

Enforcement

Resolution of Council: 16 August 2010

Responsibility:
Legal & Governance



city of villages

Enforcement Policy

Intention

The City of Sydney is an enforcement authority for some legislation, which requires Council officers to make decisions about appropriate enforcement action when non-compliance with legislation is identified.

This Policy outlines both the enforcement options available to the City and the factors that will be taken into account when City officers are required to determine what enforcement action is appropriate in the given circumstances.

It also explains 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.

Scope

The City enforces compliance with a large range of legislation relating to diverse matters including planning law, fire safety, food safety, noise and other forms of pollution, public health and safety requirements relating to companion animals.

This Policy explains how the City will exercise its enforcement powers to achieve the best possible health, public safety and environmental outcomes for the City's residents, workers, visitors and business operators.

Exclusions

This applies to all of Council's enforcement functions except parking and traffic matters. This Policy covers matters to be taken into account when exercising discretion about compliance and enforcement matters. Rangers faced with traffic and parking matters work within a different timeframe, with decisions needing to be made on the spot. It is Council's policy that Rangers will enforce the Australian Road Rules and will not exercise discretion when exercising their duties. Where a penalty notice has been issued, any application for review is dealt with by the State Debt Recovery Office

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1. 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 section 8 of the *Local Government Act 1993*;
- Assist those employed by the City in responding promptly, consistently and effectively in relation to allegations of unlawful activity whilst ensuring that principles of natural justice are respected;
- Provide information for all stakeholders about the City's position in relation to the enforcement of compliance with legislation, including the circumstances which will be taken into account when assessing different enforcement options; and
- Ensure that the City best exercises its discretion as to the appropriate allocation of resources when determining whether to take legal proceedings and other enforcement action consistent with the public interest, its policy objectives and current regulatory issues.

2. Preface

The City has a broad range of regulatory and compliance obligations under many pieces of legislation. This includes a responsibility to take action to ensure public safety, protect the environment and also to exercise control over activities within its Local Government Area. The City is empowered, in a range of circumstances, to take enforcement action by way of civil or criminal proceedings in the Local or Land and Environment Courts, or by the issue of penalty infringement notices.

On 9 December 2002, Council adopted a document entitled "Policy on Prosecution and Enforcement Priorities". Subsequently, there have been reassignments of duties and functions within the City and amendments to the underlying legislation, as well as a recognition that the City often needs to act to stop unlawful activity that affects amenity or safety as well as to prosecute the perpetrators of these acts. As a result, this Enforcement Policy has been prepared to replace the 2002 Policy.

The City's regulatory and enforcement actions should be exercised to improve the safety and amenity of residents and visitors to the Sydney local government area. The City undertakes enforcement action in relation to fire safety, the regulation of licensed premises and entertainment venues, the monitoring of food service venues, the structural safety of buildings and public areas, ensuring the safety of public roads and other public spaces, the effective control of pollution (including noise, water, air and visual pollution), unsafe or unhealthy conditions and compliance with development consents, approvals and permits. All enforcement action is to be carried out consistently with the principles of *Sustainable Sydney 2030*.

This Enforcement Policy is designed to ensure that the decision making process followed by officers is carried out in the public interest and in a transparent, efficient, fair and consistent manner having regard to all circumstances of a particular matter. Authorised officers of the City can take various forms of enforcement action, including the issuing of penalty notices and statutory orders, in accordance with their statutory powers and any delegations they hold from the Chief Executive Officer (CEO). Such action is to be taken in accordance with this policy and any guidelines or operating procedures.

This policy outlines matters to be considered at the various stages of the enforcement process from the receipt and investigation of complaints, through to various options for the taking of statutory enforcement action and finally the issues to be considered in relation to legal proceedings. The outcomes of any legal proceedings taken will also feed back into the process, through improvements to internal processes as well as steps to ensure the application of any principles set by the Court.

This policy has been made with reference to the Model Enforcement Policy and Enforcement Guidelines prepared by the NSW Ombudsman, as well as The City's previous "Policy on Prosecution and Enforcement Priorities" and the Prosecution Policies of other public authorities, including other local government authorities and the NSW and Commonwealth Directors of Public Prosecutions.

3. Scope

This policy applies to reactive and proactive investigations by the City, about unlawful activity (as defined and excluding parking or traffic offences) or failures to comply with the terms or conditions of approvals, licences or orders and to any enforcement action taken in relation to such breaches. This policy is applicable to development activity, pollution control, food safety, public health and safety issues, tree removal and land clearing, control over animals, regulation of commercial activities in the public domain and other regulatory functions for which the City is the responsible authority. A list of the legislation enforced by the City is referenced at section 15 of this Policy.

4. Definitions

For the purpose of this policy:

"Unlawful activity" is any activity or work that has been or is being carried out:

- Contrary to the terms and conditions of a development consent, approval, permit or licence;
- Contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land;
- Contrary to a legislative provision regulating a particular activity or work;
- Without a required development consent, approval, permit or licence;
- Contrary to legislation in relation to which the City is the appropriate regulatory authority;

and includes any activity, place or structure which is a risk to public health and safety but excludes any parking or traffic offences, which are dealt with in accordance with the Australian Road Rules.

“The City” is the Council of the City of Sydney.

5. Policy objectives

The key objective of this policy is to establish clear guidelines for the exercise of the City’s discretion in the context of both proactive regulatory action taken and the investigation and pursuit of complaints relating to allegations of unlawful activity. It is intended to provide workable guidelines on:

- How to assess whether complaints alleging unlawful activity require investigation;
- Options available to the City when dealing with unlawful activity; and
- How to decide whether enforcement action is warranted and what type of enforcement action is appropriate in the particular circumstances.

6. Enforcement principles

The City is committed to:

- Acting in the best interests of public health and safety, as well as in the best interests of the environment;
- Ensuring all actions are consistent, fair, impartial and without unlawful discrimination;
- Ensuring the proposed enforcement action is in keeping 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 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, whether or not that information is in support of the City’s case;
- Issuing cautions to alleged offenders where necessary and appropriate;
- Making cost effective decisions concerning enforcement action having regard to the likely outcome of a matter if taken to court; and
- Ensuring action is instigated within any relevant specified time limits.

7. Responsibility

All employees of the City who deal with written and verbal action requests or complaints alleging unlawful activity and those officers who are involved in the enforcement of relevant legislation are responsible for implementing this policy.

All complaints alleging unlawful activity 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 officers in the course of their duties should be recorded in the appropriate electronic record keeping system. City officers responsible for the investigation of a matter are responsible for keeping a full and complete record of their actions, including reasons for all decisions made in relation to an investigation.

Officers dealing with the investigation of unlawful activity are also responsible for ensuring that any other unlawful activity, particularly as it relates to life or fire safety, identified during the course of their investigation is immediately brought to the attention of the appropriate area. For example, wherever possible investigation of an allegation of unlawful use of premises should include consideration and review to determine whether appropriate documentation is being submitted in regards to the fire safety of those premises. If necessary, a referral of the premises should be submitted to the City's Fire Safety unit for further investigation.

8. Responding to unlawful activity

The City will make every effort to ensure that all Customer Service requests about alleged unlawful activity are recorded and actioned in a timely manner to the appropriate unit. Confidentiality of information will be dealt with in accordance with the City's Privacy Management Plan and all relevant legislation including the *Privacy and Personal Information Protection Act 1998* and the *Government Information (Public Access) Act 2009*.

9. Investigating unlawful activity

All matters regarding alleged unlawful activity will be reviewed to determine whether the matter requires investigation. Further enquiries or investigations will not be undertaken where:

- The matter has already been investigated and resolved or it has been determined that no further action will be taken in the absence of new information;
- The City has no jurisdiction in relation to the matter. In relation to such matters it may be appropriate for the City to bring the matter to the attention of the appropriate regulatory authority. For example a report may be made to NSW WorkCover in relation to workplace safety issues on building sites or reports to the Department of Environment, Climate Change and Water in relation to environmental offences;
- The activity is identified as being lawful without the need for an investigation; or
- The City is not the appropriate regulatory authority.

When considering whether a complaint warrants inquiry or investigation the City is to consider a range of factors including:

- Is the complaint premature? Does it relate to an unfinished aspect of work still in progress?;

- On the basis of the information available, is the activity permissible without consent or approval?;
- If the activity is permissible with consent, is there a consent in place and have all conditions been complied with?;
- Has a development application, building certificate application or other appropriate application been lodged in relation to the activity?;
- Is the complaint trivial, frivolous or vexatious?;
- What is the extent of delay between events referred to by the complaint and their notification to the City and reasons given for such delay?;
- Is the activity having a significant detrimental effect on the environment or does it constitute a risk to public health, safety and amenity?;
- Have there been previous complaints about the subject premises or this person or organisation?;
- Does the complaint have special significance in relation to existing enforcement priorities?;
- Given the particular circumstances of the complaint, are there significant resource implications in relation to any investigation and any subsequent enforcement action?; and
- Overall, is it in the public interest to investigate the complaint?

Where a decision is made not to investigate a complaint, this decision should be recorded along with the reasons for that decision. The complainant should be advised of the decision and the reasons for making that decision unless such notification is impossible (for example, where a complaint was made anonymously).

10. Taking enforcement action

When determining whether to take enforcement action and the level of enforcement action that is appropriate, in relation to a particular case of verified unlawful activity, officers should consider all the circumstances of the case including:

- The seriousness of the breach, including whether the breach is merely technical or “trivial” in nature;
- When the unlawful activity was carried out and for how long, including whether the breach is continuing;
- The harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity;
- The need for general and specific deterrence;
- Whether the breach can be easily remedied;
- Any particular circumstances of hardship affecting the complainant or the person the subject of the complaint;
- Any mitigating or aggravating circumstances;
- Any prior warnings that have been issued to the person or previous enforcement action taken against the person;
- The degree of culpability of the alleged offender;
- Whether an educative approach would be more appropriate than a coercive approach;
- The costs and benefits of taking formal enforcement action as opposed to taking informal or no action;

- The prospects of success if the proposed enforcement action were challenged in court;
- What action would be proportionate and reasonable;
- What would be in the public interest; and
- Any precedent which may be set by not taking enforcement action.

Prior to taking enforcement action, officers should always turn their mind to the criteria outlined above in undertaking an objective consideration of the evidence that has been gathered during the course of their investigation. The officers must never allow their actions to be used purely to pursue the agendas of external parties or interest groups. Where an officer feels that a particular complainant is acting in such a way as to impose inappropriate pressure on him or her in relation to the taking of enforcement action, the officer should report the matter to their manager. Enforcement action should never be undertaken by officers purely as a means of appeasing a virulent complainant in circumstances where the application of the criteria in this Enforcement Policy would otherwise indicate that enforcement action should not be taken.

Where there is sufficient evidence to issue a penalty notice, the officer may instead elect to issue a formal caution if such an approach is considered appropriate under the Caution Guidelines issued by the NSW Attorney General under the *Fines Act 1996* (the "Caution Guidelines").

In addition to this, the City may adopt guidelines which determine specific circumstances where an activity which may otherwise be unlawful will not be the subject of enforcement action. Such guidelines should specifically indicate if they intend to override this Enforcement Policy. Any City policy or guideline which does not specifically state otherwise should be read in conjunction with this Enforcement Policy.

11. Options for dealing with unlawful activity

Where an investigation has been undertaken and that investigation has confirmed an instance of unlawful activity there are a number of approaches which the City may take in accordance with the appropriate authorisations and legislation. Those options include, but are not limited to:

- Taking no action on the basis of a lack of evidence or because it is appropriate having regard to the matters set out above. Where no action is taken the reasons for that decision should be documented and any complainant will be advised of the decision;
- Warning or counselling the person the subject of the investigation to educate them as to the relevant legal requirements;
- Obtaining undertakings from the appropriate person that steps will be taken to address the concerns (for example, an application for the lodging of a development application) within a reasonable period;
- Issuing a warning letter indicating that unless certain action is taken, for example certain work is done or activities cease, more formal enforcement action will be taken by the City;

- Serving a notice of intention, followed by an order where appropriate, under relevant legislation requiring works to be done or for a use to cease or to otherwise address the unlawful activity (for example, taking action under the *Local Government Act 1993* s 124-128A, *Environmental Planning & Assessment Act 1979* s 121B, *Protection of the Environment Operations Act 1997* Pts 4.2-4.4 or Pt 8.6);
- Commencing proceedings in the Land and Environment Court to remedy or restrain a breach of legislation, including enforcement action seeking compliance with a statutory order or the commencement of injunctive proceedings where necessary;
- Issuing a formal caution in relation to a penalty notice offence under s 19A of the *Fines Act 1996* and in accordance with the Caution Guidelines;
- Issuing a Penalty Infringement Notice, where available;
- 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; and
- Carrying out the works specified in an order under the *Local Government Act* or *Environmental Planning and Assessment Act* at the cost of the person served with the order.

The options outlined above are not mutually exclusive. The approach adopted will depend entirely on the individual circumstance of the particular matter, with public safety being the key concern at all times. Where appropriate, officers may take an escalating approach to resolving the matter including, for example, the issue of a warning letter which, if not successful in resolving the issue, may be followed by statutory notices and orders and, finally, enforcement proceedings in Court when compliance cannot be achieved by any other method. Where an officer is contemplating giving a caution instead of a penalty infringement notice he or she must have regard to the Caution Guidelines.

All enforcement action will be monitored to ensure that steps are being taken within appropriate timeframes for the particular matter.

12. Legal proceedings

Where complaints are referred to the Legal & Governance Division (the Division) for the consideration of enforcement action, the Director of Legal & Governance (the Director), or an appropriately delegated officer, will assess whether or not a recommendation should be made to commence legal action. The Director will also 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.

Taking enforcement action to support its regulatory function is part of the City's core day to day operations and as such it is appropriate that, in most cases, the CEO makes the decision to commence enforcement proceedings. The CEO's delegation requires consultation with the Lord Mayor on enforcement and and prosecution matters that are not minor. Such matters requiring consultation would be proceedings not within the usual enforcement and prosecution matters conducted by the City such as criminal prosecutions in Class 5 of the Land and Environment Court and proceedings which could result in imposition of a prison sentence.

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

12.1 *The decision to commence*

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

Where a criminal prosecution is contemplated the evidence should disclose, at the least, the existence of a *prima facie* case.

Where civil enforcement proceedings are contemplated 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 with carriage of the matter must form an opinion that there are reasonable prospects of success should the matter proceed to defended hearing. Proceedings should not ordinarily 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 life or fire 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 legal proceedings is the public interest, including the City's duty to ensure the safety of its residents and visitors. The ability to commence proceedings 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. Court proceedings should be commenced only 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, in addition to those listed above under *Taking Enforcement Action*, are:

- The availability or efficacy of any alternatives to legal proceedings;
- 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 resources diverted to achieving compliance;
- The age, physical or mental health or any special infirmity of the alleged offender;
- The potential length and expense of court proceedings;
- Any potential counter-productive outcomes of taking proceedings;
- For criminal prosecutions, the likely outcome in the event of conviction, having 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 element of discrimination against the person, eg. due to race, nationality, religious beliefs etc;
- 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 officer involved in making decisions relating to the matter.

12.2 *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. In most cases it will not be appropriate for enforcement action to be taken or legal proceedings to be commenced, against every person who may be liable for the unlawful activity.

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

- Who is primarily responsible for the unlawful activity? 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; and
- For criminal proceedings, there should be clear evidence that the proposed defendant was the person who undertook (or directed) the unlawful activity and formed the relevant intent.

Corporations may also be liable for unlawful activity. When an offence is committed by employees, agents or officers of a corporation in the course of their employment, proceedings will ordinarily be commenced against the corporation. However, where the evidence discloses that the unlawful activity occurred because the employee, agent or officer embarked on the activity of their own volition outside the scope of their employment, proceedings may be instituted against the employee, agent or officer and not against the corporation. Further, some legislation provides that employees of corporations are also liable for offences committed by their employers in the absence in certain circumstances and in these cases proceedings may be commenced against both parties. It is also important to consider whether there can be effective implementation of a compliance program against the corporation.

In determining whether proceedings should be commenced against an employee of a corporation or business, relevant 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 his or her 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.

12.3 *Penalty Infringement Notices*

Penalty infringement notices are a way of imposing a fine on a person who an officer believes is guilty of an offence without commencing criminal proceedings against them. Generally, penalty infringement notices are appropriate where the breach is not serious or ongoing, the degree of harm is low, the facts appear incontrovertible, the imposition of the penalty is likely to provide a practical and viable deterrent and there are no aggravating factors. Authorised officers can issue penalty notices in accordance with their statutory responsibilities and delegations, this policy and any guidelines or operating procedures put in place by the manager of the relevant unit.

Penalty infringement notices are not appropriate where the breach is on-going or where the prescribed penalty is not adequate to address the severity of the offence. For example, repeated issuing of penalty infringement notices is not appropriate where there have been ongoing instances of unauthorised activity. Officers should also consider whether it is appropriate to issue a formal caution as an alternative to the issue of a penalty infringement notice in appropriate circumstances and in accordance with the Caution Guidelines.

Where the investigating officer proposes (after conducting an investigation of a complaint and assessing the circumstances of the matter in accordance with the criteria outlined above) to issue a penalty infringement notice, the issue of that notice should only be in circumstances where the officer is satisfied that there is sufficient evidence to establish that the offence was committed.

In circumstances where it is proposed to issue a penalty infringement notice on the basis of information provided only by a complainant (i.e. a person who is not an officer) the matter should undergo a full assessment by an appropriate manager prior to the issue of the penalty infringement notice. The evidence must include a statutory declaration signed by the proposed witness and confirmation that the witness is prepared to give evidence in court if necessary.

Wherever possible it should also include objective evidence demonstrating the commission of the offence (for example, photographs). The officers should be particularly cautious when issuing penalty infringement notices based only on evidence provided by a complainant. Where the appropriate manager is uncertain as to whether the issue of a penalty infringement notice is warranted the matter should be referred to the Division for advice.

A person issued with a penalty infringement notice relating to an unlawful activity may elect to have the matter dealt with in Court. In these circumstances the matter should be referred to the Director for assessment and for allocation to solicitor to act on the City's behalf. Upon being referred a court-elected penalty infringement notice, a solicitor 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 Court's determination of the penalty infringement notice should not proceed, the Division will make a recommendation by way of memorandum as to the appropriate course of action in the circumstances. These recommendations may include the reissue of a penalty infringement notice in circumstances where the original notice was issued on the incorrect entity or on an entity which is not a legal person. The Division may also recommend the withdrawal of penalty infringement notice matters in response to representations received from the defendant.

Where the Division is satisfied that the matter should proceed in Court, appropriate officers will deal with the matter in accordance with the requirements for conducting proceedings before the Local Court.

12.4 *Criminal proceedings*

Criminal proceedings are most appropriate where there is serious culpability or aggravating factors present or where the unlawful activity is not of an ongoing nature such that civil enforcement proceedings seeking Court orders requiring that the person cease the unlawful activity are considered necessary.

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.

Court Attendance Notices can be issued following approval by the Director. Class 5 proceedings can only be commenced where approved by the CEO, following consultation with the Lord Mayor.

It is noted that, in relation to unlawful activity under the *Environmental Planning and Assessment Act 1979*, section 127(7) of the Act provides that:

A person shall not be convicted of an offence against this Act or the regulations where the matter constituting the offence is, at the date upon which the conviction would, but for this subsection, be made:

- (a) the subject of proceedings under section 123, which proceedings have not been concluded, or*
- (b) the subject of an order made under section 124.*

The consequence of this section is that criminal proceedings should not 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.

When determining in which jurisdiction criminal proceedings should be commenced, the Division 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.

12.5 *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. However, in most circumstances the charges which are laid originally should be no more than those that appropriately reflect the circumstances of the matter. As a consequence, there will not be significant scope for charge bargaining.

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. A decision to agree to a plea of guilty in these circumstances must be approved by the Director.

12.6 *Representations – criminal proceedings*

Defendants in criminal proceedings are entitled to make representations to prosecuting authorities in relation to matters before the Court. Representations should be made to the Chief Executive Officer. 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.

12.7 *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.

Civil enforcement proceedings are commenced in Class 4 of the Land and Environment Court's jurisdiction. Such proceedings will, in most cases, be taken to enforce a statutory Order already issued by the City which has not been complied with. It is possible, however, for proceedings to 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 or if the City is otherwise satisfied that the unlawful activity will not be addressed without court orders and there is strategic benefit in commencing proceedings without sending a letter of demand.

Civil enforcement proceedings can be taken in relation to ongoing 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 there is no other means of achieving the desired public benefit.

In order to commence Class 4 proceedings, the Director is required to obtain approval from the CEO, who will consult with the Lord Mayor where appropriate. Consultation can be undertaken informally if necessary in the circumstances. 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.

12.8 *Contempt proceedings*

Where an order is made by the Court and not complied with, the person who has failed to comply with the Court's order can be brought before the Court 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.

Where the City has commenced proceedings in Class 4 and the 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 the Class 4 proceedings, the City is likely to commence contempt proceedings to ensure that the orders of the Court are complied with.

Contempt proceedings require evidentiary proof at a standard higher than the “balance of probabilities” standard required for civil enforcement proceedings. The standard of proof is more akin 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.

Contempt proceedings may only be commenced with the approval of the CEO, following consultation with the Lord Mayor where appropriate. As Contempt proceedings may result in the imprisonment of a person found guilty of contempt careful consideration must be given to all the public interest factors involved and the possible sentencing recommendations that will be put to the Court.

13. Delegations

The delegations to relevant officers relevant to this policy are included in the City of Sydney’s Delegation Register.

14. Enforcement priorities

From time to time different areas of the City will identify the need for enforcement and regulatory action to be particularly focussed on one or more issues. Where a Director, in consultation with relevant stakeholders, considers it necessary to identify particular enforcement priorities for the division, he or she may develop a list of proposed enforcement priorities and/or guidelines for enforcement action in relation to particular types of unlawful activity.

15. References

This Policy relates to all enforcement action taken by the City under in accordance with statutory functions. Relevant legislation under which the City takes enforcement action includes, but is not limited to:

- *Environmental Planning and Assessment Act 1979*
- *Local Government Act 1993*
- *Protection of the Environment Operations Act 1993*
- *Food Act 2003*
- *Companion Animals Act 1998*
- *Roads Act 1993*
- *Road Transport (General) Act 2005*
- *Road Rules 2008*
- *Crown Lands Act 1989*

- *Swimming Pools Act 1992*
- *Road (Safety and Traffic Management) Act 1999*
- *Impounding Act 1993*
- *Noxious Weeds Act 1993*
- *Fines Act 1996.*

The City also has regulatory powers and functions under Regulations made under the above Acts.

16. Approval and review

The date of next review is August 2012.

This policy will be reviewed bi-annually or as circumstances warrant (for example, where a particular judicial decision may have an impact on the procedures outlined in this policy).

This policy is the responsibility of the General Counsel, Director of Legal & Governance.

Trim reference number: 2009/116400

17. Authorisation

Adopted by Council on 16 August 2010.