

# Core considerations

## Compliance strategy and decision making framework

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| <b>Risk</b>                                | <p>Risk is the possibility, chance or likelihood of harm, hazard or loss to people or the environment. Risk is the first consideration for authorised persons, prioritised over all others, and is to be identified, assessed and managed by authorised persons using the <b>Risk overview</b>.</p>   | <b>Natural justice and procedural fairness</b>    | <p>An authorised person is to provide alleged offenders with an opportunity to present their case during the investigation and allegations are to be put squarely to alleged offenders before action is taken. The decision made by an authorised person is to be made in an unbiased way by an impartial authorised person based on the available evidence.</p> <p>Note—Denial of natural justice and procedural fairness is a ground for review of an administrative decision and may void the decision. It is therefore important that authorised persons give alleged offenders natural justice and procedural fairness when making decisions on what action to take.</p>  |
| <b>Best practice</b>                       | <p>In order to meet Council's compliance and enforcement obligations under the Acts which Council administers in a consistent Council-wide manner, Council has developed a number of policies, procedures and frameworks for authorised persons to consider and use in their decision-making. This multi-tiered approach to decision-making is drawn from different sources recognised for being part of industry best practice. To meet the expectations of the community and Council's commitment to service excellence, Council expects authorised persons to use these documents when making and communicating their decisions fairly, promptly and respectfully.</p>   | <b>Public interest factors</b>                    | <ul style="list-style-type: none"> <li>• Seriousness of the offence (including impacts)</li> <li>• Age and physical or mental health of alleged offender</li> <li>• Whether breach is continuing or subsequent offence</li> <li>• Prevalence of offence and need for deterrence</li> <li>• Degree of culpability and community expectations</li> <li>• Availability and effectiveness of alternatives to action</li> <li>• Length and expense of action</li> <li>• Any precedent that might be set by not taking action</li> <li>• Length of time since offence</li> <li>• Whether consequences of action would be unduly harsh</li> <li>• Behaviour and cooperation of alleged offender</li> <li>• Whether there are counter-productive features of action</li> <li>• Alleged offender compliance history</li> </ul>  |
| <b>Appropriate and consistent</b>          | <p>The appropriate action in any circumstance is based on an objective assessment of the facts, consistent with previous cases, able to be defended by Council (eg. where there is a danger to persons it is not appropriate to take no action) and be made dispassionately without influence from bias.</p> <p>An authorised person should refer to Council's Procedures on what typically should happen next in normal circumstances. Procedures are a guide to achieving consistency across decisions. Like circumstances should be dealt with in a similar way. This makes the community come to know what to expect if they do the wrong thing and is fair to everyone.</p> <p>However, Procedures are not required to be strictly adhered to as an authorised person is expected, with the support of Council, to depart from Procedures where an authorised person has considered the facts of the case and this Compliance Framework and concluded there is justification for departing from the normal course of action in the specific matter.</p>  | <b>Time limitations</b>                           | <p>Council may only issue PINs or commence a prosecution if the statutory limitation date for the offence under the Act has not expired. Generally, this is 1 year from the date of the offence but each Act may contain a different limitation date and should be checked before considering those options. Limitation dates may also be influenced by s148 of the Local Government Act 2009 or s32 of the State Penalties Enforcement Act 1999. The decision on whether to issue a PIN or commence a prosecution must be made promptly and if there is doubt as to whether a limitation period has expired then legal advice should be sought.</p> <p>Note—Section 13(4) of the State Penalties Enforcement Act 1999 dictates a PIN may only be issued if the administering authority may start a prosecution for the offence.</p>   |
| <b>Council resources</b>                   | <p>Council's ability to take certain types of action may be limited by its available resources. Before taking an action, an authorised person is to consider what Council resources may be involved in executing it. Authorised persons must consider the financial implications, officer hours, whether other branches of Council will be involved and any flow-on implications from taking the action (eg. a PIN may be contested in the Magistrates Court or a notice may be appealed to a court).</p> <p>If the resources involved in an action are significantly disproportionate to the alleged unlawful activity then an authorised person must have good reason for taking the action.</p> <p>Note—The financial and other resources available to Council are relevant to deciding whether Council has breached its duty of care (s35 of Civil Liability Act 2003).</p>   | <b>Evidence</b>                                   | <p>There must be sufficient evidence to take compliance and enforcement action under a law administered by Council. Different actions require different standards of evidence. If there is a lack of sufficient evidence for one type of action (eg. beyond a reasonable doubt to prosecute) there may be sufficient evidence to take other action (eg. a reasonable belief to issue an enforcement notice). An authorised person is only to take action if there is sufficient evidence to allow them to take the action.</p> <p>The most common standards are—</p> <ul style="list-style-type: none"> <li>• Beyond reasonable doubt – required for issuing a PIN or commencing a prosecution;</li> <li>• On the balance of probabilities (more probably than not) – required for civil legal proceedings (eg. Planning and Environment Court or animal regulation) but the strength of the evidence must be higher the more serious the allegation or the gravity of the consequences flowing from a particular finding;</li> <li>• Reasonable belief (a belief reasonably held based on logically probative evidence) – required for issuing some statutory notices (eg. compliance or enforcement notices);</li> <li>• Reasonable grounds for suspecting (facts sufficient to form a suspicion, beyond mere speculation) – required for obtaining warrants under some Acts.</li> </ul> |
| <b>Council reputation and consultation</b> | <p>Council prides itself on taking a firm but fair approach to compliance and enforcement. This means that decisions should not be made in a vacuum, without consideration as to how a decision might impact on Council's reputation or bring the decision-making process into disrepute. Complaints are to be managed in a timely way, be transparent where possible, using available resources (eg. this Compliance Framework) and involve a discussion with key stakeholders to consider foreseeable impacts.</p> <p>Where a proposed action might disproportionately impact a person or key stakeholder (eg. a major employer in the local government area), be considered unduly harsh, or have the potential to negatively impact Council's reputation, team leaders, supervisors and managers are to be consulted as necessary before decisions are made. In doing so, a 'working as one team' approach (eg. collaboration, building teams, clear direction and support, respect and cooperation) is to be adopted.</p> <p>Where a proposed action may affect the regulatory efforts of another branch or government entity, prior consultation with them may also be appropriate to develop a response that holistically addresses all interests.</p> | <b>Education / encouragement over enforcement</b> | <p>One of the fundamental pillars of Council's approach to regulatory compliance is that it is committed to education and encouragement for self-compliance outcomes. This should be reflected in the exercise of discretion by authorised persons in deciding what action to take to resolve issues involving unlawful activities. Refer to the Compliance and Enforcement Policy for more detail.</p>  |
| <b>Outcome focus</b>                       | <p>Each compliance and enforcement action taken by an authorised person should be intended to resolve unlawful activities or progress a matter towards resolution. Authorised persons should not take steps they do not believe will resolve or progress a matter towards resolution. Council does not encourage an authorised person to take a step if there are no real prospects of the action progressing a matter towards resolution.</p>  |   |  |

# Compliance strategy and decision making framework

## Purpose, Outcome and Scope

This Compliance Framework sits between the Compliance and Enforcement Policy and the Standard Operating Procedures (Procedures) dealing with unlawful activities. It builds on those matters identified in the Policy and the various Procedures.

This Compliance Framework is to be used by regulatory staff ('authorised persons'), who enforce compliance with the laws which Council administers and under which Council performs its local government responsibilities. It assists authorised persons in deciding the appropriate compliance action by outlining the core considerations that each authorised person should consider.

This Compliance Framework is used as a consistent, Council-wide approach to empower an authorised person to make decisions that are justified, supported by Council and provide documented reasons for the taking of certain compliance action.

This Compliance Framework applies to all compliance activities undertaken by Council.

## How to use this Compliance Framework

- 1 Consider each of the **Core considerations** against the facts of the case.
- 2 Decide what action to take based on balancing all the **Core considerations** together. Risk to the public and the environment are prioritised above all other considerations.
- 3 Document the decision and deliberation involved in the making of the decision. Reference the **Core considerations** against the Policy, Framework and Procedures.
- 4 Re-assess the decision using steps 1, 2 and 3 of this Compliance Framework when new information becomes available or there is a change in circumstances. Reaffirm or alter the decision made to resolve the unlawful activities.

## Risk overview

Risk is the possibility, chance or likelihood of harm, hazard or loss.

Council's Risk Management Policy provides further detail about risk management and sets out four elements that guide the risk management at Council (Mandate and commit, Design process for managing risk, Implement risk management process and Monitor and review risk management process).

### Why does risk have to be managed?

Under the Acts administered by Council there are responsibilities that each local government performs. Sometimes these responsibilities place an obligation on Council to act to protect the health and safety of the people in the local government area and the environment. This obligation is known as a 'duty of care'. When a duty of care arises, Council must act to protect the public, prevent harm or remedy the impacts. Council acts through its employees so it is paramount that authorised persons, in deciding what action to take, identify and assess the level of risk posed to the public and the environment and act appropriately in response to that risk to eliminate or minimise it. Council can be held liable if it fails to act appropriately. For these reasons, it is critically important that Council, through its authorised persons, continually acts appropriately to discharge its duty of care owed to the public and the environment.

### How do I identify risk?

To assist in identifying risk consider the following:

1. Look for tangible and intangible sources of risk (eg. holes in fences, exposed electrical wires, chance of flooding);
2. Consider any limitations of knowledge and reliability of information (eg. works have been covered over, second or third-hand information);
3. Look for time-related factors (eg. the person is about to sell the premises, rectification works will take time);
4. Identify indicators of emerging risks (eg. likelihood of the activity occurring again, increases in intensity or scale of activity);
5. Recognise vulnerabilities and capabilities (eg. financial means).

### How do I assess the level of risk?

To assist in assessing the level of risk consider the following:

1. Look at the likelihood of risks materialising and evaluate their consequences and impacts if they do (eg. are they reversible, are other intervening acts required for a risk to materialise, what are the chances of those acts occurring?);
2. Attribute a level to individual risks (eg. low, medium, high);
3. Identify who/what is at risk and the risk exposure (eg. a shed has been unlawfully converted to habitable space and is being used for living/sleeping, members of the public use premises without knowledge of potential risks);
4. Look at existing controls and evaluate their effectiveness in managing risk;
5. Consult with others (eg. colleagues, team leaders, managers) for a different perspective;
6. Identify your assumptions and consider what could happen if they are wrong.

Note—Further considerations are outlined in AS ISO 31000:2018 (Risk Management—Guidelines)

### How do I manage risk?

To discharge Council's duty of care, Council expects its authorised persons will:

1. **Identify and assess** the level of risk posed to the public and the environment because of the alleged unlawful activities based on the information available and using this Compliance Framework;
2. Continually re-assess the level of risk based on any new information or change in circumstances;
3. Document the level of risk and any change to it so that Council retains a record of an authorised persons reasons for attaching a certain level of risk to a set of facts;
4. Act appropriately in response the level of risk posed because of the unlawful activities.