

# **Attachment C**

**Compliance Policy 2017 (Current)**

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# Compliance Policy

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## Introduction

### Purpose of the Compliance Policy

The Compliance Policy outlines the City of Sydney's risk-based approach to, and priority setting process for, compliance and enforcement.

This policy is designed to guide the City's decision-making so our compliance activities and actions are risk-based, responsive, effective, efficient and collaborative. It is intended to:

- guide compliance outcomes that are credible, understandable, and consistently applied
- explain this approach to our communities and businesses, including how and why we conduct compliance activities.

### Role of the City of Sydney

The City of Sydney is the local government authority with responsibility for the area defined as the City of Sydney Local Government Area.

As a local government authority, the City of Sydney is governed by the requirements of the Local Government Act (1993) and Regulations, the City of Sydney Act (1998) and other relevant legislative provisions, and is responsible for administering its local government area.

The City of Sydney has a several roles within the community, including as a community leader, service provider, regulator, advocate, facilitator and educator.

In its regulatory role, the City of Sydney undertakes compliance and enforcement activities to ensure acceptable environmental and public health interest outcomes.

### Scope of the Compliance Policy

The Compliance Policy applies to City of Sydney staff with responsibility for managing and investigating regulatory issues within the City of Sydney's areas of responsibility including:

- development and building control
- pollution control
- environmental health
- public health and safety
- noxious weeds

- water and sewer
- control over animals
- food safety
- fire safety
- tree preservation.

The Compliance Policy does not apply to parking and parking related matters.

## Definitions

For this policy, these definitions apply:

Term	Meaning
Complaint	<p>An expression of dissatisfaction made about the City's services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.</p> <p>For this policy, a complaint does not include:</p> <ul style="list-style-type: none"> <li>• a report alleging unlawful activity (see definition below)</li> <li>• a request for information about the City's policy or procedure</li> <li>• a request for an explanation of actions taken by the City</li> <li>• a request for internal review of the City's decision.</li> </ul>
Report alleging unlawful activity	<p>An expression of concern or a request for service about an alleged unlawful activity where a response or resolution is explicitly or implicitly expected or legally required.</p>
Unlawful activity	<p>Any past or current activity, work, conduct or behaviour that is contrary to the list below, or failure to take required action to comply with this list:</p> <ul style="list-style-type: none"> <li>• legislation for which the City is the appropriate regulatory authority</li> <li>• an environmental planning instrument that regulates the activities or work that can be carried out on particular land</li> <li>• a required development consent, approval, permit or licence</li> <li>• terms and conditions of a consent, approval, permit or licence.</li> </ul>

## The City of Sydney's compliance framework

The City takes an outcomes-based approach to compliance, balancing individual and community interests, and considering risk to the community in all matters. This ensures we can appropriately allocate resources to issues that present the highest risk to regulatory compliance.

The City of Sydney is committed to monitoring and enforcing compliance in a fair, consistent and equitable manner with rigour and integrity. Its compliance officers undertake two main forms of compliance:

- Proactive – to promote compliant behaviour and detect non-compliance through ongoing monitoring, inspections and education.
- Reactive – in response to unforeseen incidents or reports alleging non-compliance from members of the public.

### Key relationships

The City works with many other government agencies and authorities to inform its compliance activities.

#### Shared enforcement responsibilities

Compliance matters raised by members of the community or identified by City of Sydney staff can involve shared regulatory responsibilities. At times, this is between the City of Sydney and other authorities including the Environmental Protection Authority, NSW Police Force, Liquor & Gaming NSW, NSW Fair Trading and NSW Food Authority.

The City recognises that collaboration and cooperation between authorities to address issues of shared responsibility is the best approach. Where there are shared legislative responsibilities, City staff will liaise with the relevant authorities to establish:

- which authority will take a leading role in any joint investigation
- which activities each authority will carry out
- responsibilities for updating an individual where relevant
- protocols for exchanging confidential information between the relevant authorities.

#### Private certifiers

Private certification has an important role to play in the building and development industry.

When a private certifier is the Principal Certifying Authority (PCA) for a development, the City of Sydney retains its regulatory role and enforcement powers. However, the PCA is responsible for ensuring building and construction compliance.

Private certifiers have limited enforcement powers when acting as the PCA. They have the power to issue a notice of intention to issue an order to the owner or builder to comply with the conditions of consent or rectify any breaches. A copy of any notice of intention issued by a private certifier must be provided to the City. The City will assess whether it enforces the notice by issuing an order.

The City will attempt to work with private certifiers to resolve any issues when they arise to achieve compliance with the development consent or complying development certificate. City staff will take steps to ensure individuals are clear about the roles each agency performs.

### Compliance model – risk-based regulatory approach

The City of Sydney uses a risk-based approach to prioritise and target its compliance actions and improve the efficiency and effectiveness of its regulatory actions.

The purpose of this risk-based compliance and enforcement is not to eliminate risk. It is to use risk to prioritise the City's efforts to promote compliance and to identify and enforce non-compliance.

In determining risk, the City of Sydney considers:

- Consequence – the relative severity of the harm likely to be caused to human health, the economy, the community and the environment. It also considers the scale and duration of any harm or impact.
- Likelihood – the relative chance of a non-compliance, offence or incident occurring or recurring. This takes into account the track record of the non-compliant or offending party and the response of the non-compliant party, such as whether or not the non-compliance was self-identified and rectified. It also considers the frequency of similar non-compliance in a particular industry or area.

### Proactive compliance activities

The City undertakes proactive compliance to monitor activities that are sensitive or potentially of high-risk to the community. These activities include, but are not limited to, food preparation inspections, inspections of cooling towers, and the monitoring and inspection of late night and licensed venues.

To guide its proactive auditing, monitoring and educational compliance activities, the City uses a risk-based assessment and ranking method. It includes risk rating tools to assist compliance staff in undertaking a systematic approach to risk assessments of regulated businesses and activities.

This method ranks each business or activity based on its potential risk to the community and the environment. The higher the risk, the higher the ranking and the greater the resources the City commits to proactive monitoring.

The ranking method ensures the City of Sydney's efforts are focused on those activities that have a high risk of:

- not complying with conditions of approval
- creating public health and safety concerns
- poor environmental performance
- impacting adversely on the health and wellbeing of the community.

The key considerations used by the City when assessing risk are:

- community safety
- environmental and statutory performance and compliance
- demonstrated risk to the type of activity based on previous issues
- proximity to sensitive locations such as childcare centres, schools and residential premises
- community interest and amenity
- management systems already in place
- responses to past enforcement or compliance action by the person(s) engaged in the activity.

The risk rating process is ongoing. Businesses or activities may move up and down the ranking over time based on environmental and public health performance and compliance with their approvals and relevant legislation. This approach is designed to create the right incentives for voluntary compliance by reducing the regulatory burden on those with a lower ranking and subjecting those with a higher ranking to an increased level of regulatory and compliance oversight by the City of Sydney.

## Reactive compliance activities

All reports of non-compliance are assessed and an appropriate response determined and prioritised by the level of perceived risk. The initial assessment of such reports includes an examination and analysis of the information received to determine the nature, seriousness, likelihood, and actual or potential consequences of the unlawful activity. Based on this initial assessment and the circumstances of the matter, the City determines the appropriate level of response, if further investigation is required, or whether the matter should be referred to a different agency.

## Compliance principles

The City aims to undertake its compliance and enforcement role in a clear and responsive manner. Our regulatory actions are guided by the following principles:

- **Proportional** – compliance and enforcement actions match the level of harm, the risk posed to the community and the environment, the seriousness of the non-compliance and the culpability of the offender.
- **Targeted** – compliance and enforcement activities are focussed on operational activities that, based on the likelihood of harm towards the environment or community, pose the greatest risk.
- **Effective and efficient** – compliance and enforcement activities use evidence-based, reasonable responses drawn from a range of options. These responses are applied promptly to obtain the best outcomes for the environment and our communities and maximise the effectiveness of any deterrence.
- **Transparent** – compliance and enforcement expectations are clearly explained, and our compliance and enforcement activities are based on documented evidence.
- **Certain and consistent** – compliance and enforcement activities are clearly outlined and staff receive ongoing training to ensure a consistent approach. This ensures the public and regulated community know what to expect when a breach occurs, and that breaches of similar significance result in similar responses.
- **Ethical and accountable** – our staff act ethically and in line with the City's code of conduct.

## Approach to investigation and compliance monitoring

Investigations are an important element in compliance and enforcement. The City conducts them in a manner that is:

- objective, fair and impartial
- consistent with the presumption that an alleged offender is innocent until proven otherwise
- within the delegated authority of the investigating officers
- in line with the law
- respectful of individuals.

## Assessment of potential non-compliances

Matters involving non-compliance typically come to the City's attention through:

- proactive inspection programs
- information from other agencies, regulators and private certifiers
- complaints made by members of the public.

When a potential unlawful activity is identified, we do a preliminary assessment to determine the appropriate response. We make every effort to ensure all complaints made by members of the public about alleged non-compliance are recorded and sent to the appropriate business unit promptly.

When considering if a report from the public needs further investigation, we may look at a wide range of factors, including whether:

- the unlawful activity is having a significant detrimental effect on the environment or constitutes a risk to public interests
- the activity or works are permissible, with or without consent or approval
- the conditions of the consent or the approval in place have been complied with
- a development application, building certificate application or other appropriate application has been lodged for the activity
- the extent of delay between events referred by the complaint and their notification to the City and reasons given for such delay
- there have been any previous complaints about the subject premises or the person or organisation that is involved in an alleged unlawful activity
- the complaint has special significance to existing enforcement priorities
- there are significant resource implications for any investigation and any subsequent enforcement action
- it is in the public interest to investigate the complaint
- the issue is a private matter not requiring investigation
- another agency, such as NSW Police, may be a more appropriate body to investigate.

### **Anonymous reports**

Anonymous reports are recorded and assessed by the above criteria. However, because it is not possible to seek clarification or further information, it may be more difficult to evaluate the allegations.

### **Circumstances where no investigative action is taken**

The City may decide not to investigate if the initial review and a preliminary assessment identify that:

- the matter has already been investigated and resolved, or a determination has been made that no further action will be taken in the absence of any new information
- the City has no jurisdiction over the matter and is not the appropriate regulatory authority. In these circumstances, the City may bring the matter to the attention of another regulatory agency
- the activity is identified as lawful (for example, an approval exists for the activity, and it is clear the activity is being carried out consistently with this)

- the investigation or other action would have an unreasonable impact on resources and/or is unlikely to achieve an outcome sufficient to justify the expenditure of resources
- the report alleging unlawful activity is not supported with evidence, or appears to have no substance at that point in time
- the complaint is trivial or unreasonable.

If we decide not to investigate a report of alleged unlawful activity for one or more of the reasons above, we record this decision and the reasons for it. Where possible, we advise the person who made the report of our decision and the reasons for it.

### Investigative powers and tools

The City of Sydney's compliance officers have considerable powers, under several different pieces of legislation to conduct site inspections and audits on a proactive basis, or to investigate issue-specific potential non-compliance.

Compliance officers have, under certain circumstances, the power to enter and search premises, conduct interviews, obtain information and records, and require persons to answer questions.

The tools that compliance officers use to monitor compliance and identify offences include:

- onsite inspections
- desktop analyses of reports, approvals, audits, and other data
- interviews
- spot checks without warning
- review of required reports
- issue-specific inspections
- community feedback
- information and reports from other agencies and regulatory authorities.

### Determining the significance of a breach

If the City determines, based on the evidence, that a breach has occurred, we use two criteria to determine its significance. These are the level of harm or potential harm (severity), and the culpability of the offender (compliance history, financial benefit, the timeframe of the non-compliance, whether the harm is still occurring or has been reduced, foreseeability and intention).

The level of significance of the breach guides our approach and the response necessary to remedy the breach and/or to reprimand the offender.

If the offender failed to obtain approval, the City views this as a high level of potential harm. This is because the actual impact of the offender's actions and the need for further mitigating measures have not been assessed. This may be the case whether or not there is any actual harm.

### Determining the degree of harm from the offence

#### **Low**

- No or very little harm or potential harm to the environment or amenity and no actual or potential human health impacts.
- A very small and temporary impact to the environment or to amenity that is easily rectified.

- Medium**
- An impact of medium extent that has caused some actual or potential harm to the environment, safety or amenity of some individuals.
  - The duration of the impact is medium-term, localised and may require remediation.
- High**
- A large or very large impact that has caused a high degree of actual or potential harm to the environment, safety or amenity or any impact on the health of many individuals.
  - The impact has medium to long-term or permanent environmental impact that will require remediation and/or mitigation works, or compensatory offset in some cases.
  - The offender has obtained an economic benefit from the non-compliance.

### Determining the culpability of the offender

- Low**
- Good performance history, non-compliance was of short duration caused by unforeseen circumstances or genuine misunderstanding of requirements.
  - Operational standards at the time of the incident were high.
  - Harm was avoided or quickly remedied.
- Medium**
- Past non-compliance reported or found.
  - Harm was unintentional, yet disregard for controls or conditions to prevent harm.
  - Non-compliance was of a short or medium duration, and operational standards were satisfactory at the time of the incident.
  - Harm abated quickly and remediation initiated.
- High**
- Subject to past enforcement activities.
  - Acted knowing that harm or potential harm to the environment or community could result.
  - Harm not abated, remediated or breach not rectified.
  - Willful disregard of regulation or operational standards or operational standards were low, or involved in misleading or dishonest conduct.
  - Motivated by financial gain.
  - Not reported or significant delay in reporting.

We assess a breach against the elements in the criteria above when determining the appropriate regulatory response. If an offender deliberately fails to complete works as set out in an approval, they may be considered to have benefitted financially.

### Regulatory responses

Regulatory responses are designed to achieve one or more of these outcomes:

- restrain or remedy a breach
- remedy/address environmental or public health impacts
- punish an offender for breaking the law by issuing a fine or having a penalty imposed
- prevent and provide a deterrent to potential future breaches

- build community confidence that development projects and business/community activities are appropriately regulated.

If evidence shows a breach has been committed, the City determines the appropriate response to achieve the appropriate outcome. We consider the role of all parties involved in the breach, including contractors and consultants, and the impact of the unlawful activity on the environment and/or public health and safety.

The regulatory response is escalated according to the significance of a breach and the appropriate outcome.

The applicability of, and weight given, to each factor depends on the facts of each case. The severity of the reach and the culpability of the offender are determined by the evidence collected during the investigation.

The City always acts within the confines of its code of conduct. We apply the principles of natural justice, also known as procedural fairness when discharging its regulatory duties. These include:

- **Providing a fair hearing** – allowing a complainant or a proponent whose interest may be adversely affected by a breach or a decision to present their case, except in circumstances where this is not appropriate (For example: when action is taken in an emergency)
- **Impartiality in the decision-making process** – officers are to be unbiased and not hold a vested interest in the outcome of an investigation or regulatory response
- **Decisions based on evidence** – decisions must be based on the evidence provided and not on irrelevant issues, and there must be a rational basis on which the decision-maker has decided to accept the evidence as credible
- **Acting in good faith** – at all times City of Sydney staff are to act in good faith.

## Enforcement options

### No breach / no enforcement action

No enforcement action is taken if the outcome of an investigation is that an offence has not occurred or there is insufficient evidence to establish that there has been an offence.

### Informal action

#### Non-compliance recorded

For minor non-compliances that are administrative, or that resulted in nil or a minor consequences for the community or environment, informal action may be appropriate. The City records the decision as well as the rationale for future reference. We may issue the offender with a letter to outline its future expectations.

#### Warning letter

A warning letter may be issued where a breach of a minor nature is identified, but where no formal enforcement action is required. This may arise in situations where the degree of harm and the culpability of the offender are minimal, and the issue has been remedied quickly by the offender.

#### Voluntary undertaking

One alternative to a punitive regulatory response is an ‘outcome-based’ option. This is where the City of Sydney and the offender enter an agreement where the offender will act to remedy an issue that has already occurred or will refrain from acting where a non-compliance is anticipated. This

agreement provides a record of what the offender has agreed to do and can avoid costly court proceedings, but it is not legally enforceable. If an offender does not comply with a voluntary agreement, then a formal enforcement option such as a court order may be sought, depending on the seriousness of the breach. A failure to comply with an earlier agreement would be considered if there is any future unlawful activity of a similar nature.

### **Formal action (criminal)**

#### ***Official caution***

A caution is an enforcement tool available under the provisions of the Fines Act 1996. A caution can be used when a penalty notice could be issued for the breach, but the City instead elects to issue a formal caution based on an analysis of the circumstances. This may include instances where an offender has an excellent track record, the offence results in no harm, or when a simple action can bring about compliance. In this case, the seriousness of the offence needs to be low in terms of harm to the community or the environment. The offender also needs to have had a good record of compliance until that point. A written caution outlines that further offences can lead to escalating enforcement action, such as the issuing of a penalty notice.

Official cautions are issued in line with the *Caution Guidelines under the Fines Act 1996* (NSW Attorney General).

#### ***Penalty notice***

A penalty notice is a financial penalty issued for specific, minor offences under various pieces of legislation. A penalty notice requires payment by a certain date and can be contested in the Local Court.

The City of Sydney may issue a penalty notice when all of these criteria apply:

- the cause of and responsibility for the offence is clear
- the offence is of minor consequence
- a financial penalty is considered an effective deterrent to future offending
- the investigating officer has sufficient evidence to prove all elements of the offence beyond reasonable doubt.

Penalty notices are not appropriate for more serious offences that meet any of these criteria:

- cause or are likely to cause harm to the community or the environment
- are ongoing and not within the alleged offender's capacity to remedy quickly
- involve repeated non-compliance
- warrant a higher penalty than the fine prescribed for the penalty notice.

#### ***Prosecution***

Prosecutions are taken for the more serious offences where there is sufficient evidence, there is a significant offence, and the reason to prosecute serves the public interest.

All legal proceedings for compliance matters take place under the City's Prosecution and Civil Enforcement Policy.

### **Formal action (civil)**

#### ***Order***

Under some legislation, the City of Sydney may have the option to issue an order to the relevant person or company to remedy, or refrain from committing, a specific offence. Orders are used as a preventative step where there is sufficient evidence that a breach is occurring or about to occur and the breach has the potential to result in harm to the community or the environment. Orders are

tailored to the significance of the offence and are used to potential offences of medium to high significance and can be used in conjunction with other enforcement options.

Orders must be complied with within a specified timeframe. Failure to do so can result in a penalty notice being issued or civil or criminal court proceedings being commenced. There is a right of appeal to orders.

### ***Court order***

In some circumstances where there has been, or there is, an imminent risk of a serious offence the City of Sydney may be able to apply to the Land and Environment Court for a Court Order in civil enforcement proceedings.

All legal proceedings for compliance matters take place under the City's prosecution and civil enforcement policy.

## **Complaint management**

All City of Sydney staff who deal with written or verbal compliance and enforcement complaints and those staff members who are involved in the enforcement of relevant legislation are responsible for implementing this policy.

All reports complaints should be logged in the City's electronic records system as soon as possible upon receipt and directed to a responsible officer in the appropriate unit. Details of all instances of unlawful activity identified by staff should be recorded in the appropriate electronic record keeping system.

City of Sydney staff investigating non-compliance are responsible for:

- keeping full and complete records of their actions, including reasons for all decisions made about an investigation
- treating all relevant parties with courtesy and respect, and informing people whose rights and interests may be affected by the investigation, about their rights and substance of the allegations
- providing those people with a reasonable opportunity to respond to the allegations made against them and consider all relevant evidence/submissions from all parties in a matter
- communicating with all relevant parties and providing feedback on the progress of an investigation, without compromising the integrity of investigative process
- making necessary and reasonable inquiries before making a decision as to what action to take
- acting without bias and avoiding conflict between their interest and interests of any party involved
- conducting the investigation and any inquiries without undue delay
- providing as much information as possible to all relevant parties about investigation outcomes
- providing information to all relevant parties on available options for seeking an internal or external review of the decision that is or may be affecting that party
- ensuring that any other unlawful activity, particularly as it relates to life or fire safety, identified during their investigation is immediately brought to the attention of the appropriate area. For example, an investigation of an alleged non-compliant use of premises should include consideration and review to determine whether appropriate documentation is being

submitted regarding the fire safety of those premises, with appropriate action being taken if necessary.

### Complaints about the City of Sydney's compliance actions

If a person or an organisation disputes the City of Sydney's decision to take enforcement against them, they are directed to make representations to the appropriate internal or external appeal body. Any complaints about the City's handling of reports alleging unlawful activity are recorded separately and handled in line with the City's complaints and feedback procedures. The City reviews these complaints and where appropriate, takes action in line with its code of conduct and disciplinary policy.

### References

<b>Laws and standards</b>	<ul style="list-style-type: none"><li>• <i>Boarding Houses Act 2012</i></li><li>• <i>Companion Animals Act 1998</i></li><li>• <i>Crown Lands Act 1989</i></li><li>• <i>Environmental Planning and Assessment Act 1979</i></li><li>• <i>Fines Act 1996</i></li><li>• <i>Food Act 2003</i></li><li>• <i>Heavy Vehicle National Law (NSW)</i></li><li>• <i>Impounding Act 1993</i></li><li>• <i>Local Government Act 1993</i></li><li>• <i>Noxious Weeds Act 1993</i></li><li>• <i>Protection of the Environment Operations Act 1997</i></li><li>• <i>Public Health Act 2010</i></li><li>• <i>Roads Act 1993</i></li><li>• <i>Road Transport Act 2013</i></li><li>• <i>Road Rules 2014</i></li><li>• <i>Swimming Pools Act 1992</i></li></ul>
<b>Policies, procedures and guidelines</b>	<ul style="list-style-type: none"><li>• City of Sydney, Prosecution and Civil Enforcement Policy</li></ul>

### Approval status

The Council approved this policy on 7 August 2017.

## Approval history

Stage	Date	Comment	TRIM Reference
Original Policy	(April 2014)	Approved by Council/ Endorsed by the Executive	2014/149695
Review	(7 August 2017)	Full review, rewritten to ensure a risk and outcomes based approach to compliance. Approved by Council	2017/407075
Next review	(7 August 2020)		

## Ownership and approval

Responsibility	Role
Author	Investigative Specialist
Owner	Manager, Standards and Policy
Endorser	Director City Planning, Development and Transport.
Approver	City of Sydney Council/Chief Executive Officer