecution which has no reasonable prospect of a conviction. If, on the available admissible evidence, there is no reasonable prospect of conviction, then unless further investigation will remedy any deficiency in the prosecution case, the matter should be discontinued.

c. Public interest

Despite the existence of a prima facie case and reasonable prospect of conviction, it may not be in the public interest to proceed if other factors, singly or in combination, render the prosecution inappropriate. These factors include:

- i. The trivial or technical nature of the alleged offence in the circumstances;
- ii. The age, physical or mental health or special infirmity of the victim, alleged offender or a witness;
- iii. The alleged offender's antecedents;
- iv. The staleness of the alleged offence including delay in the prosecution process;
- v. The degree of culpability of the alleged offender in connection with the offence;
- vi. Whether the alleged offence is of minimal public concern;
- vii. The attitude of the victim of an alleged offence to a prosecution;
- viii. The likely length and expense of a trial if disproportionate to the seriousness of the alleged offending; and/or
- ix. The likely effect on public order and morale.

These factors may be weighed against the following when determining whether to proceed in the public interest:

- i. The need to maintain the rule of law;
- ii. The need to maintain public confidence;
- iii. The entitlement of a person to criminal compensation, reparation or forfeiture;
- iv. The need for punishment and deterrence;
- v. The circumstances in which the alleged offence was committed; and/or
- vi. The need to ensure consistency in the application of the law.

2.5.7 Rectification Works

Upon successful prosecution of an offender, the Shire may complete the rectification works required to gain compliance if the person responsible has not completed the required work within a set timeframe, and where relevant legislation enables the Shire to complete the rectification work.

When the Shire utilises this option the Shire will seek to recover costs in a court of competent jurisdiction. Where a Court order is issued in favour of the Shire to complete the works, the Shire will lodge a caveat over the land to which the costs relate. This will only be withdrawn when payment has been received by the Shire in accordance with the court order.

PART 3

3. Enforcement Options

PROSECUTION

STATUTORY NOTICES & INJUNCTIONS

- Unlawful Activities & Behaviour
- Enforce the Law

INFRINGEMENTS

- Non-Compliance
- Correct Behaviour

FORMAL WARNINGS

- Minor Non-Compliance
- Counsel & Educate

INFORMAL ACTION

- Voluntary Compliance
- Assist and Support

PART 4

4. Administration

Record Management

All records associated with a Compliance and Enforcement actions must be recorded and retained.

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Amended	