

5 COMPLIANCE AND ENFORCEMENT POLICY

FILE REFERENCE INT1986608

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RECOMMENDATION

It is recommended that the attached policy, “Compliance and Enforcement Policy” be adopted by the Council and implemented by all staff performing law enforcement functions within the scope of the policy.

Attachments

1 Cardinia Shire Council Compliance and Enforcement Policy 13 Pages

EXECUTIVE SUMMARY

The Cardinia Shire Council Compliance and Enforcement Policy provides a summary of the principles that should be applied by Council staff when performing law enforcement functions.

It provides high-level principles, without restricting the discretion of officers performing statutory roles.

The policy sets out internal policy positions regarding:

- principles of good enforcement (proportionality, consistency, transparency)
- enforcement & prosecution decision making factors, including what will and what will not be taken into account when Authorised Officers make enforcement decisions
- enforcement actions, including examples of when and how certain options might be preferred
- principles regarding enforcement and revenue
- customer service expectations during enforcement activities

BACKGROUND

This policy was developed following an Internal Audit requirement that Council develop an Enforcement Policy to set out the policy basis of law enforcement activities.

It is considered best practice for law enforcement agencies to set out their policy approaches to common issues and strategies. This promotes transparency in the exercise of statutory powers over residents and citizens.

The attached policy is modelled on the Local Government of South Australia model enforcement policy, and has been adapted to Cardinia's specific legislative context. This policy has been internally applied since 2016, and is internally considered to be comprehensive and robust. Some minor amendments have been made in this version, based on the experiences of the past 3 years, and internal consultation.

The policy sets out high level policy positions regarding:

- principles of good enforcement (proportionality, consistency, transparency)

- enforcement & prosecution decision making factors, including what will and what will not be taken into account
- enforcement actions, including examples of when and how certain options might be preferred
- principles regarding enforcement and revenue
- customer service expectations during enforcement activities

The enunciation of enforcement principles strengthens the moral argument for consistent and strong enforcement action, based on public interest and the principled exercises of discretion.

The policy preserves the original legal authority to statutory office holders under the direction of the Chief Executive Officer.

POLICY IMPLICATIONS

This policy has been used internally since 2016. There are some minor amendments, reflecting the experiences of the last 3 years.

RELEVANCE TO COUNCIL PLAN

Council law enforcement activities help Council to achieve the following Council Plan objectives:

- 1.6 Increased awareness of safety
- 2.4 Improved health and wellbeing of our residents
- 3.1 Provision and maintenance of assets
- 3.4 Natural and built environments supporting the improved health and wellbeing of our communities
- 5.2 Open governance

CONSULTATION/COMMUNICATION

This policy will be communicated to residents through the website, Connect and other public means, throughout 2020.

FINANCIAL AND RESOURCE IMPLICATIONS

There are no financial or resource implications of this policy.

CONCLUSION

The Cardinia Shire Council Compliance and Enforcement Policy collects valuable and meaningful law enforcement principles into a single guiding document, which in turn can be supported by business rules and strategy documents.

While the policies contained in the document will mostly reflect our current practices, articulating them in a policy statement promotes transparency and accountability in the conduct of

enforcement activities, and will allow us to more robustly respond to public criticism of enforcement decisions.



Cardinia Shire Council Compliance and Enforcement Policy

HPRM number	INT1975579		
Policy owner	Owen Hardidge, Team Leader – Prosecutions		
Adopted by	Council		
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Publication	CardiNet and website		
Revision/version number	Version 2.8		

1 Policy alignment

Council law enforcement activities help Council to achieve the following Council Plan objectives:

- 1.6 Increased awareness of safety
- 2.4 Improved health and wellbeing of our residents
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- 3.4 Natural and built environments supporting the improved health and wellbeing of our communities
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2 Purpose

The purpose of this policy is to:

- promote consistency in enforcement action in matters of non-compliance;
- ensure transparency, procedural fairness and natural justice principles are applied; and
- ensure that enforcement action is proportionate to the alleged offence in each case.

3 Scope

This policy is an “umbrella” policy that outlines Council’s approach to enforcement matters and provides staff with direction about the manner in which law enforcement activities are to be undertaken.

In addition to enforcement, Council carries out a range of activities to encourage compliance with the law, such as community education programs. Detailed policies and procedures about specific activities may also apply.

This policy applies to all enforcement activities undertaken in accordance with the following Acts and regulations:

- *Building Act 1993* (and regulations)
- *Planning and Environment Act 1987*

- Road Safety Act 1986 and the Road Safety Road Rules 2017
- Domestic Animals Act 1994 (and regulations)
- Cardinia Shire Council Local Law 17
- Country Fire Authority Act 1958
- Impounding of Livestock Act 1994
- Food Act 1984
- Public Health and Wellbeing Act 2008
- Tobacco Act 1987
- Environment Protection Act 1970

These activities are carried out by Development and Compliance Services (in respect of Building, Local Law, Environmental Health, animal management and parking enforcement) and Safe and Inclusive Communities team (in respect of Fire Hazard enforcement).

Prosecutions undertake prosecution and other formal actions.

4 Policy description

Local Government is charged with legislative responsibilities that protect individuals and the community as a whole. Council's customers include both those on whom the law places a duty and those whom the law protects. While it is ultimately the responsibility of individuals and other bodies to comply with the law, Council staff are required to carry out activities that enforce compliance with the law.

Enforcement activities include:

- patrolling streets and public places;
- inspecting premises, land or other places either on a routine programmed basis or on a random basis; and
- responding to enquiries and complaints.

5 Related documents

Type of document	Title and/or HPRM reference
Strategies	Municipal Building Control Plan Domestic Animal Management Plan

6 Glossary of terms

In this document:

Duty holder refers to any person that is under a legal duty to do something, or refrain from doing something, or to prevent something from occurring. Who the duty holder is, and the role or capacity they have, will vary depending on the law that creates the duty.

A duty holder may be an individual or a company. In some cases, officers of organisations may be duty holders.

For example:

- the **owner of a dog** is under a legal duty to have proper control of the animal
- the **occupier of land** is under a legal duty to ensure nuisances do not emanate from the land
- the **proprietor of a food business** is under a legal duty to register the premises
- the **operator of a vehicle** is under a legal duty to park a vehicle in accordance with the Road Rules.

Enforcement

includes all activities intended to encourage or compel higher levels of compliance with legal requirements by individuals, businesses and other bodies.

In this document, **enforcement** is broadly defined to include informal education and advice to duty holders, through to formal legal mechanisms to compel compliance.

For example, all of the following activities may be **enforcement** actions:

- Investigating alleged breaches of the law, to determine what has happened
- Providing information and advice to a duty holder of their obligations
- Verbally warning a duty holder of potential consequences of not following the law
- Issuing a notice to comply, requiring compliance within a specified period
- Formally requiring a duty holder to show cause why enforcement action should not be taken
- Commencing action in the Magistrates' Court or VCAT to deter and remedy breaches of the law

Enforcement decisions

includes any decision made by a Council officer during the investigation or prosecution of an alleged breach of the law.

For example:

- The decision to verbally warn a duty holder who has inadvertently breached a law
- The decision to issue an infringement when a breach of law is detected
- The decision to cancel or revoke a licence, permit or registration following a breach of the law
- The decision to commence Magistrates' Court or VCAT proceedings for a breach of the law

- The decision about the conduct of legal proceedings, including deciding what orders will be sought, and whether a proceeding will be discontinued

are all *enforcement decisions*.

7 Principles of Good Enforcement

Enforcement actions are taken within the context of both a legal and policy framework. Council staff will carry out *enforcement* work, and make *enforcement decisions*, with due regard to the following principles:

7.1 Proportionality

A proportionate response means that enforcement will be scaled to the seriousness of the breach.

Council recognises that most individuals want to comply with the law and will assist compliance by being open and helpful. It can be appropriate for officer to offer informal advice and provide a chance to discuss compliance problems.

Attention will be focussed on those whose activities give rise to the most serious risks, or where potential hazards are least well controlled. Depending on the seriousness and persistence of the breach, Council will minimise the costs to the person infringing the law by enforcing the minimum action necessary to secure future compliance.

Prosecution will generally be used as a last resort, or for serious offences. Prosecutions may be necessary when a problem or hazard is serious, or prevalent in the community, and prosecution will tend to deter people from breaching the law.

7.2 Consistency

Council will take a similar approach in similar cases to achieve similar outcomes.

While decisions on enforcement require the use of professional judgement and discretion to assess varying circumstances, officers will:

- follow standard operating procedures wherever possible;
- ensure fair, equitable and non-discriminatory treatment; and
- record any deviation from standard operating procedures and their reasons.

7.3 Transparency

Council will be open and transparent about the manner in which it undertakes enforcement activities and the laws it enforces. Council officers will be clear and open about what is expected from those on whom the law places a duty (duty holders).

In educating the community at large and dealing with duty holders, Council will make a clear distinction between what is **legally required** and what is **desirable but not compulsory**.

Staff will be open to discussing potential and actual breaches of the law, before, during and after enforcement decisions have been taken.

When remedial action is needed, officers will explain clearly and in plain language why the action is necessary. Where practicable, officers will give notice of its intent to commence formal action. Officers will identify what action is required to achieve compliance and the timeframe for undertaking that action. Where they exist, advice will be provided on statutory review rights and the process for seeking a review of (or appeal against) that decision.

Where it is not practical to give notice, Officers will record why this is so.

Complainants will normally be advised of what action has been taken and why that action has been taken.

Private or confidential information received by Council during the course of investigations will be handled and protected according to law. In particular, complainants may be advised of *what steps* Council have been taken and why, but Council officers may be unable to disclose personal information regarding the duty holder, or aspects of their personal circumstances that may have influenced Council's enforcement decision.

Council recognises that there is sometimes a public interest in enforcement action, and that publicising enforcement action plays an important role in helping the community and duty holders to understand the role of Council, and the purpose and consequences of breaches of the law. However, in providing information to media outlets, Council will also consider:

- Whether the release of information will jeopardise or hinder other enforcement activities, and
- Whether Council has incomplete information, or is still investigating a report (for example, when the investigation may be ongoing), and
- Whether Council is aware of circumstances particular to the complainant, duty holder or others involved that mean partial disclosure of information will mislead or give a distorted picture of the facts.

In these circumstances, it will often be appropriate for Council to make no public comment.

8 Authorisation of Officers

Only officers who are competent by training, qualification and/or experience will be authorised to take enforcement action. Officers will also have sufficient training and understanding of Council's policies and procedures to ensure a consistent approach to their duties.

Officers are required to show their authorisations on demand.

Generally, enforcement staff will make enforcement decisions with the assistance of:

- standard operating procedures,
- clear business practices or
- more experienced officers.

Generally, senior staff will make decisions about enforcement strategies, priorities and programs that can be applied consistently to classes of persons, issues or matters.

9 Decision Making

Where non-compliance is discovered as a result of enforcement activities, options available to the Council to seek or promote compliance include:

- **explaining legal requirements** and, where appropriate, the means to achieve compliance;
- **providing an opportunity to discuss** issues, where appropriate;
- **allowing reasonable timeframes** to achieve compliance
- **facilitating mediation** between affected parties;
- **issuing a verbal or written warnings;** or
- **formal enforcement actions** such as issuing infringements, issuing an order/direction or prosecution.

Enforcement decisions must be fair, consistent, balanced and relate to common standards that ensure the public is adequately protected.

Where a decision is made not to investigate a complaint, the decision and reasons will be recorded by the Officer and the complainant will be advised.

When making a decision on the most appropriate means of enforcement, the officer shall consider, amongst other relevant factors:

- the **seriousness** of the offence;
- the **degree of knowledge or wilfulness** involved;
- the **past history** of the duty holder;
- the **consequences** of non-compliance;
- the **likely effectiveness** of the various enforcement options that are available;
- **deterrence** (both to the duty holder, and to others in the community);
- **the effect** on the duty holder, the community and other people; and
- **consistency of approach** to similar breaches/offences.

The following factors must be ignored when making an enforcement decision or choosing an enforcement strategy:

- any element of **discrimination or bias in favour of or against** the person based on social status, ethnicity, nationality, political association, religion, gender, sexuality or beliefs; and
- any possible **political advantage or disadvantage** to a government, person holding (or a candidate for) public office, or any political group or party.

Where a personal association or relationship with the duty holder or any other person involved exists:

- an alternative staff member will make enforcement decisions (where possible); and
- the facts about any conflict/relationship will be recorded by the officer.

Written correspondence and documentation will include all the information necessary to:

- identify the legal duty that has been contravened,
- understand what needs to be done to ensure compliance
- identify the consequences of non-compliance; and
- clearly differentiate between legal requirements and recommendations of good practice.

10 Enforcement Options

10.1 No Action

No action will be taken when, after investigation, no breaches of the law are discovered.

It may also be appropriate to take no action when:

- the complaint is vexatious or the breach is trivial in nature;
- the alleged offence is outside Council's area of authority; or
- taking action may prejudice other investigations or Council activities
- it is otherwise not in the public interest.

10.2 Informal Action

Informal action to achieve compliance with laws may include:

- offering verbal or written advice;
- verbal warnings and requests for action; or
- written warnings.

Advice from officers will be given clearly and simply and (where appropriate) will be confirmed in writing.

The circumstances in which informal action may be appropriate include:

- where the act or omission is not serious enough to warrant formal action;
- where the duty holder's past history reasonably suggests that informal action will secure compliance;
- where confidence in the duty holder is high;
- where the consequences of non-compliance will not pose a significant risk; or
- where informal action may prove more effective than a formal approach.

Where formal action is not possible, but it would be beneficial in a wider public safety context to urge a particular outcome, such action will be taken by a senior officer of Council and the reasons for this will be recorded by the relevant staff member. The recipient will be made aware that the requested actions are not legally enforceable.

10.3 Mediation

In some circumstances, it may be appropriate for Council to facilitate mediation between affected parties. Mediation may be appropriate where, after investigation, an officer determines that the problems being complained of are incapable of resolution through other formal or informal means. The use of mediation services may also be appropriate where an aggrieved individual has no wish to pursue action to resolve a complaint by legal means.

Circumstances that may be suitable for mediation may include where complaints relate to minor losses of amenity by the conduct of one person towards another.

Mediation will not be suitable:

- Where any participant is concerned for their personal safety because of the conduct of another participant, or
- Where either party is not willing to participate in mediation, or
- Where non-compliance exposes a person or property to unacceptable risk of injury or harm, or
- Where the non-compliance is not of a minor nature.

10.4 Formal Action

10.4.1 Service of Orders and Directions

Sometimes, legislation will specify the procedures that Councils must follow, in order to:

- advise of the intention to issue an Order;
- invite submissions with respect to the matter;
- order a duty holder to do or refrain from doing a thing under specified circumstances; and/or
- issue directions specifying how the Order may be complied with.

Council Officers will use professional judgement and discretion to assess the variables relating to each matter under consideration, including the reasonableness of the actions required by an Order/direction and the timeframe to comply.

Only in circumstances such as a threat to life or immediate threat to public health or safety will an Order be made without giving notice of intention. In these circumstances, immediate compliance to resolve a situation can be required.

In most cases the person receiving the Order has a right of review or appeal (usually to a court, tribunal other statutory body) if the Order is considered unreasonable. If an Order is served for which a review is possible, Council will advise the recipient in writing of the right to review at the time of serving the Order.

Where there is evidence that an offence has been committed, Council may issue an Infringement Notice or commence a prosecution in addition to serving an Order. This will only be done where it is determined that the circumstances justifies taking both steps.

10.4.2 Council undertaking works following a default

Failure to comply with orders and notices will usually result in further enforcement action, such as commencement of a prosecution.

Where a duty holder fails to do a thing that is required by law, and the necessary action has not been carried out in the time allowed without good reason, Council can sometimes undertake the required work. Before doing the work Council will consider whether there is a realistic prospect that the person responsible will complete the work within a reasonable time. Where work in default is undertaken, Council may seek to recover all costs over a fair period, using any statutory means available.

The decision to carry out action in default will be made by the relevant General Manager.

Where an offence has been committed, an Officer may issue an Infringement Notice or commence a prosecution in addition to taking action to fulfil an Order. This will only be done where the circumstances justifies taking such steps. Factors such as giving false information, the obstruction of Council staff and the harm or risk of harm caused by the duty holder's delay will be considered when deciding additional enforcement actions.

10.4.3 Service of an Infringement

A person receiving an Infringement is entitled to elect to be prosecuted for the alleged offence. Hence, before an infringement is issued, there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the alleged offence. In other words, there must be sufficient evidence available that there is a reasonable prospect of proving the offence in a Court proceeding.

The following circumstances are likely to warrant an Infringement being issued:

- certain breaches of the legislation administered by Council;
- where there is a failure to correct an identified problem after having been given reasonable opportunity to do so by an Authorised Officer;
- where there is a failure to comply with the requirements of an Order or notice;
- where confidence in the duty holder is low; or
- where a verbal or written warning has already been given for a similar offence.

Infringements will often be appropriate to be issued in circumstances, where:

- there is a high volume of offences detected, or
- in circumstances where it is not practicable or efficient to provide warnings to duty holders, or
- there is a legitimate expectation that duty holders should be aware of their obligations.

Infringements may be the most common form of enforcement action for some offences, including:

- public parking offences,
- fire hazard offences,
- failure by builders to comply with requirements for maintaining building sites,
- failure of business proprietors to maintain proper registration or standards,
- planning and amenity offences arising from the operation of business activities, such as advertising signage,
- failure of owners to prevent the trespass of livestock on roads or private property,
- failure of owners to register their animals, or failure to prevent domestic animals wandering at large.

10.4.4 Prosecution

A prosecution will only proceed where there is a reasonable prospect that an offence can be proved beyond reasonable doubt, having regard to all applicable principles relevant to the offence.

Before a prosecution is commenced there must be substantial, reliable and admissible evidence that an duty holder has committed the offence.

Where circumstances warrant a prosecution, all relevant evidence and information will be considered to enable a consistent, fair and objective decision to be made.

The following circumstances are likely to warrant a prosecution:

- a flagrant breach of the law such that public health, safety and welfare have been put at risk;
- Where a prosecution is necessary before Council can take protective actions or be able to rectify problems created by the offending;
- the alleged breach is too serious or the risks too great to be dealt with by means of infringements;
- a failure to correct an identified serious problem after having been given reasonable opportunity to do so;
- a failure to comply with the requirements of an Order or notice;
- an established and recorded history of similar offences;
- an unwillingness, on the part of the individual or other body, to prevent a recurrence of the problem;
- the recovery of the costs of the investigation or remedial work or financial compensation that are required by Council or an aggrieved party; or
- the prosecution of the offence is otherwise in the **public interest**.

A decision to prosecute must be in the **public interest**. In considering whether prosecution is in the **public interest**, Cardinia Shire Council adopts the policy statements of the Director of Public Prosecutions in respect of "Prosecutorial Discretion". In summary, the following additional factors will be considered:

- the seriousness of the offence
- the degree of culpability of the offender, including the level of premeditation;
- any mitigating or aggravating factors;
- the obsolescence or obscurity of the law;
- whether the offence is of considerable public concern;
- any entitlement of Council, the victim or other person or body to compensation if the offender is prosecuted;
- the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- the need to influence the offender's future behaviour;
- the effect on the offender's or witness's physical or mental health, balanced against the seriousness of the offence;
- the availability and efficacy of any alternatives to prosecution;
- the prevalence of the alleged offence and the need for deterrence, both personal and general; and
- the likely length, expense and outcome of a trial.

While there may be **public interest** factors tending against a particular prosecution, often the appropriate course will be to proceed with the prosecution and for those factors to be put to the court in mitigation of sentence.

The decision of whether to prosecute must not be influenced by:

- any element of **discrimination or bias** for or against the person based on ethnicity, nationality, political association, religion, gender, sexuality or beliefs; and
- possible **political advantage or disadvantage** to a government, person holding (or a candidate for) public office, or any political group or party.

Where possible, the decision to prosecute may be made by an Authorised Officer, but will be reviewed and approved by a Prosecutions Officer.

The final decision to prosecute will be made by the relevant General Manager.

11 Enforcement action and impact on revenue

It is acknowledged that most of the offences that Council enforces will only attract monetary penalties when enforced. Furthermore, Council is entitled to issue infringements for many offences, in accordance with the *Infringements Act* and the Attorney-General's Guidelines relating to Infringement Offences.

Financial penalties have been a part of criminal and regulatory enforcement in Victoria for a long time, and are an efficient mechanism to deter unlawful behaviour and to ensure that the costs of enforcement are not disproportionately borne by law-abiding residents.

However, enforcement decisions will not be made for the purpose of increasing revenue to Council.

Enforcement programs or strategies will not be implemented for the sole purpose of increasing revenue to Council.

Authorised Officers must not be required or induced to maintain enforcement "targets" based on revenue to Council.

Where enforcement programs or strategies (such as a targeted "blitz" on a particular category of offending) will result in a higher-than-normal number of infringements or infringement offenders, this will be approved by a relevant team leader or co-ordinator.

12 Customer Service expectations

When Council officers are undertaking enforcement activities, they must be aware that duty holders are frequently residents, or otherwise contributing to the community of the Municipality, and are therefore entitled to the same standards of customer service as any other residents.

Equally, those who reports non-compliance (or are otherwise affected by non-compliance) are entitled to responses to their concerns in accordance with Council Customer Service charters.

However, it is the nature of enforcement activity that complex or technical information may need to be conveyed, or potentially serious consequences may result from non-compliance.

Where is it practical to do so, and unless a delay might compromise the investigation (or another investigation), officers undertaking enforcement activities, will:

- Attempt to communicate swiftly and clearly, in a manner that is understood by the person they are dealing with, and
- Be aware of any impediments that may impact on the person's ability to understand the nature of the contact, and take reasonable steps to alleviate those impediments
- Accommodate any reasonable request to postpone the contact or communication to obtain a translator, legal advice, personal or social support or otherwise to obtain assistance.

- Avoid (where possible and practical) relying solely on impersonal communication (such as posted communication) but will attempt to make personal contact by phone or in person, and all attempts at contact will be documented.

Where a member of the community will be seriously aggrieved by an enforcement decision, a senior Council staff member will communicate the decision and the reasons for the decision as clearly as possible to the person so effected. (For example, this might occur where the Council decides not to prosecute a case where the complainant strongly expects that this will occur.)

Prior to commencing a prosecution, Authorised Officers will (where practical) provide an accused person the opportunity to participate in a record of interview, to explain their side of the story, prior to commencing a prosecution, and document the offer and the answer.

13 Complaints procedure regarding this policy

13.1 Where no statutory right of review applies

If a person has a complaint about an *enforcement decision* within the meaning of this policy, the person may request that the *enforcement decision* be reviewed by an alternative decision maker.

Where it is practicable to do so, an alternative decision maker will review the enforcement decision, applying the principles in this policy.

Where it is practicable to do so, the reviewing officer will advise the requestor of the outcome of the review.

A person may only request a review of an *enforcement decision* once.

13.2 Where a statutory right of review applies

Where a statutory right of review applies, the person will be advised to follow the process available to them.

A statutory right of review applies to many enforcement decisions, including:

- The decision to issue an infringement
- The decision to serve a charge sheet or an initiating application
- The decision to issue a Building Notice or Building Order
- The decision to issue a Fire Prevention Notice
- The decision to issue a Prohibition or Improvement Notice, and
- any other decision where the enabling legislation provides for an independent review, appeal or process to challenge the decision.

14 Council's "law making" role

Council is mindful that it has a role to play in making laws for the peace, order and good governance of the municipality (Section 111 of the Local Government Act).

Council will review its Local Laws every 5 years, to ensure that the laws continue to meet the needs for which they were introduced, and meet the needs of the community that they impact.

Any new Local Laws, or amendments to the existing Local Laws, will follow the process set out in the *Local Government Act*, and will only be made following suitable public consultation.