

EXT 035: COMPLIANCE AND ENFORCEMENT

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Objective

To enable a common practice on compliance and enforcement actions, by:

- Ensuring a consistent and proportionate approach to compliance and enforcement related matters;
- Providing transparency, applying procedural fairness and upholding natural justice for all compliance and enforcement related matters;
- Providing an educational, cooperative and collaborative process, aimed at achieving voluntary compliance; and
- Guiding decision-making processes and subsequent actions to be taken.

Scope

This Policy applies to all compliance and enforcement actions by any Officer with responsibilities under statutory or delegated authority for ensuring compliance with Western Australia state legislation and Shire of Esperance (the Shire) local laws.

Purpose

To outline the Shire's approach to addressing compliance related issues and to ensure any decisions made for enforcement action are timely, consistent and reasonable. This Policy will apply to the Shire's compliance responsibilities with respect to the following Acts (and any subsidiary legislation made under the Acts):

- *Building Act 2011;*
- *Bush Fires Act 1954;*
- *Caravan Parks and Camping Grounds Act 1995;*
- *Cat Act 2011;*
- *Cemeteries Act 1986;*
- *Dog Act 1976 1976;*
- *Emergency Management Act 2005;*
- *Environmental Protection Act 1986 (Public Health component only);*
- *Food Act 2008;*

- *Health (Miscellaneous Provisions) Act 1911;*
- *Litter Act 1979;*
- *Local Government Act 1995;*
- *Local Government (Miscellaneous Provisions) Act 1960;*
- *Planning and Development Act 2005; and*
- *Public Health Act 2016.*

Responsible officers are not limited by this Policy in their use of discretion and the exercise of their functions. The full circumstances of each case will be considered and a decision made on the merits of each individual matter.

The Policy is intended to complement (not substitute) the below external references:

- Compliance and Enforcement Guideline for Enforcement Agencies published by the Western Australian Department of Health for compliance and enforcement of the *Food Act 2008, Food Regulations 2009* and Australia New Zealand Food Standards Code; and
- Compliance and Enforcement Policy published by the Department of Water and Environmental Regulation applicable to the *Environmental Protection Act 1986, Litter Act 1979* and related legislation.

Definitions

Authorised Person: a person or a member of a class of persons who have statutory (including delegated) power or who are otherwise authorised to commence and carry out legal proceedings relating to an offence, as provided in the relevant legislation.

Compliance: acting in accordance with relevant legislation and lawful directions.

Enforcement: both action taken against parties in response to evidence of unlawful activity, and to the processes preceding such action: responding to allegations of breaches, inspecting, assessing and investigating potential unlawful activity. Enforcement also includes processes prior to making a decision not to enforce the law in particular circumstances, despite evidence or allegations of non-compliance.

Investigation: the process of establishing and analysing facts and applying fair and reasonable interpretations to determine whether a non-compliance or an offence have occurred and the person most likely responsible.

Offence: a form of non-compliance that is classified as an offence in legislation.

Officer: an employee of the Shire of Esperance.

Proactive Compliance: the commencement of compliance investigations into an activity without a written complaint.

Shire: the Shire of Esperance.

Standard of Proof: the desired standard of proof, to be applied to all relevant facts, is 'beyond a reasonable doubt', as required for a successful prosecution in criminal proceedings.

Compliance and Enforcement Action

The Shire is required to administer its statutory responsibilities under applicable legislation in a transparent and fair manner in the interest of public health, safety, and amenity. The Compliance Matrix contained in this Policy is not a complete list of compliance matters the Shire may investigate under its responsibilities.

Each investigation into an alleged offence undertaken by the Shire will be assessed on a case-by-case basis as per this Policy. An Offence Category may be varied to ensure the response is appropriate under the circumstances and is proportionate to the nature of the offence, and the harm caused or likely to be caused. Where there is a deviation, the responsible Manager or Director will be informed to confirm the divergence from the Policy and proposed actions.

Conflict of Interest

Where a real or perceived conflict of interest may exist, the Officer affected will ensure the responsibility to investigate and respond is transferred to another appropriately-authorised person.

Investigation Process

Process of investigation:

1. Assess the information/allegation of alleged breach;
2. Determine the appropriate investigative approach;
3. Ensure the Officer has the appropriate powers and authority;
4. Plan the investigation;
5. Collect information and evidence;
6. Apply standard of proof;
7. Record all relevant information;
8. Prepare investigation documentation with any recommendation for enforcement action; then
9. Close investigation.

The investigation process must be read in conjunction with any statutory provisions and guidelines applicable to a particular investigation being undertaken.

Reactive Compliance Investigations

Reactive compliance investigations will be undertaken and prioritised based on the Offence Categories set out in this Policy.

In some circumstances compliance issues may be the result of neighbourhood disputes. The Shire may discontinue an investigation of a complaint where it can be reasonably ascertained the complaint is unsubstantiated or pertains to a civil matter. The Shire will not provide advice in relation to civil matters.

Proactive Compliance

Proactive compliance may be carried out in the following circumstances:

- Audits of Approvals, Permits and/or Refusals;
- Assessments conducted in response to Pre-Sale Report requests;

- Education and awareness raising to encourage voluntary compliance;
- Investigation of issues observed by officers during the course of work-related activities; and
- Investigation of issues identified through annual work programs in which the principles outlined in the Policy will also be applied.

Conclusion of Investigation

At the conclusion of an investigation, officers shall use the most appropriate action based on this Policy in conjunction with the Compliance and Enforcement Matrix, unless approved otherwise by the appropriate Manager or Director.

Complainants and alleged offenders will be advised in writing, or another appropriate form of communication, of the investigation outcome (subject to confidentiality requirements) and the matter closed.

Offence Categories

Where an investigation is undertaken, and it is considered there is sufficient evidence to substantiate an allegation of a breach, the Shire will take the appropriate enforcement action. The action will be based on the specific circumstances of each individual case, with considerations to the Offence Categories.

Offence Categories

Minor: A breach of legislation, which has a minimal impact on the community, a person or the environment. The breach may be able to be resolved in a relatively short timeframe without any further impact once compliance has been reached.

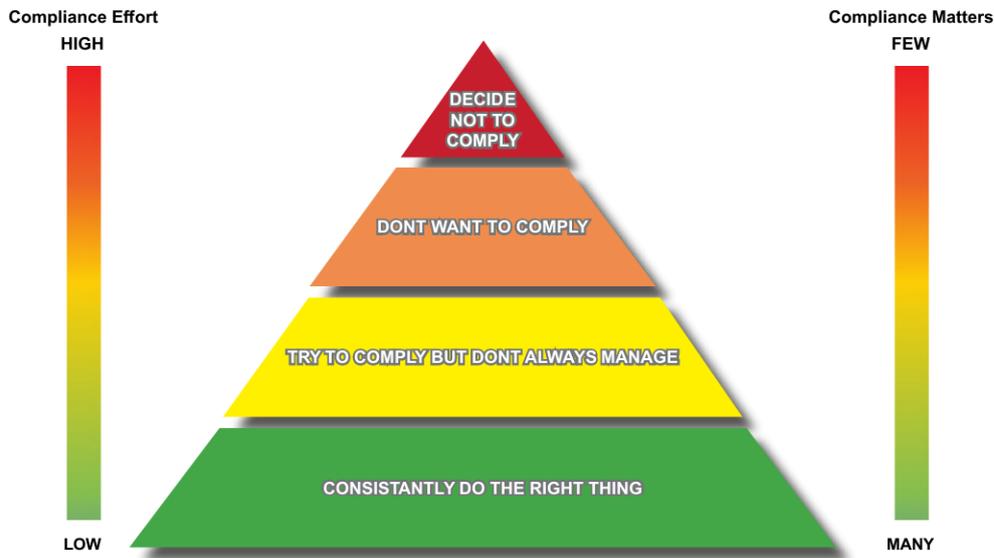
Moderate: A breach of legislation that may initially have minimal impact on the community, life, critical infrastructure, property, or the environment but if allowed to continue the impact may have a major or more significant impact. The breach may initially be able to be resolved with a formal warning, infringement, directions notice or order under relevant legislation.

Major: A breach of legislation that significantly affects or risks the health and safety of the community, life, critical infrastructure, property, or the environment. It may also be a case where the issue cannot be resolved in a short timeframe, or where the alleged offender is not willing to cooperate or negotiate in order to achieve compliance, which may lead to a prosecution action.

Offence Categories are a guide only and are subject to review during the investigation process. Enforcement actions contained in the above definitions are not exhaustive or limiting to each particular definition.

Enforcement Options

The Shire will apply a graduated and proportionate approach consistent with the below diagram:



Enforcement action may only be initiated by an Officer with relevant delegated authority or authorisation. Any enforcement action commenced is to be timely in order to provide the best chance of achieving a desired outcome.

Enforcement Options

At the conclusion of an investigation, officers shall use the most appropriate action. This may include one or more of the following enforcement options (listed in increasing order of severity)

1. No enforcement action taken, or information provided on how to achieve compliance;
2. Referral to an external agency or relevant authority;
3. Request for retrospective approval (if applicable), or remedy in accordance with relevant legislation;
4. Formal Warning issued;
5. Penalty Infringement Notice issued;
6. Statutory Notices, Orders, or Declarations issued *;
7. Prosecution action commenced; or
8. A combination of the above.

* Notices, Directions or Orders may require, amongst other things, the land owner, occupier, or recipient to obtain subsequent approvals, cease the unapproved development, remove unapproved structures or undertake prescribed work.

Enforcement Action

Decisions on enforcement action may have regard to any or all of the following factors:

- a) Whether there has been a failure to comply with any request, direction or notice;

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- b) Internal recommendations, including those made by the Development Coordination Unit;
- c) Whether the breach or offence was committed wilfully or unknowingly;
- d) Whether the breach or offence is ongoing;
- e) Any mitigating or aggravating circumstances;
- f) Any demonstrated history of non-compliance;
- g) The length of time since the incident (including statutory time frames);
- h) The potential short and long-term consequences of non-compliance; and
- i) Legal precedents, advice received or the existence of an estoppel situation.

Circumstances Where No Enforcement Action Necessary

The Shire may take no enforcement action after an investigation, where:

- a) It is considered that an educative approach through issuance of a written warning or verbal instruction to prevent continuance or reoccurrence of the matter is most appropriate;
- b) There is insufficient evidence to prove non-compliance after reasonable attempts have been made to investigate the matter;
- c) The individual or entity has remedied the alleged breach, discontinued or removed the unauthorised development or has obtained the relevant approval(s);
- d) Having regard for the capacity of the alleged offender, it is determined that an alternative approach to achieving compliance is more appropriate;
- e) The matter is considered trivial in nature, or would be an unreasonable use of the Shire's resources;
- f) It is likely a consent would have been given for the activity if it had been sought; and
- g) Considerable time has elapsed since the breach occurred, in circumstances where the potential for harm is minimal and the matter is minor in nature.

Acting in Default of Notices or Orders

Legislation may permit the Shire to undertake works as specified in a Notice or Order to restore the land as nearly as practicable to its condition immediately before the development started, or execute that work as it directed that person. The Shire may be entitled to recover its expenses in a court of competent jurisdiction.

Prosecution Actions

Initiation of Proceedings

The Shire may instigate prosecution proceedings under an Act, regulation or local law where the Shire considers the offence warrants such action. The Shire may also become involved in prosecution proceedings if:

- At the election of the alleged offender;
- Escalation following a court decision; or
- Escalation following a State Administrative Tribunal (SAT) decision.

The Shire may consider the following when determining whether to initiate prosecution proceedings:

- a) The seriousness and nature of the offence;
- b) Legal advice received including the prospects of success;
- c) Any evidence of contempt or disregard for the law;
- d) Any public health or safety impacts resulting from the offence; and
- e) Whether the prosecution is in the public interest.

Withdrawal of Proceedings

The Shire may consider the following factors when determining whether to withdraw from prosecution proceedings:

- a) Legal advice received; or
- b) The Chief Executive believes an appropriate level of compliance has been achieved;
or
- c) The matter has been settled out of court; or
- d) An error of law or fact occurs; or
- e) The owner or occupier of the land is deceased or cannot be located.

Right of Review and Appeals

Offenders will be notified in writing of their right to appeal a direction or decision of the Shire when applicable. Where a right of review is lodged with the State Administrative Tribunal or Shire, no further enforcement action will be taken until a determination has been made.

This does not prevent the Shire from pursuing other matters in instances where numerous non-compliances relate to the offender.

Disclosure of Information

Requests for information from members of the public in relation to compliance or enforcement matters will be handled in accordance with the Shire's Freedom of Information Statement.

Requests made pursuant to the *Freedom of Information Act 1992* (FOI Act) will be handled in accordance with the processes set out in the FOI Act. Any decision to release or refuse to release information will be considered on a case-by-case basis in accordance with the provisions of the FOI Act.

Officers shall not release information on specific compliance and enforcement activities, such as active investigations to the public.

Delegations

Refer to Register of Delegations and Sub-delegations (as amended).

Compliance Matrix

Offence Description	Statutory Authority	Offence Category		
		Minor	Moderate	Major
Building Services				
<i>Building Regulations 2012</i>				
Non-compliant pool barrier – non-compliant barrier	r50			X
Unauthorised building work	s9		X	
No Notice of Completion	s33	X		
Occupying a building without Occupancy Permit	s41		X	
Planning Services				
<i>Planning & Development Act 2005</i>				
Unauthorised land use ¹	s218		X	
Unauthorised development ¹	s218		X	
Extractive Industries				
No approval / major breach of conditions	s218			X
Ranger Services				
<i>Dog Act 1976 & Cat Act 2011</i>				
Unregistered animal (dog / cat)	Dog s7(1) Cats 5(1)	X		
<i>Dog Act 1976</i>				
Wandering dogs - private property (dog in a place without consent)	s33A(3)		X	
Dog attack - causing physical injury	s33D(1)			X
Dog attack - causing no physical injury	s33D(2A)		X	
Restricted breed or declared Dangerous Dog offences	s33E		X	
Dog causing a nuisance by barking	s38(5)		X	
<i>Local Government (Miscellaneous Provisions) Act 1960</i>				
Livestock - wandering at large – thoroughfare	s.484(1)			X
<i>Litter Act 1979</i>				
Illegal dumping	s 23		X	
Private Property Local Law				
Unightly / untidy properties	Local Law		X	
<i>Bush Fires Act 1954</i>				
Fire – offences relating to fires in the open air during a Total Fire Ban	s22(B)2		X	
Failure to meet Fire Hazard Reduction Notice requirements	s33(3)		X	
<i>Local Government (Uniform Local Provisions) Regulations 1996</i>				
Interfering with, or taking anything from, land that is local government property without lawful authority	r. 5(1)		X	
Placing on a public thoroughfare anything that obstructs it without lawful authority	r. 6(1))		X	
Constructing anything on, over, or under a	r. 17(1))		X	

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public thoroughfare or other public place that is local government property without lawful authority				
Environmental Health Services				
<i>Health (Miscellaneous Provisions) Act 1911</i>				
Construction or installation of apparatus for the treatment of sewage without the approval of the local government or Chief Health Officer	s107(2)		X	
Inhabiting or occupying a house that has been declared unfit for human habitation	s136F		X	
Failure to comply with a notice issued under Part V of the Health Act	s140(1)		X	
Open or use a public building without a valid certificate of approval	s178(4)		X	
Causing a nuisance and allowing it to continue	s182		X	
Carrying out an offensive trade in breach of the Health Act	s189		X	
<i>Food Act 2008</i>				
Handling and sale of unsuitable food	s18		X	
Failure to comply with requirements of authorised officers	s45		X	
Contravention of a prohibition order	s68			X
Failure to provide notification of conduct of food business	s107		X	
<i>Environmental Protection Act 1986</i>				
Unreasonable noise emissions from premises	s79		X	
Failure to comply with a Noise Abatement Direction	s81(2)		X	
<i>Caravan Parks and Camping Grounds Act 1995</i>				
Caravan park or camping ground not to be operated without licence	s6		X	
Failure to maintain a register of occupiers, copies of the act and regulations and facility rules if any on the premises	s13(1)(b) & (c)	X		
Failure to display a licence, conditions if any, a plan of the facility, facility rules if any and name, address and telephone number of a person to be contacted in an emergency.	s14(2)	X		
Obstructing an authorised Officer	s19		X	
Failure to comply with a works specification notice	s21		X	
Local Laws				
<i>Shire of Esperance Health Local Law</i>				
Contravenes a provision of the local laws	Local Law	X		

[1] Where a non-compliant use or development (excluding signage) has occurred in Special Control Area (SCA)4, or SCA5, the offence automatically moves up one category.

The offences contained in the above Compliance Matrix are indicative only and do not form a complete list of compliance matters the Shire may investigate under its regulatory responsibilities.

..... Policy Ends