
GUIDELINE
INVESTIGATIONS



HCCREMS
HUNTER & CENTRAL COAST REGIONAL
ENVIRONMENTAL MANAGEMENT STRATEGY

A project delivered by the Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS): a program of the Environment Division of Hunter Councils Inc.



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FOREWORD

The Investigations Guideline is provided as supporting guidance to the HCCREMS model Compliance Assurance Policy and is designed to provide a consistent approach to the environmental regulatory framework implemented throughout the fourteen member councils of HCCREMS.

The model Compliance Assurance Policy provides councils with a position on the use of both proactive and reactive compliance assurance activities to manage compliance of the regulated community. **Figure 1** (below) displays the relationship of this guideline to the Regional Compliance Assurance Policy and other guidance documents.

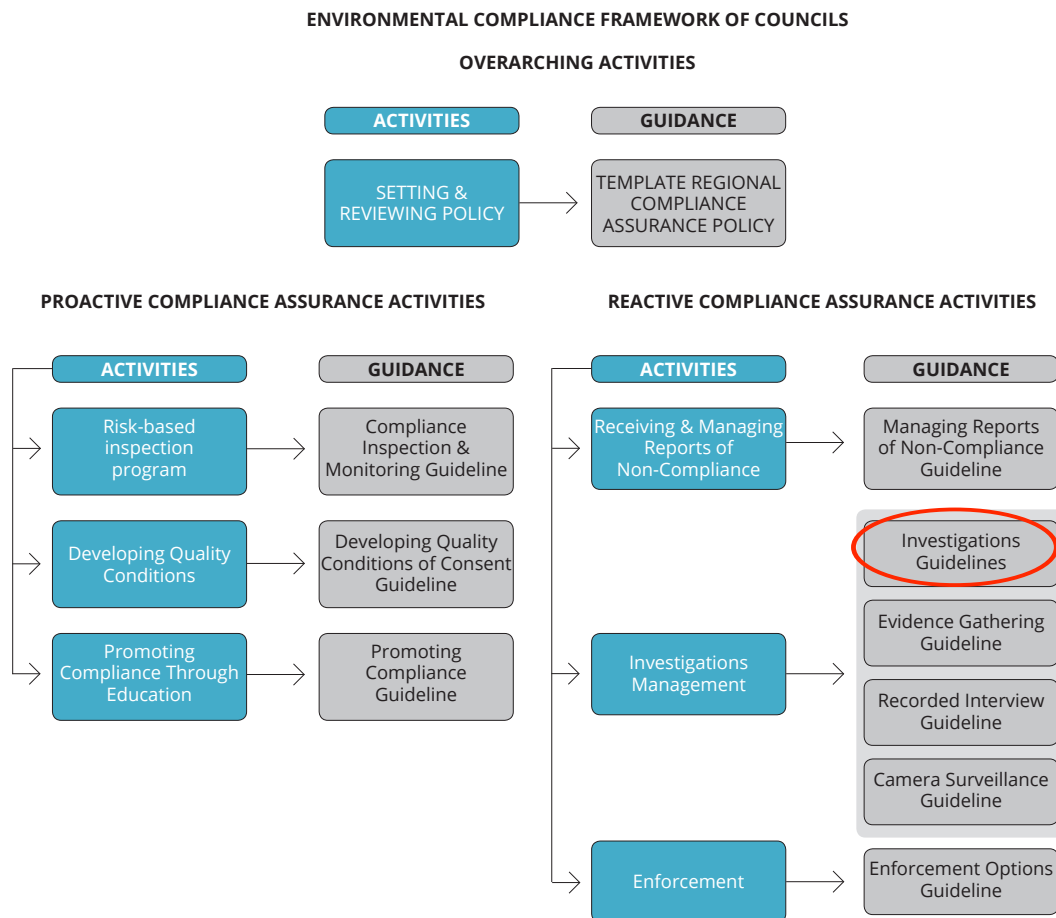


Figure 1:
Regional Compliance Assurance Framework

1. INTRODUCTION

An investigation is a thorough and logical gathering of information combined with the unbiased assessment of that information to decide whether a breach of legislation, standards or policy has occurred. If there has been a breach, the investigation must also identify where responsibility for the act or omission lies and the relative seriousness of the breach.

This Guideline provides guidance to Council officers on procedures to be followed when undertaking an investigation. This guideline covers planning and conducting investigations and should be read in conjunction with the HCCREMS Evidence Gathering Guideline.

This Guideline is applicable to the majority of local government enforcement activities and relevant legislation. The principal statutes reviewed in the development of this Guideline were:

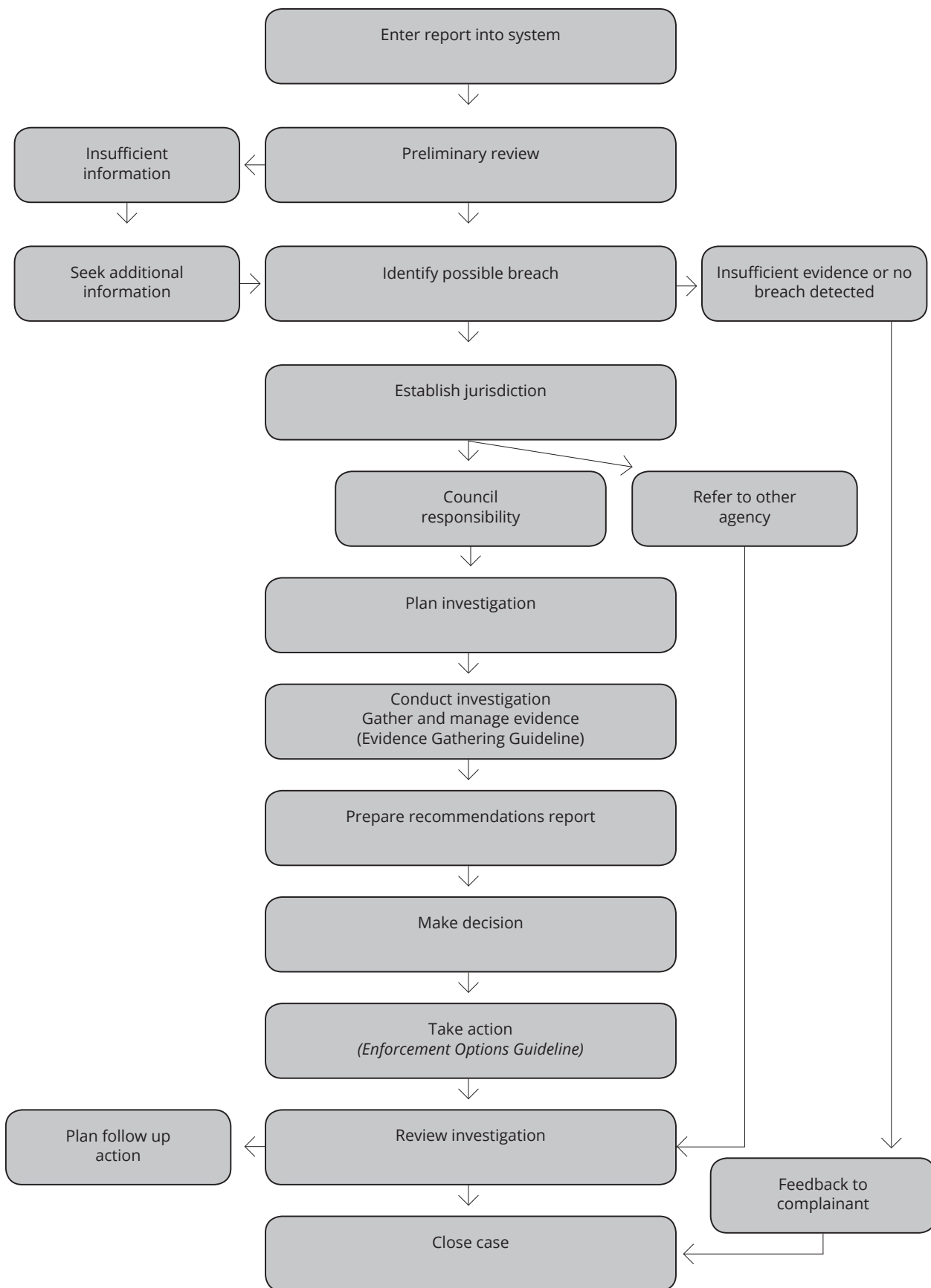
- Local Government Act 1993 & Regulations (LG Act).
- Environmental Planning and Assessment Act 1979 & Regulation (EP&A Act).
- Protection of the Environment Operations Act 1997 & Regulations (POEO Act).

This Investigations Guideline does not address:

- Detailed information on gathering evidence. This is covered in the HCCREMS Evidence Gathering Guideline.
- The much broader issue of enforcement policy and procedure. Officers are referred to the HCCREMS Enforcement Options Guideline or Council's other compliance and enforcement policies and SOPs in this regard.

Figure 2 is a summary of the Investigations Guideline. It shows the steps in the process and what section of this document, or which other document, includes further detail about each step.

Figure 2:
*Summary of Investigations
Guideline*



2. BACKGROUND INFORMATION

PURPOSE OF INVESTIGATIONS

Investigations are typically undertaken for the following reasons:

- To determine the cause of the incident.
- To determine whether or not there has been a contravention of law, policy or standards.
- To gather evidence to the required standard to support enforcement action or facilitate appropriate administrative measures (i.e. negotiated outcomes).
- To improve controls to prevent contraventions.
- To minimise any detrimental impacts on the environment, human health and safety.
- To achieve an appropriate outcome with regard to the public interest within a reasonable time and at reasonable cost, according to legislative requirements and the nature of the investigation.

IMPORTANCE OF EFFECTIVE INVESTIGATION MANAGEMENT

Investigations can be time consuming and costly, and as a result, there is a need to implement good investigation management practices at every stage of the investigative process.

Effective management of an investigation requires the investigator to:

- Obtain all relevant evidence in relation to the alleged offence to the required standard of proof.
- Conduct the investigation in a time-efficient manner.
- Conduct the investigation in a manner that effectively utilises available resources.

CASE MANAGEMENT SYSTEMS

A suitable electronic system should be used to manage and document investigations from the time of initial notification through to resolution of the issue. Councils use a range of case management systems, but commonly investigations are managed through the customer or complaints management system. A 'running sheet' kept in the front of the hard copy file (and later copied to the electronic file) can also assist with tracking tasks related to an investigation. Refer to **Appendix 1** for an example.

Any actions or decisions taken during and after an investigation may come under scrutiny from Council, members of the public, other interested parties, a Court or the Independent Commission Against Corruption (ICAC). Throughout an investigation it is imperative to record all decisions, including the specifics of the decision made and the reason for decisions. For more information refer to the NSW Ombudsman's Public Sector Agencies *Fact sheet No 18: Reasons for Decisions (2005)*. Record keeping procedures are outlined in more detail in the HCCREMS Evidence Gathering Guideline.

COMMUNICATION

During the course of an investigation, keep all parties subject to the investigation informed as to progress, unless doing so would be detrimental to the investigation. For specific guidance on managing and communicating with complainants, refer to the Customer Service policies of your Council, the NSW Ombudsman's Complaint Handler's Tool Kit (2004) and the NSW Ombudsman's Reporting of progress and results of investigations (2008).

3.

INVESTIGATIONS PROCESS

RECORDING INITIAL DETAILS OF POTENTIAL BREACHES

Information on potential breaches may be reported to council in the form of a complaint from the public, a report by another government body or an observation by council staff. Regardless of the source of the information, a report should be entered into the relevant case management system, covering all relevant details and assigning a priority for response. Collecting this information provides the ability to demonstrate that the investigation commenced on a lawful basis if challenged, later, by the person/ entity being investigated.

Further information on this step can be found in the HCCREMS *Managing Reports of Non Compliance Guideline*. As per usual procedures, the report will then be forwarded to the appropriate officer for preliminary review.

PRELIMINARY REVIEW

An initial assessment of the report of non-compliance should be made by the relevant officer to determine whether further investigation is required.

Section 1.3 of the NSW Ombudsman's *Enforcement Guidelines for Councils (2002)* details a range of factors to consider when deciding whether a complaint requires investigation. The major factors to be considered include whether the report of non-compliance:

- *A.Relates to a legal activity*. This will include a check of relevant approvals and other documentation on Council's system relating to the site or the potential offender, and also a determination as to whether the activity

is permissible without any approvals or consent being required.

- *Relates to an ongoing issue* already under investigation, in which case it can be forwarded to the relevant officer.
- *Relates to a trivial or frivolous matter* or a communication problem that is more appropriately resolved through means other than an investigation.
- *Has been made by a vexatious complainant*. In these cases refer to council policy and/or the NSW Ombudsman's "Public Sector Agencies fact sheet No 22 Very Difficult Complainants" (2006).

If there is insufficient information in the report on non-compliance to undertake this preliminary assessment, further information may need to be sought from the complainant, the site operator/owner or via an inspection.

If a decision is made not to investigate, the reason for the decision should be recorded and the complainant or informant advised. All legitimate complaints or allegations must be investigated to some extent (even if only a desk-top inquiry is warranted). It is only after a preliminary review has occurred that the discretionary decision to take no further steps in the investigation can occur.

IDENTIFICATION OF POSSIBLE BREACHES

Where possible, attempt to identify what kind of breach of legislation, standards or policy may have occurred or has potential to occur, from the report of non-compliance. Where it is identified that:

- *No breach has occurred or is likely to occur* - advice is to be provided back to the informant and the reason for not proceeding with investigation shall be recorded.
- *A breach may have occurred or has potential to occur* - the relevant sections of legislation, standards or policy need to be identified. This will assist with the further steps of establishing jurisdiction, powers, authorisations and expertise necessary to investigate.

DETERMINATION OF JURISDICTION

The legislation, standards or policy identified as relevant to the potential breach will determine whether Council has jurisdiction to deal with the matter. Some examples of matters that may be outside Council's jurisdiction are:

- The Council is not the Appropriate Regulatory Authority (ARA) under the Protection of the Environment Operations (POEO) Act 1997 (e.g. for Schedule 1 licensed premises).
- The report relates to clearing regulated by the Environmental Protection Authority (EPA) under the Native Vegetation Act 2003.
- The report relates to safety matters on building sites for which WorkCover is responsible.
- The report relates to a noise complaint regulated by another agency such as the Police, RTA or the Office of Liquor, Gaming and Racing.
- The complaint relates to a development site where a Private Certifier is the Principle Certifying Authority and would be better placed to resolve the issue.

If Council does not have jurisdiction, advice should be provided back to the complainant / informant to this effect. The report should also be referred to the appropriate authority if this is required by legislation or otherwise seen as desirable by Council (providing Privacy laws, regarding the personal information of the complainant are complied with).

PLANNING THE INVESTIGATION

Once determined that an investigation is required, developing an investigation plan will greatly assist to organise the investigation and ensure relevant legal and resource aspects are considered.

An investigation plan template is provided in **Appendix 2**. The investigation plan should identify:

- The allegation.
- The objectives of the investigation.
- The possible offence(s).
- The elements / proofs of the offence(s).
- The avenues of inquiry.
- Resource needs of the investigation, such as what specialist advice might be required.

The elements of an offence (sometimes called 'proofs') are the aspects that must be proved in order to prosecute an offence. Elements include the:

- Specific words or phrases in the piece of legislation that make the offence.
- 'Common elements' - time, date, place and an entity/person.

NO TIME TO PREPARE A WRITTEN PLAN? TAKE SOME TIME, MOST LIKELY WHILE SITTING IN THE CAR OUTSIDE THE PREMISES, TO WRITE DOWN A FEW NOTES AGAINST THESE HEADINGS AND DEVELOP A PRELIMINARY INVESTIGATION PLAN.

Delegations

Delegations are critical to enable officers to enter premises, ask questions and gather evidence.

To ensure evidence will be admissible, officers must ensure that they have the necessary delegations to undertake the particular enforcement activity through which evidence will be gathered. If there is a lead officer for the investigation they should confirm the delegations of other officers.

Essential equipment

Equipment requirements will vary with each investigation, but will usually include the following core items:

- Authorised officer's identification card.
- Written list of delegations.
- Camera.
- Official notebook.
- Safety boots and hardhat.
- Written authority to enter land (as per relevant Acts, e.g. Under the EP& A Act, permission from the owner or advanced Notice of Entry under s118c for non-residential premises, or s118k Search Warrant for residential premises).

Ensure all relevant specialty equipment (e.g. water testing equipment) is calibrated to ensure admissibility of evidence in court. This may also extend to cameras to ensure date/ time stamps on images are accurate.

Occupational health and safety

All investigation procedures must be undertaken in accordance with Council's occupational health and safety policies and procedures. Examples of requirements may include:

- Planned investigations should be conducted in pairs – this not only increases the level of safety for investigating officers but enables corroboration of observations and evidence.
- Where officers encounter direct physical abuse or threats they should withdraw from the scene or premises.
- There may also be times when substances at or near a particular premises present a potential health risk e.g. toxic substances, chemicals or asbestos. Carrying and using appropriate Personal Protective Equipment (PPE) will help mitigate the risk.
- In some circumstances other

government agencies involvement may be required e.g. HAZMAT.

A site specific risk assessment to identify potential hazards prior to all inspections is recommended.

CONDUCTING THE INVESTIGATION

The procedure for conducting the investigation will be driven by the Investigations Plan and will involve collecting evidence to prove or disprove potential offences. Refer to the Evidence Gathering Guideline for information on appropriate powers for entering and inspecting premises, appropriate cautions when questioning people, and evidence gathering and management procedures.

PREPARING THE RECOMMENDATIONS REPORT

A recommendations report of the outcome of the investigation can be prepared at the conclusion of an investigation or at any other stage when decisions must be made on how to proceed. This report will provide an effective basis for deciding further action. A suggested structure for a recommendations report, including what detail to include in each section, is outlined in **Table 1**. The recommendations report make take the form of a memo or Council Report depending on individual Council procedures.

OFFICIAL NOTEBOOKS ARE ISSUED BY THE NSW STATE DEBT RECOVERY OFFICE AND ARE USED TO DOCUMENT CONTEMPORANEOUS NOTES DURING AN INVESTIGATION. THEY ARE 'CONTROLLED DOCUMENTS', ISSUED TO COUNCILS AND THEN TO SPECIFIC OFFICERS.

Summary	Executive summary of the report. In a couple of lines or bullet points summarise the nature of the offence and the recommended course(s) of action.
Introduction	Who, What, When, Where and Why: Including details of original incident/ complaint report, relevant people/companies involved, the site and relevant date(s).
Background	Including background to previous issues and approvals on the site, any planning provisions that apply, record of offender (if relevant) and any relevant information on the issue involved (such as relevant threatened species).
Investigation	Detail the process of investigation that was undertaken and the evidence collected including results of inspections, samples taken and interviews with witnesses and offenders.
Nature of the Breach	Based on the investigation conducted, detail the relevant legislation (including specific offences and offence elements), and whether or not there is sufficient evidence of a breach to the required standard of proof.
Conclusion	Detail the circumstances of the breach (including any mitigating factors) and identify the offender (if known).
Recommendations	Detail what should be done to remedy the problem, or detail the reasons why no action is to be taken. Include reference to any relevant compliance or enforcement policies, guidelines and procedures. Discuss any resource or legal implications of the recommended course of action. Include the reasons for the recommendations, including reference to any relevant compliance or enforcement policies, guidelines and procedures.

DECIDING ON A COURSE OF ACTION

It is preferable, wherever possible, to separate the investigation and decision making functions. A recommendations report should be considered by a person, other than the investigator, who has the authority to make any necessary decisions arising out of an investigation (see NSW Ombudsman's Public Sector Agencies *Fact Sheet No 18: Reasons for Decisions, 2005*). In a Council, this is likely to be a manager or team leader.

If no breach has occurred or no further action is to be taken, documentation should include the reason for the decision. The original complainant / informant and the parties being investigated should be advised. Reasons for taking no further action may include the public interest or insufficiency of evidence.

Some examples of action that may be taken as a result of an investigation include:

- Negotiating a resolution with the parties.
- Issuing a warning or caution which includes information on how to comply.
- Taking enforcement action such as issuing an order, notice, instituting a prosecution or seeking a court order to remedy or restrain a breach.
- Referring a matter to an external agency for further investigation or prosecution.

- Obtaining a court injunction (in some cases of immediate and significant risk of environmental harm or threat to public safety).

Please refer to the Enforcement Options Guideline for more information on various enforcement options.

INVESTIGATION REVIEW

Once action has been undertaken, and before closing the case, a review of the investigation should occur to consider outcomes achieved and identify any lessons for future investigations. It may be useful to convene a meeting of the investigation and enforcement team to discuss these issues. Any follow up activities that are determined to be needed, such as monitoring, should be documented. It may be necessary to inform the original complainant / informant of the outcomes of the investigation and action taken.

CASE CLOSING

All electronic and hard copy files on the case should be completed and closed on Council's systems. Files should be completed to a standard that would be of assistance for future investigations or legal action.

Table 1:
*Outline of structure
and content of a
recommendations report*

4. REFERENCES AND FURTHER INFORMATION

Australian Government – Department of Environment and Heritage, 2006, Investigations Procedures Manual – Operational draft Version 1.5. Department of Environment and Conservation Western Australia, 2009, Draft Investigations Manual.

HCCREMS, 2010, Cert IV Local Government Investigations training materials by ICETS, Available to HCCREMS members at: <http://www.hccrems.com.au/Partners/Login.aspx?ReturnUrl=%2fPrograms%2fEnvironmental-Compliance%2fRegional-Compliance-Network%2fMembers-Only-Resources.aspx>

HCCREMS 2009, Workshop training materials by Russell Harrison, Available to HCCREMS members at: <http://www.hccrems.com.au/Partners/Login.aspx?ReturnUrl=%2fPrograms%2fEnvironmental-Compliance%2fRegional-Compliance-Network%2fMembers-Only-Resources.aspx>

NSW Ombudsman’s Office, 2002, Enforcement Guidelines for Councils and Appendices, particularly Appendix B “Tips on conducting enforcement investigations”. Available at <http://www.ombo.nsw.gov.au/publication/guidelines.asp>

NSW Ombudsman’s Office, 2004, Complaint Handler’s Tool Kit, Available at <http://www.ombo.nsw.gov.au/publication/guidelines.asp>

NSW Ombudsman’s Office, 2004, Public Sector Agencies fact sheet No 9 “Investigation of Complaints” Available at: <http://www.ombo.nsw.gov.au/publication/factsheets.asp>

NSW Ombudsman’s Office, 2005, Public Sector Agencies fact sheet No 18 “Reasons

for Decisions”. Available at <http://www.ombo.nsw.gov.au/publication/factsheets.asp>

NSW Ombudsman’s Office, 2008, Public Sector Agencies fact sheet No 22 Very Difficult Complainants. Available at <http://www.ombo.nsw.gov.au/show.asp?id=412>

NSW Ombudsman’s Office, 2008, Reporting on Progress and Results of Investigations, Available at <http://www.ombo.nsw.gov.au/show.asp?id=493>

APPENDIX 1. EXAMPLE 'RUNNING SHEET' FOR HARD COPY FILE

Appendix 1 Example 'running sheet' for hard copy file

INVESTIGATION RUNNING SHEET

Investigating Officer(s):
Property:
Property Owner:
Complainant/Informant Contact Details:
Contact details for other persons of interest:
File number:

Note: Date file received should be included by first and each subsequent investigator actioning the file

Investigator	Date/Time	Comments
<i>Initials</i>	<i>Xx/xx/xx</i>	<i>E.g. Rang John Smith (EPA) 02 xxxxxxxx. He checked their database and found that they have a complaint about xxxxxxxxxxxx. He will send a fax with all the details.</i>
	<i>X00 hrs</i>	<i>Fax from EPA received.</i>
<i>XX</i>	<i>Xx/xx/xx</i>	<i>NSW Roads & Transport check – PRIOR has driver's licence and listed DOB is xx/xx/xx, address of is xxxxxxxxxxxx.</i>



APPENDIX 2. 'ELEMENTS OF OFFENCE' EXPLANATION

Appendix 2 'Elements of Offence' explanation

Introduction

When investigating an offence it is important to obtain all the relevant information to prove or disprove the allegation. To be able to achieve this, the investigator must have an understanding of the offence they are investigating, know the elements required for the offence to be proven, and also be aware of any statutory defences that exist with respect to the suspect or incident.

Elements of offences

At the commencement of an investigation, it is important to look at the elements of any possible offences in order to allow for effective planning and to determine what evidence is required. To successfully take enforcement action it is necessary to prove each element to the required standard of proof, which in criminal cases is beyond a reasonable doubt. Every offence consists of a series of sub components known as "elements" or "proofs". An element is essentially any significant word or phrase contained in the section of the Act that creates the offence. Insignificant words (e.g. "the", "of", "be") in the section are not individual elements but may form a component of the elements.

Identifying the elements of an offence

Identifying the Elements of an Offence involves examining each word or phrase in the offence and determining whether that word or phrase involves particular issues of law or fact. Four elements are common to every offence. They are the:

- Time;
- date;
- place of the offence; and
- the person or entity charged.

For convenience, time, date and place are generally treated as one element and whilst offence sections do not have the words "time, date and place", they should always be included as elements that must be proved.

Defences

During the course of an investigation, it is not the role of the investigator to provide an offender or their counsel with a defence to any proceedings instituted on behalf of Council. However, an alleged offender may rely on defences set out in the relevant Act, and part of the investigative process would include collection of information to negate any possible defences. In relation to criminal cases, a particular risk of not addressing the possible defences is that the suspect need only raise a defence and provide sufficient evidence to meet a standard of proof to the balance of probabilities that the defence did in fact exist. The prosecution however must prove beyond a reasonable doubt that the defence did not exist.

Attachment 1 provides detail on the elements of common environmental offences.



APPENDIX 3. INVESTIGATION PLAN TEMPLATE

Appendix 3 Investigation plan template

Background information

Date:
Investigating officer(s):

Property:
Property owner:
Complainant / informant contact details:
Contact details for other persons of interest:

File location:

Manager signature and date:

Investigation objective / scope:

Outline of risk management / OH&S considerations:



Evidence matrix

Allegation observation	or	Possible offence	Elements of the offence	Avenues of enquiry
<i>What is alleged to have occurred? What have you observed?</i>		<i>Which Act and provisions may, potentially, apply.</i>	<i>What are the elements of that provision that need to be proven (Note: first row should always be time, date and place).</i>	<i>Which techniques, resources, methods and ultimately, evidence, are required.</i>

Legal advice

Insert any advice received from Council's legal team.

Resource needs

Personnel

Expertise required	Delegations required	Suitable staff or contractor name	Timeframes



Equipment

Item of equipment	Location/source	Do personnel require particular qualifications to calibrate or operate?	Any other notes

Evidence gathering action plan

Task	Responsibility (staff)	Date due	Notes

