

Attachment D

**Prosecution and Civil Enforcement Policy
2017 (Current)**

Prosecution and Civil Enforcement Policy

Purpose

The purpose of this policy is to:

- Ensure that the City’s regulatory functions are exercised consistently and without bias, in accordance with its obligations under Chapter 3 of the *Local Government Act 1993*; and
- Ensure that the City best exercises its discretion as to allocation of resources when determining whether legal proceedings are appropriate and consistent with the public interest, its policy objectives and current regulatory issues.

Context

The Council of the City of Sydney (“the City”) is an enforcement authority under a large range of legislation.

This policy outlines what options the City has for initiating legal proceedings to enforce non-compliance with legislation and what factors will be considered by City staff when determining whether proceedings should be initiated in each set of circumstances. It should be read in conjunction with the City’s Compliance Policy, which explains how unlawful activity will be investigated and what factors are taken into account in making decisions regarding the exercise of the City’s compliance powers.

Scope

This policy applies to all of the City’s enforcement functions except parking and parking related matters. Except in exceptional circumstances, all legal proceedings relating to parking and traffic matters are dealt with by the NSW Police prosecutors rather than the City’s legal staff.

1. Definitions

For the purpose of this policy, the following definition applies:

Term	Meaning
Unlawful activity	<p>Any activity, work, conduct or behaviour that has been or is being carried out contrary to the below and/or failure to take required action in order to be compliant with:</p> <ul style="list-style-type: none">• legislation in relation to which the City is the appropriate regulatory authority;• an environmental planning instrument that regulates the activities or work that can be carried out on particular land;• a required development consent, approval, permit or licence; and• any terms and conditions of a consent, approval, permit or licence.

2. Policy objectives

This policy establishes clear principles about the circumstances in which the City will undertake legal proceedings in order to achieve compliance with the legislation under which it has regulatory responsibilities.

3. Principles

The City will:

- Give primary consideration to what is in the public interest when making decisions about taking or not taking legal action;
- Put public health and safety outcomes ahead of private interests when making decisions about enforcement action;
- Act in the best interests of the environment and the community;
- Take action that is transparent, consistent, fair, impartial and without unlawful discrimination;
- Take enforcement action in line with the relative severity of the offence;
- Ensuring enforcement action is taken against the right person for the correct offence;
- Ensuring that any actual or potential conflict of interest situations are managed and resolved in a fair, consistent and impartial manner;
- Disclosing all evidence relevant to the alleged offence, including assisting the Court by providing all necessary information; and
- Make cost effective decisions concerning enforcement action having regard to the likely outcome of a matter if taken to court.

4. Responsibility

This policy is the responsibility of the legal staff of the City's Legal Services unit.

5. Options for legal proceedings

Where an investigation has been undertaken and unlawful activity has been identified there are a number of approaches which the City may take. Initial decisions as to the appropriate course of action are made in accordance with the Compliance Policy. This Policy deals with matters once they have been referred for the consideration of the Legal Services unit.

Legal proceedings that the City may commence in relation to enforcement action include, but are not limited to:

- Commencing proceedings in the Land and Environment Court to remedy or restrain a breach of legislation, including civil enforcement action seeking compliance with a statutory order or the commencement of injunctive proceedings where necessary;
- Issuing a Court Attendance Notice alleging that an offence has been committed against nominated legislation for determination in the Local Court;
- Commencing proceedings for the prosecution of a criminal offence in Class 5 of the Land and Environment Court's jurisdiction (which may include seeking additional orders to remedy or restrain the unlawful activity);
- Carrying out the works specified in an order under the *Local Government Act 1993* or *Environmental Planning and Assessment Act 1979* at the cost of the person served with the order, with proceedings being commenced to recover those costs where appropriate; and
- Contempt proceedings where there has been a failure to comply with the orders of a Court.

6. Legal proceedings

Where matters are referred to the division for the consideration of enforcement action, the Director of Legal & Governance (the Director), or an appropriately delegated staff member will assess whether or not a recommendation should be made to commence legal action. The Director will evaluate, taking into account the public interest and the City's policies and priorities, whether or not legal action should be initiated. The City will commence legal proceedings in accordance with the delegations to the Lord Mayor, CEO and other appropriately delegated officers.

Solicitors employed in the Division will represent the City in court proceedings wherever possible. However, external solicitors and barristers may be engaged where this is considered to be necessary and appropriate.

6.1 The decision to commence

Prior to recommending the commencement of proceedings, the solicitor responsible for a matter must be satisfied that the available evidence establishes a case to the required standard of proof.

Where a criminal prosecution is contemplated the evidence should disclose, at the least, the existence of a *prima facie* case and having regard to the need to achieve the criminal standard of proof – that is, that the elements of the offence be proved beyond reasonable doubt.

For civil enforcement proceedings there should be sufficient evidence to indicate that the City will be able to establish the elements of the case on the balance of probabilities. In recommending that civil enforcement proceedings be commenced in relation to a particular matter, the solicitor must form an opinion that there are reasonable prospects of success should the matter proceed to defended hearing. Proceedings should not be commenced where there are no reasonable prospects of success.

A solicitor's recommendation for the commencement of proceedings requires consideration of the relative seriousness of the matter, including any public health or safety factors or environmental harm involved. The recommendation to commence must contain a consideration of all factors

relevant to the City's prospects of success, bearing in mind the primary importance of ensuring the safety of the community and the environment.

The dominant factor in the exercise of the City's discretion to commence proceedings is the public interest, including the City's duty to ensure the safety of its residents and visitors. The decision should be considered in the context of all of the enforcement options available to the City to ensure that the approach taken is that which is most likely to achieve the desired outcome and is consistent with the factors listed below. Court proceedings should be commenced where this is the appropriate strategic response and it is in the public interest to do so. The factors to be considered in making this determination may include:

- The seriousness of the breach, including the harm or potential harm to the environment, public health, safety or amenity caused by the breach;
- The availability or efficacy of any alternatives to legal proceedings (including any other means by which the breach can be remedied);
- Whether the offender has been dealt with previously by non- prosecutorial means;
- Whether the breach is a second or continuing offence;
- Whether the issue of Court orders is necessary to prevent a recurrence of the offence;
- The number of complaints about the unlawful activity, the number of complainants and whether complaints have been received from the emergency services or other public authorities;
- The prevalence of the type of unlawful activity and the need for deterrence, both specific and general, as well as the extent of the City's resources diverted to achieving compliance;
- Any special circumstances or vulnerabilities of the person carrying out the unlawful activity;
- Whether the potential length and expense of court proceedings would out-weight public risk considerations ;
- Any potential counter-productive outcomes of taking proceedings;
- The likely outcome in the event of conviction, with regard to the sentencing options available to the court; and
- Whether the consequences of criminal conviction would be unduly, harsh or oppressive in the circumstances.

Enforcement action and court proceedings will not be undertaken by the City for any improper purpose. A decision on whether or not to take legal proceedings will not be influenced by:

- Any form of unlawful discrimination, such as race, religious beliefs and gender;
- Personal empathy or antipathy towards the offender; or
- Political affiliations or any other associations of any of the persons involved in the matter including the offender, the complainant and any staff member involved in making decisions relating to the matter.

6.2 The appropriate party

It will often be the case that enforcement action or legal proceedings could be commenced against more than one person in relation to the same incident.

When determining the appropriate person to be the subject of proceedings the solicitor should consider the following:

- Who is primarily responsible for the acts or omissions giving rise to the alleged offence or the circumstances giving rise to the unlawful activity?
- What was the role of the party against whom it is proposed to commence proceedings?
- The effectiveness of any Court orders which may be made against the proposed defendant or respondent.
- The state of evidence as to who undertook or directed the unlawful activity.

Corporations may be liable for unlawful activity. In some circumstances the evidence may indicate that proceedings can be commenced against the employee of a corporation as well as or instead of the corporation itself.

In determining whether proceedings should be commenced against an employee of a corporation, factors include:

- Whether the employee knew or should have known that the activity in question was unlawful;
- The seniority of the employee and the scope of their employment duties;
- Whether liability is imposed on the employee in the circumstances under the relevant legislation; and
- Whether the employee had, given their seniority and employment duties, taken reasonable steps to draw the attention of the employer or other relevant persons to the unlawful activity.

6.3 Penalty notices

A person issued with a penalty notice relating to an unlawful activity may elect to have the matter dealt with in Court. Upon being referred a court-elected penalty notice, the solicitor allocated to the matter will undertake a full review of the available evidence and the relevant law.

Where the evidence does not disclose a *prima facie* case, or where there are other reasons that the matter should not proceed to Court, the solicitor will make a recommendation as to the appropriate course of action in the circumstances. These recommendations may include the reissue of a penalty notice in circumstances where there was an error in the original notice or where a different charge is more appropriate. The solicitor may also recommend the withdrawal of penalty notice matters in response to representations received from the defendant.

Where a review identifies that the matter should proceed, the solicitor will deal with the matter in accordance with the requirements for conducting proceedings before the Local Court.

6.4 Criminal proceedings

Criminal proceedings are most appropriate where there is serious culpability or aggravating factors present.

Criminal proceedings can be commenced in the Local Court (via Court Attendance Notice) or in the Land and Environment Court (Class 5 proceedings). Criminal proceedings cannot be commenced in relation to an offence where a penalty infringement notice has been issued and finalised in relation to the same offence.

When determining in which jurisdiction criminal proceedings should be commenced, staff will assess the objective seriousness of the alleged offence, the public interest, the appropriate sentence range and any benefit from a rapid resolution of the matter in the Local Court. Where the offence is one

under the *Environmental Planning and Assessment Act 1979*, consideration should also be considered as to whether any further orders to remedy or restrain the unlawful activity when identifying the appropriate jurisdiction. Such orders are only available following a conviction in Class 5 proceedings.

Criminal proceedings under the *Environmental Planning and Assessment Act 1979* cannot be commenced where civil enforcement proceedings for a breach of an Order or a breach of an Act are underway or where the Court has made orders pursuant to such proceedings.

Charges – criminal proceedings

Where criminal proceedings are commenced, the charges laid should adequately reflect the nature and extent of the unlawful activity disclosed by the evidence. The key aim should be to provide the court with the basis on which to impose an appropriate penalty.

In some circumstances where charges are laid, as part of the discussions between the defence and the prosecuting officers prior to the hearing, the defendant may indicate a willingness to plead guilty to some, but not all, of the charges. In these circumstances it may be appropriate for the City to agree to proceed with some but not all of the charges.

Any submissions made on behalf of the defendant to plead guilty to some of the charges will be appropriately assessed, taking into account the benefits including the significant cost and time benefits in the matter not proceeding to defended hearing. Any proposal of this nature should only be agreed to if it can be demonstrated that the remaining charges adequately reflect the nature of the conduct of the defendant and those charges will provide the basis for an appropriate sentence in all circumstances of the case.

Representations – criminal proceedings

Defendants in criminal proceedings are entitled to make representations to prosecuting authorities in relation to matters before the Court. All representations will be considered and a recommendation made as to whether or not proceedings should continue in the circumstances. The Defendant is to be notified in writing of the outcome of their representations before the next occasion the matter comes before the court wherever practicable.

6.5 Civil enforcement proceedings

Civil enforcement proceedings are most appropriate in situations where the City's objective is to secure an undertaking that an ongoing unlawful activity will cease or that works be undertaken to remedy an unsatisfactory situation and the matter is not one which is suitable for the commencement of a criminal prosecution in the Land and Environment Court.

Civil enforcement proceedings are commenced in Class 4 of the Land and Environment Court. Such proceedings will, in most cases, be taken to enforce a statutory Order already issued by the City which has not been complied with. Proceedings may be commenced without prior action where there has been a direct breach of legislation which is considered to be of sufficient seriousness, for example where there is a significant risk to public health, safety or amenity.

In most circumstances where the City is considering civil enforcement proceedings, a letter of demand will be sent to warn the person against whom legal proceedings are anticipated, both that proceedings will be commenced unless the unlawful activity is addressed within a specified period and that the City will seek orders to recover its costs of any such proceedings. The City may commence proceedings without a letter of demand in circumstances where there is a serious risk to health or safety such that urgent action is required.

Civil enforcement proceedings can be taken in relation to ongoing or apprehended breaches of the legislation, regardless of whether or not criminal proceedings have previously been taken in relation to the issue. In taking civil enforcement proceedings, the City will ordinarily be seeking that the Court issue orders requiring the respondent to the proceedings to do, or cease from doing, certain things. The City will also seek orders that the costs incurred in bringing the proceedings be borne by the respondent. In certain circumstances the City may seek orders from the Court enabling it to go onto private property and undertake certain works itself. Such orders will only be obtained where the public interest requires and there is no other means of resolving the issue.

Where proceedings are commenced the City will continue to attempt to resolve the issue as quickly as possible, which includes attempting to resolve proceedings efficiently and with minimal costs incurred.

In certain circumstances where an injunction is sought the City may be required to give an undertaking as to damages. Such an undertaking can only be given by the CEO on behalf of the City of Sydney.

6.6 Contempt proceedings

Where a Court order is not complied with, the respondent can be charged with contempt of court. Where a person is found guilty of contempt the consequences can be significant and may involve the possibility of imprisonment or sequestration of property.

In all circumstances where orders of the Court have not been complied with the City will consider whether it is appropriate to take contempt proceedings. Unless there has been a significant change in the circumstances that founded the decision to initiate civil enforcement proceedings, the City is likely to commence contempt proceedings.

Contempt proceedings require evidentiary proof at a standard higher than the “balance of probabilities” standard required for civil enforcement proceedings and is closer to the standard of “beyond reasonable doubt” for criminal proceedings. Where a solicitor is recommending the commencement of contempt proceedings they should be confident that the evidence will meet the higher standard of proof.

As contempt proceedings may result in imprisonment careful consideration must be given to all the public interest factors involved and the possible sentencing recommendations that will be put to the Court.

7. References

This Policy relates to all legal proceedings taken by the City in accordance with its regulatory functions and should be read in conjunction with the City’s Compliance Policy. Relevant legislation under which the City takes enforcement action includes, but is not limited to the following Acts. The City also has regulatory powers and functions under Regulations made under these Acts.

Laws and standards

- *Environmental Planning and Assessment Act 1979*
- *Local Government Act 1993*
- *Protection of the Environment Operations Act 1997*
- *Food Act 2003*
- *Companion Animals Act 1998*
- *Roads Act 1993*
- *Road Transport Act 2013*
- *Road Rules 2008*
- *Crown Lands Act 1989*
- *Swimming Pools Act 1992*
- *Public Health Act 2010*
- *Impounding Act 1993*
- *Noxious Weeds Act 1993*
- *Fines Act 1996*
- *Boarding Houses Act 2012*
- *Heavy Vehicle National Law (NSW)*

8. Approval

The Council approved this policy on 7 August 2017.

9. Review

Review period	Next review date	TRIM reference
The General Counsel, Director of Legal & Governance will review this policy every 3 years or as circumstances warrant (for example, where a particular judicial decision may have an impact on the procedures outlined in this policy).	7 August 2020	2017/253537