
GUIDELINE

EVIDENCE GATHERING



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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Disclaimer

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FOREWORD

The Evidence Gathering 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 model Compliance Assurance Policy and other guidance documents.

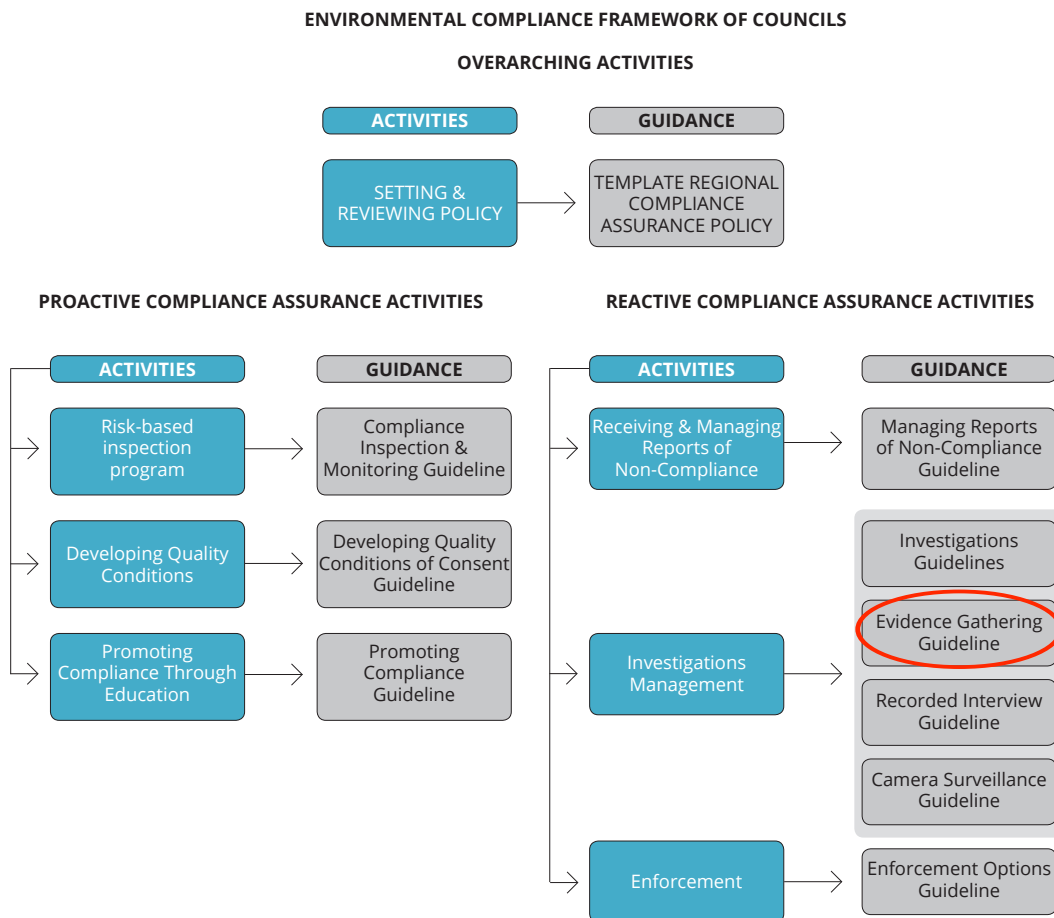


Figure 1:
Regional Compliance Assurance Framework

1.

INTRODUCTION

This Evidence Gathering Guideline provides guidance to Council officers on how to gather evidence on matters for which they have regulatory responsibility. It is applicable to the majority of local government enforcement activities and provides an organisational directive that establishes a standard course of action for the gathering of evidence.

This Guideline seeks to assist authorised officers to ensure any evidence collected during investigations is sufficient to enable Council to successfully utilise appropriate enforcement methods in accordance with Council's adopted Enforcement Policy. The Evidence Gathering Guideline seeks to ensure that Council enforcement activities are carried out consistently and without bias, as is required under the Local Government Act 1993.

Adherence to the Evidence Gathering Guideline will reduce the risk of enforcement action failing, due to either incomplete evidence or evidence that has not been gathered in accordance with the necessary evidentiary standard for use in criminal or civil proceedings.

The principal statutes considered in the development of the Evidence Gathering Guideline are:

- 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).
- Public Health Act 1991 & Regulations.
- Noxious Weeds Act 1993.
- Food Act 2003 & Regulations (Food Act).

- Companion Animals Act 1998 & Regulations.
- Impounding Act 1993 & Regulations.
- Swimming Pools Act 1993.

The Evidence Act 1995 and Interpretations Act 1987 are also important statutes in determining the admissibility of evidence and interpreting documents or provisions which are to be relied upon in any court proceedings.

The Evidence Gathering Guideline does not address:

- The much broader issue of enforcement policy and procedure. Please refer to the Template Regional Compliance Assurance Policy or Council's own policies in this regard.
- Detailed guidance on overall case management systems. Please refer to the Investigations Guideline for information on managing investigations.
- Post investigation matters such as preparing a brief for Council's legal team.
- Technical procedures already described in methods or procedural documents (e.g. water sampling).

Figure 2 is a summary of this Evidence Gathering Guideline. It shows the steps in the process and what sections of this document include further detail about each step.

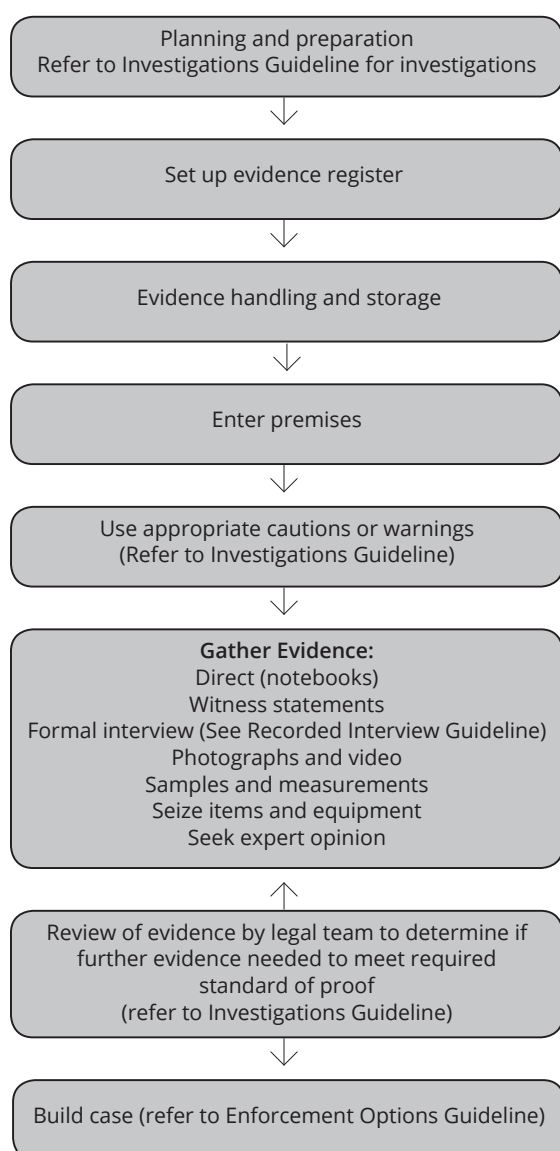


Figure 2:
Summary of the Evidence
Gathering Guideline

2. THE ROLE OF EVIDENCE

Evidence consists of documents, exhibits/ things, expert opinion, affidavits and oral testimony. **Appendix 1** provides more details of the different types of evidence. Evidence is used to prove, or disprove the elements of a particular offence or breach. The evidence gathered must be sufficient to allow Council to utilise an appropriate enforcement method such as Orders, Penalty Notices (PINs) and Court proceedings. Some enforcement methods such as Orders and PINs issued by Council officers are subject to appeal. Therefore, it is prudent for officers to ensure that they have sufficient evidence to be able to defend the chosen method of enforcement action, before commencing the action. Before deciding which enforcement mechanism is utilised, two threshold questions need to be answered in the affirmative:

1. Has the appropriate and correct notice/ order recipient or liable defendant been identified?
2. Is the available admissible evidence capable of establishing each element of the offence or breach, either on the balance of probabilities (civil) or beyond reasonable doubt (criminal)?

Please note, further information and guidance on enforcement options is included in the Enforcement Options Guideline.



GUIDING PRINCIPLES FOR EVIDENCE GATHERING

RELEVANT

The focus of the investigation should be to gather evidence that is relevant to the elements of the possible offence or breach. Relevant evidence is evidence which can assist in determining the existence of a fact in issue in the matter under investigation.

RELIABLE

Evidence collected should enable confident conclusions to be drawn. Evidence should be consistent, objective and where relevant, come from a person with particular expertise and experience.

FAIR

Treat suspects fairly and with professionalism and avoid behaviour which could be regarded as unfair or oppressive. Use only lawful and proper means to obtain evidence.



The standard of proof required, is dependent on the nature of the offence and the legislation under which proceedings are taken. Criminal proceedings require a higher standard of proof because of the potentially serious consequences of a conviction.

- In criminal proceedings, the evidence must prove each element of the offence, beyond reasonable doubt.
- In civil proceedings, each element of the offence must be proved on the balance of probabilities.

Depending upon the nature of the proceedings and/or whether the proceedings are taking place in a local court, or a court of higher jurisdiction, evidence is presented in different ways. For example, in a local court criminal prosecution, witness evidence is generally introduced by way of oral testimony. In the Land Environment Court, whether in the context of civil enforcement or criminal enforcement proceedings, witness evidence is given by way of a written, sworn and witnessed affidavit and often also oral testimony. Ultimately it is the job of the Council officer to gather admissible evidence. Should proceedings be commenced, Council's legal team will then assist Council to determine the type of proceedings which should be pursued (criminal or civil) and advise on the appropriate way of presenting admissible evidence to the court.

3.

PLANNING AND PREPARATION

Following a preliminary investigation, it is very helpful to prepare a detailed investigation plan prior to gathering further evidence. This will ensure that evidence is gathered in a logical and thorough manner, capable of proving all the necessary elements of an offence. For further information on investigations planning please refer to the HCCREMS Investigations Guideline.

The decision to involve or not involve Council's legal team early in an investigation is a matter of policy for individual Councils. While this Evidence Gathering Guideline provides instruction on how to gather evidence it is not a replacement for legal advice from the qualified individuals who will be progressing the matter through to the courts.

Effective investigation planning will involve the following steps to prepare for evidence collection:

- Setting up an evidence register.
- Planning for correct evidence handling and storage.

SET UP AN EVIDENCE REGISTER

Investigations generate large quantities of documents and information, and in a variety of formats.

The preparation of the investigation plan will give an officer an indication of the types of evidence the investigation will generate (physical document, notebook observations, photos, samples, seized equipment.). An evidence register should be created as soon as practicable to help manage the evidence that will be gathered during an investigation. The evidence register provides a detailed record of each piece of evidence, including detail of its origins and storage location. It can be an extension of the investigation plan. An example register is provided in **Table 1** overleaf.

UNIQUE IDENTIFIER	TITLE	DESCRIPTION	DATE COLLECTED & WHO BY	STORAGE LOCATION
Quickspray.air.dc – 001	Quickspray Photos (16 July 2009).	Photographs of emissions leaving boundary of premises.	16 July 2009 M. Smith.	<ul style="list-style-type: none"> • Photos on server (location). • Hardcopy on file (location).
Quickspray.air.dc – 002	Jack Thomson Interview.	Interview with business owner.	17 Jul 2009 M. Smith.	<ul style="list-style-type: none"> • DC's notebook. • Hardcopy on file (location). • Electronic on server (location).

Attention to evidence management at the commencement of the investigation will not only result in a better quality investigation but also save significant time at the post investigation phase when preparing a brief for Council's legal team.

EVIDENCE HANDLING AND STORAGE

Significant resources are invested in gathering evidence and it is therefore critical all steps in the evidence chain can be clearly demonstrated and defended if challenged in court. A clear 'chain of evidence' provides confidence that evidence, once gathered, has not been tampered with or altered in any way prior to being presented to the court. **Table 2** summarises the recommended handling and storage procedures for common evidence types.

Council's electronic document storage systems should be considered a back up for the storage of documentary evidence. The original hard copies of documents often need to be kept for use as evidence, as these cannot easily be tampered with.

Table 1:
Example evidence register

Evidence type	Recommended handling and storage
Environmental and biological samples	<ul style="list-style-type: none"> • Ensure relevant sampling procedures are followed. • Be able to account for the location of samples from time of sampling to delivery at laboratory (chain of custody). • Minimise the time from sampling to delivery to laboratory.
Official notebook	<ul style="list-style-type: none"> • Following correct procedures for use. • Keep your notebook safe at all times. • Return your notebook once completed.
Witness statements	<ul style="list-style-type: none"> • Maintain electronic copies on server in both word processing and PDF formats. • Keep the original signed hardcopy on file, along with a copy.
Formal interviews – electronic audio or video files	<ul style="list-style-type: none"> • Save copy on server of audio file on server. • Copy audio files to CD and attach to the hardcopy file associated with the investigation.
Documentation	<ul style="list-style-type: none"> • Make copies and keep originals secure on the investigation file.
Expert opinion	<ul style="list-style-type: none"> • See witness statements.
Formal interviews – paper copies	<ul style="list-style-type: none"> • See witness statements.
Electronic documentation and databases	<ul style="list-style-type: none"> • Save copy on server. • If possible print out hard copy and place on the investigation file. • At conclusion of investigation burn all files to CD and attach copy to investigation file.

Table 2:
Summary of evidence
handling and storage
procedures

4. GATHERING THE EVIDENCE

ENTERING AND INSPECTING PREMISES

Before entering any premises, an officer must ensure they are properly authorised and empowered to do so. Any evidence collected through unauthorised entry risks being inadmissible in court.

The powers of entry for the main Acts under which Councils undertake enforcement activities are summarised in **Appendix 2**. Officers are encouraged to have a thorough knowledge of where their powers of entry are derived. Officers should also familiarise themselves with the limitations of their powers whilst inspecting premises, under each Act for which they are authorised officers.

REQUIREMENT TO EITHER 'WARN' OR 'CAUTION' BEFORE QUESTIONING

Prior to the commencement of an interview, or the questioning of any person suspected of having information relevant to an investigation, it should be considered if the person is issued with either a warning or caution.

It is advisable that both warnings and cautions are issued as soon as the authorised officer has formed the opinion that the person is suspected of having information relevant to the investigation. If questioning has commenced prior to this opinion being formed then it is advisable that the questioning officer stops the line of questioning, issues the appropriate warning or caution and recommences questioning if necessary.

WARN - WHERE THERE IS POWER TO REQUIRE ANSWERS TO QUESTIONS

POEO ACT & EP&A ACT

Section 203 of the POEO Act and section 118BA of the EP&A Act provide authorised officers with the power to require answers to questions. These Acts specify the nature of the warning that must be given when questioning a person who is reasonably suspected of having knowledge of a matter which is under investigation under these Acts. This means that the conventional 'Evidence Act caution' does not apply in the context of a POEO or EP&A Act investigation.

A sample script of the warning which must be used when conducting interviews under the POEO Act and EP&A Act is provided in **Appendix 3**.

It is an offence under the POEO Act and EP&A Act for a person, who an authorised officer reasonably suspects of having information or knowledge relevant to the investigation of a pollution incident/illegal works/other offence/breach, to refuse to answer questions in relation to that incident/those works, providing that the person was warned on that occasion that failure to comply is an offence.

The risk of self incrimination is not a valid excuse for refusing to answer a question put by an authorised officer. However, the person must be told that they may object to furnishing the information or giving the answer on the ground that it might incriminate themselves. They are still required to answer the question.



FAILURE TO WARN OR CAUTION, WHEN EXERCISING FUNCTIONS UNDER CERTAIN ACTS, MAY RESULT IN THE EVIDENCE COLLECTED FROM THAT PERSON BEING INADMISSIBLE AS EVIDENCE AGAINST THAT PERSON IN CRIMINAL PROCEEDINGS.



It is very important that the warnings provided in **Appendix 3** be given at the commencement of any interview (whether on-site or formal) with a person who an authorised officer suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required to enable the authorised officer exercise any of their functions under the POEO Act or EP&A Act. This includes interviews with company representatives who are nominated to answer questions on behalf of the company in response to a section 203(2) (POEO Act) or 118BA(3) (EP&A Act) notice.

FOOD ACT

Section 37(1)(o) of the Food Act provides authorised officers with the power to require answers to questions, but does not provide for the person questioned to object on grounds of self-incrimination. The only warning required to be issued under this Act is to the following effect:

"I am an authorised officer under the Food Act 2003. I require you to answer my questions. Your refusal to answer my questions [or failure to provide me with requested records, documents or items for examination] may constitute an offence. Do you understand?"

Failure to issue this warning will not result in evidence collected being inadmissible. As provided by section 40(2) of the Food Act, it would simply mean that the person could not be prosecuted for failing to answer your questions or provide you with the requested records, documents or items.

CAUTION - IN OTHER CASES

Multiple other Acts from which councils derive their enforcement powers, do not give authorised officers the power to require answers to questions and are silent on the nature of warnings that must be given to those reasonably suspected of having knowledge of a matter under investigation. When exercising enforcement functions under these Acts the following caution should be issued prior to commencing an interview or questioning:

"You do not have to say or do anything but anything you do say or do may be used in evidence. Do you understand?"

LOCAL GOVERNMENT ACT

Although section 192(d) provides authorised officers with the power to require answers to questions, refusal to answer an authorised officer's questions when that officer is exercising functions under the LG Act does not constitute an offence except in respect of very limited lines of questioning (see sections 662, 663 and 680). It may be that section 192(d) provides an exception to the requirement to issue the Evidence Act caution before questioning. However until there is authority on this issue from the courts, it is recommended that a caution be issued before questioning any person during an inspection of a premises authorised under the LG Act.

PRIVILEGE AGAINST SELF INCRIMINATION (POEO & EP&A ACTS)

When an officer is using his or her powers under the POEO Act or EP&A Act, a person cannot refrain from answering a question on the ground that doing so may incriminate the person or make the person liable to a penalty. However, a person can object on that ground to giving the answer. If the person does object or is not told that he or she may object at the time of answering, then the answers he or she does give will not be admissible in evidence against the person.

However those answers objected to may nevertheless be used to obtain further information against that person via other means, which will be admissible. For example, once the authorised officer is given the name of the contractor who the landowner engaged to do the work, that contractor can then be interviewed to obtain evidence against the landowner. In addition, evidence given, but objected to by one person, may be used in evidence against other people responsible for the offence. It is worth noting that the privilege against self incrimination is only available for individuals, and only if they object at the time of answering the question or providing the information. The privilege does not apply to corporations. Answers and information provided by a corporation's nominated representative bind the corporation, even if the individual claims the privilege for himself/herself at the time of providing the information or answer. Furthermore, the privilege only applies to information and answers. It does not apply to records.

WARNINGS AND CAUTIONS IN THE CONTEXT OF CIVIL ENFORCEMENT ACTION

It is recommended that authorised officers issue the appropriate warning or caution, irrespective of whether the officer is contemplating at the time of the interview, civil or criminal enforcement action or perhaps no formal action at all. This will ensure that Council's enforcement options remain open throughout the course of an investigation and that an informed decision about the most appropriate course can be made, in accordance with Council's enforcement policy, once all evidence has been collected. See **Appendix 3** for details on which parts of the warning script are relevant for different levels of proceedings.

REQUIRING INFORMATION AND RECORDS TO BE PROVIDED (POEO ACT)

Section 193 of the POEO Act provides a very useful tool for gathering evidence in respect of pollution incidents. The section enables authorised council officers to issue a written notice requiring a person to furnish to the officer such information or records (or both) as the officer requires by the notice in connection with any matter within the functions of the Council under the POEO Act. A 'section 193 notice' should include the following warning in accordance with the requirements of section 212 of the POEO Act.

Warning

This warning is given for the purposes of section 212 of the POEO Act.

It is an offence under the POEO Act to fail to comply with this notice unless you have a lawful excuse for not complying. It is also an offence to provide information or do any other thing in purported compliance with this notice that you know is false or misleading in a material respect.

The fact that the information, records or answers to the questions listed above might incriminate you or make you liable to a penalty does not excuse you from having to comply with this notice.

However, if you are a person (that is, an individual rather than, for example, a company or other incorporated body) any information provided or answer given by you is not admissible in evidence in criminal proceedings against you personally (except proceedings for an offence under Chapter 7 of the POEO Act) if you object at the time of

providing the information or answer, on the ground that it might incriminate you. This does not apply to records.

It should be noted that section 212(4) of the POEO Act provides that any record furnished by a person in compliance with a requirement under a section 193 notice is not inadmissible in evidence against the person in criminal proceedings on the ground that the record might incriminate the person.

In cases where written answers to questions, information and records are all required from one person in relation to a pollution incident, a single notice can be issued to that person under sections 203(1) and 193.

CONTEMPORANEOUS NOTES

Contemporaneous notes are used to make a record of a conversation or an event at the time it occurred or shortly after.

In the case of a conversation, notes are used to record a conversation between an authorised officer and at least one other person. That is, they are an officer's notes made during the course of the discussion. Notes may be cryptic or "key-word" in format but should be legible in case they are required as evidence.

Notes may also be made immediately after a meeting or discussion. Notes may also be used to record details of an event. If the notes are to be accepted as a valid record of what occurred, then they should be made as soon as possible after the meeting or discussion while everything is fresh in the memory of the officer.

Taking contemporaneous notes is one of the most important aspects of any investigation, primarily because it increases the credibility of an officer's testimony if they can accurately recall the events, observations and discussions that occurred at or around the time of an alleged offence.

OFFICIAL NOTEBOOKS

Official notebooks are frequently used as the most reliable way of recording contemporaneous notes. Details on how they should best be used are outlined below.

1. Obtaining and using official notebooks

Officers issued with a notebook should immediately enter their name and title in the notebook by inscribing these details on the inside cover in the space provided. The notebook should be carried on their person at all times. Official notebooks are to be used to record particulars relating to possible offences against the legislation administered. The notebooks should not be used to record private notes or memoranda. If an officer is not carrying their official notebook while conducting an investigation a notepad can be used, provided they follow the methods as described for the official notebook. When returning to the office, officers should then convert the notes into a file note for proper storage. Ensure notes are then stored securely within Councils records management system.

2. Storage of completed official notebooks

Completed notebooks should be signed and dated on the inside cover in the space provided and returned to the relevant manager within Council designated responsible for the custody of such books, and apply for the issue of a fresh notebook. Completed notebooks should be kept in safe custody by the Council and should not be disposed of without the consent in writing of Records Management.

3. Information to be recorded

Notebooks should be used to record the following information in relation to a potential offence:

- Time and date of entry in notebook.
- Time and date of investigation.
- Precise location of the scene.
- Record direct conversations.
- Full particulars (names, addresses, telephone numbers, role on the site or relationship with other witnesses) of all witnesses.
- Description of site (evidence of land uses, structures, watercourses, works being undertaken).
- Number and descriptions of person(s) present.

4. Entries in official notebooks

Officers should observe the following guidelines in making notes:

- All entries must be made neatly and legible in ink/ball point pen.
- Notes may be abbreviated, but in all cases proper names and address must be written out in full. Avoid shorthand because witnesses or suspects are not going to sign something they cannot read and/or understand.
- Every entry must show the time and date at which it is made.
- All entries in the notebook must be inserted in chronological order.
- A line must be ruled immediately under every entry.
- The next entry must commence immediately below.
- Pages must not be torn out, nor inserted.
- Notes must not be erased. If any alteration is necessary then the proper procedure is to rule a line through the original notes. Do not use liquid paper.



TYPES OF WITNESSES AND HOW TO APPROACH THEM

IMPARTIAL WITNESS

Nothing to gain and nothing to lose. They are helping you with a sense of civic duty. There is an absence of any vested interest in the outcome.

BIASED WITNESS

Has a definite interest in the outcome and colours their account of events accordingly. Remember to check all witness versions with the known facts.

UNFRIENDLY WITNESS

Hostile toward the investigator. May have relatives or friends involved. May deliberately try to mislead the investigator. You should remember to keep the facts of the matter confidential and not reveal them to the unfriendly witness.

UNTRUTHFUL WITNESS

The untruthful witness may seem cooperative. There are those who invent facts in an attempt to please the investigator. Some untruthful witnesses are motivated by bias and deliberately mislead the investigator. If an officer thinks that a witness is being untruthful or if they claim to have no knowledge of the matter under investigation, take a statement from them to that effect. This reduces their value as a witness for the defence.

NERVOUS WITNESS

Adopt a caring and confident approach with the nervous witness. You need to gain their confidence.



If an error occurs when recording conversation from a suspect a line should be drawn through the mistake and the witness or suspect asked to initial the alteration.

- Any alteration should still allow for the original note to be in a completely legible form.
- All entries in a law enforcement notebook are to be made in the handwriting of the Service officer to whom the notebook has been issued.
- Where one officer records information and/or conversation and another officer is involved that other officer should be given the opportunity to endorse the notes by checking the notes a short time after they have been recorded and then initial them at the end of the entry. This adoption allows the other witness to use the notes as if they were his own.

WITNESS STATEMENTS

Witness statements are useful for gathering evidence for Local Court prosecutions. The purpose of a witness statement is to:

- Provide information about the evidence and whether that evidence supports an enforcement action.
- Guide the prosecutor if the matter goes to court. The statement provides the prosecutor with the information to lead the evidence in chief.
- May provide a reference for the witness to refresh their memory before entering court.



STANDARD JURAT

"This statement made by me accurately sets out the evidence which I would be prepared, if necessary, to give in Court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true"



The steps to follow when taking a witness statement are:

- Prepare a list of questions/issues.
- Ensure that the standard jurat is included at the commencement of the witness statement.
- Use appropriate warning or caution.
- Discuss the matter with the witness and get their full uninterrupted account.
- Identify the main points.
- Ask questions and clarify ambiguities.
- Visit the scene with the witness if practical.
- Place the witness evidence in logical order.
- Refrain from including hearsay.
- Use the exact words used by the witness.
- Where conversation occurred, quote exactly what was said, first person conversation.
- Produce exhibits.
- Read the statement over yourself and have the witness read it.
- Clarify any issues arising.
- Have the witness sign the statement on each page and date it.
- Witness all signatures and initials.

RECORDS OF INTERVIEW

For information on conducting formal interviews with witnesses or suspected offenders please refer to the HCCREMS *Recorded Interview Guideline*.

DOCUMENTARY EVIDENCE

Typical documentation that may be collected as evidence includes, but is not limited to:

- Business registration details.
- Contracts, receipts and correspondence between suppliers and purchasers.
- Waste collection and disposal receipts/ docketts.
- Electronic media containing information, images and video.

Where possible take original documents rather than photocopies. Where this is not possible view the originals and ensure the copies are accurate, clear and not missing any critical information. Ensure that a receipt is provided to the person from whom the document is taken.

If original documentation is obtained as part of an investigation make a working copy as soon as practicable and store the original in a secure location.

PHOTOGRAPHS & VIDEO

a) Photographs

Photographs should be taken to assist with describing a particular scene or setting, and describing particular proofs or elements of the offence. Examples include:

- Visible pollution at or adjacent to a particular premises.
- The state or condition of the land or environment that has resulted from a particular action, e.g. cleared land.
- The state or condition of plant and equipment that may have contributed to a particular pollution event occurring.

An example procedure for recording and storage of digital photographs can be found in **Appendix 4**.

b) Video

Video evidence may be gathered for the same reasons as photographic evidence. Record the date, time and location verbally as part of the audio recording.

MATERIAL EVIDENCE

Material evidence is objects, other than documents, which are produced for inspection by a court. This, when available, is usually a reliable form of evidence because it generally does not require testimony or inference. Unless its genuineness is in dispute, the evidence speaks for itself.

SAMPLES AND MEASUREMENTS

Specific powers to take samples and measurements (and do other things) are provided in the POEO Act, EP&A Act, Food Act and LG Act. Authorised officers should ensure that they are familiar with the different powers available under each of the Acts for which they have delegated authority.

There are a number of specific methods and procedures for the taking of samples and measurements, be they food, biological, environmental or material (waste). There are however a number of core procedures and practices that should be adhered to so as to ensure that samples and measurements are taken to an evidentiary standard, and importantly defensible in a court.

1. Competency

An officer may need to satisfy the court that they are competent in a particular sampling or measurement procedure. Competency can be shown usually through experience and qualifications.

2. Testing equipment

All equipment used should be of a type and standard acceptable to a court. This will vary depending on the types of equipment. Maintenance and calibration schedules should be maintained, including field calibrations, to help prove reliability of the equipment.

3. Containers and bags

A selection of sample containers and bags for the range of investigations officers are likely to encounter should be maintained either in the officer vehicles or in a secure location at the Council office. It is important that they are stored in a manner that prevents tampering by third parties, e.g. locked filing cabinet.

4. Method

Approved or best practice methods should be used.

5. Chain of custody

The taking of a sample for laboratory analysis and testing should be managed within a strict chain of custody process to ensure that sample integrity is maintained and

defensible. If applicable, ensure that you advise the laboratory that the samples may be used in Court procedures and therefore they should not be destroyed after analysis until express permission to do so is given by the person who delivered the sample to the laboratory.



MAKE DETAILED NOTES

When taking samples and measurements be sure to document what you do in your official notebook together with the exact date and time of when you did it.

Be detailed and clearly demonstrate how you have followed the correct procedures.

APPROVED ANALYSTS

Under s262 of the POEO the NSW Environmental Protection Authority may appoint analysts for the purpose of the Act.

This essentially means that if samples are analysed by an EPA appointed analyst they can issue a certificate regarding their analysis which is admissible as evidence in court.

If the analysis is not appointed under s262 then an affidavit is required with qualifications etc and attendance at court. The use of an EPA appointed analyst is a much simpler process.

When planning to undertake an investigation NSW Environmental Protection Authority can be contacted to obtain a copy of their current appointed analysts.



SEIZING ITEMS AND EQUIPMENT

Specific powers of seizure and provisions relating to the handling and return of seized items are contained in the relevant Acts, such as POEO Act (Part 7.4). Prior to seizing particular items, the officer, in addition to identifying the power of seizure available under the relevant Act, should consider the practical aspects of item seizure such as:

- How will it be transported?
- Does it contain hazardous or toxic substance that will require particular safety precautions?
- To where will it be taken?
- Can the security of the item once seized be assured?

A record of seizure should be created and a receipt prepared at the time or as soon as practicable thereafter. This receipt should include the following:

- Date, time, place of seizure (or possession).
- Name of person providing the item.
- Name of owner.
- Name of person taking possession of the item.
- Warrant holder (if applicable).
- Full description of the item.
- Full description of the location where the item was located prior to seizure or possession.

A record of the scene from where the item was seized should also be created, either in sketch or photographic form.

EXPERT OPINION

Expert assistance may be used where the investigating officer(s) do not have necessary technical expertise on an issue that is critical to specific elements of an offence. Examples include:

- Environmental and biological chemistry
- Environmental noise and acoustics
- Land survey
- Environmental modelling
- Aerial photography interpretation
- Engineering

Expert evidence should be gathered and presented using the same procedure and format as for a normal witness statement. The expertise of a particular expert witness must be expressed at the beginning of the statement by providing a list of their qualifications and summary of relevant experience.

5. REFERENCES AND FURTHER READING

Australian Government – Civil Aviation Authority, 2005, Enforcement Manual – CASA’s enforcement strategies for securing compliance with aviation safety standards.

Australian Government – Department of Environment and Heritage, 2006, Investigations Procedures Manual – Operational draft Version 1.5.

NSW Food Authority, 2006, Compliance and Enforcement Policy.

NSW Government, 2005, Uniform Civil Procedure Rules 2005.

NSW Ombudsman’s Office, 2002, Enforcement Guidelines for Councils and Appendices, particularly Appendix B “Tips on conducting enforcement Investigations”.

NSW Police, 2008, Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME).

“ ALL EXPERT REPORTS SHOULD INCLUDE A STATEMENT TO THE FOLLOWING EFFECT:

“I have read and agree to be bound by the provisions of the Uniform Civil Procedure Rules 2005 applicable to expert evidence and the code of conduct set out in Schedule 7 of those rules. I have prepared this affidavit/expert report in accordance with those rules.”

APPENDIX 1.

TYPES OF EVIDENCE

Appendix 1 Types of evidence

There are many different types of evidence.

A.1 Direct evidence

Evidence of something that has been directly perceived by a witness through one or more of his or her five senses - for example, has been seen, heard, smelled, felt or tasted.

Direct evidence is given by the witnesses through written statements called affidavits and/or through oral testimony in court.

A.2 Material evidence

Material objects, other than documents, which are produced for inspection by a court, are commonly called material evidence. This, when available, is usually a reliable form of evidence because it generally does not require testimony or inference. Unless its genuineness is in dispute, the material speaks for itself.

A.3 Documentary evidence

There are two types of documentary evidence:

Primary documentary evidence is the production of the original document itself.

Secondary documentary evidence is the production of a copy of the original document - for example, photocopy or certified copy, etc. It can generally only be produced after it has been shown to the court that the original is either lost or destroyed, or that it is impracticable to produce the original document.

A document is anything in or on which information is recorded and includes photographs, an audio tape, a video tape, a DVD, a computer hard drive or diskette.

A.4 Expert opinion

Someone's opinion is generally inadmissible as evidence. An exception to that rule is the opinion of an expert. Such evidence is only accepted when it is within the witness's field of expertise. The witness must first prove to the satisfaction of the court that he or she is qualified in that field.

A.5 Hearsay and circumstantial evidence

a) Hearsay

Evidence given by a witness of what was said to him or her by another person who is not called as a witness, generally cannot be relied upon to prove the truth of what was said by that other person. Such evidence is often excluded on the grounds that it is hearsay evidence. Refer to the following case study for an example of how hearsay might arise during a typical investigation and how the rule would be applied.

Case Study - Tree clearing prosecution in the Land and Environment Court under section 76A of the EP&A Act

In her affidavit, the investigating Council officer gives the following evidence:

During my inspection of the subject land on 18 June 2009, Bob Smith, the machinery operator said to me words to the following effect: "Mr Jones contracted me to do the work. He told me he wanted these trees cleared to make way for his new development."

The hearsay rule prevents this evidence from being admitted in order to prove that Mr Jones wanted the trees cleared to make way for his new development. The evidence would still be hearsay even if it was included in an affidavit deposed by Bob Smith.

However, if the evidence of the Council officer was from Mr Jones himself, assuming that the appropriate warning was given at the commencement of the interview, it would probably be admissible on the basis that it was an **admission**. This is because the *Evidence Act* provides that the hearsay rule does not apply to evidence of an **admission**.

For example:

Mr Jones said words to the following effect: "I wanted these trees cleared to make way for my new development. I am expecting the consent to come through any day. I asked Bob Smith to do the work because I knew he had machinery that could handle the job."

b) Circumstantial

Evidence from which a fact may be inferred as a natural or probable conclusion. It is usually made up of a series of items that point to the same conclusion.



APPENDIX 2. LEGISLATION REGISTER

Note: always refer directly to legislation for up-to-date information.

Act	Provision	Purpose of entry	Type of premises	Pre-conditions to entry	Notes
Companion Animals Act 1998	Section 69A	To seize or secure any companion animal that the officer is authorised to seize or secure or To determine whether there has been compliance with, or a contravention of, the Act or the regulations	Excludes residential unless there is permission, or authority is given by search warrant (Section 69A)	Giving to occupier of reasonable of notice of intention to enter the property	See Division 1 of Part 7A (i.e. sections 69A-69D) generally
EP&A Act 1979	Section 118A	To exercise any functions under the Act	Excludes residential unless there is permission, it is necessary for the purpose of inspecting work being carried out under a development consent, authority is given by search warrant, or it is necessary for inspecting the premises in order to issue a building certificate (Section 118J)	Council authorisation in writing for the purpose of allowing a council to exercise its functions, provided written notice of the intention to enter the premises is given to the owner or occupier	See Division 1A of Part 6 (i.e. sections 118A-118N) generally
Food Act 2003	Section 37	Purposes of the Act	Any premises that the authorised officer reasonably believes are used in connection with the handling of any food intended for sale or the sale of food, or any food transport vehicle or	See left	See Division 1 of Part 4 (i.e. sections 37-43) generally



Act	Provision	Purpose of entry	Type of premises	Pre-conditions to entry	Notes
			<p>Any premises or food transport vehicle, in which the authorised officer reasonably believes that there are any records or documents that relate to the handling of any food intended for sale or the sale of food</p> <p>Excludes residential except with consent, under the authority given by a search warrant or if that part of the premises is being used for the preparation or service of meals provided with paid accommodation</p>		
Local Government Act 1993	Section 191	To exercise any functions under the Act	Excludes residential unless there is permission, it is necessary for the purpose of inspecting work being carried out under an approval, or authority is given by search warrant (Section 200)	Council authorisation in writing for the purpose of allowing a council to exercise its functions, provided written notice of the intention to enter the premises is given to the owner or occupier	<p>See Part 2 of Chapter 8 (i.e. sections 191-201) generally.</p> <p>See also Section 659 – Production of certificate of authority to enter premises.</p>
POEO Act 1997	Section 111	To exercise functions under Chapter 4 – Environment protection notices	Any	Limited to functions under Chapter 4 – Environment protection notices (EPN)	Nil.
	Section 196	For determining whether there has been compliance	Excludes any part of premises used	In the case of premises on	See Part 7.4 of Chapter 7 (i.e. sections 196-202)



Act	Provision	Purpose of entry	Type of premises	Pre-conditions to entry	Notes
		with or a contravention of the Act or the regulations or any environment protection licence, notice or requirement issued or made under the Act or For obtaining information or records for purposes connected with the administration of the Act or Generally for administering the Act and protecting the environment.	only for residential purposes without the permission of the occupier or the authority of a search warrant	which the authorised officer reasonably suspects that any industrial, agricultural or commercial activities are being carried out – limited to any time during which those activities are being carried out there. In the case of any premises at or from which the authorised officer reasonably suspects pollution has been, is being or is likely to be caused – at any time. In the case of any other premises – at any reasonable time.	generally



APPENDIX 3. CAUTIONS

The text shown in [grey highlight] is indicative only and those parts can be tailored at the authorised officer's discretion to suit each individual context. The rest of the script should be followed very closely.

Warnings Script for interviews conducted under section 203 of the POEO Act 1997 or section 118BA of the EP&A Act 1979

1. I have reasonable grounds to suspect that you have knowledge of matters in respect of a [pollution incident/building works/use/other] that [is occurring/occurred/is taking place] at [place], on [date].
2. You are required by the [Protection of the Environment Operations Act 1997/Environmental Planning and Assessment Act 1979] to answer the following questions as part of our investigation of the [incident/works/use].¹ Failure to answer any of my questions is an offence.²
3. It is an offence to provide information knowing that it is false or misleading.³
4. It is also an offence to wilfully delay or obstruct me in the course of my investigation of this [incident/matter].⁴
5. You are not excused from providing me with records or information or to answer a question on the ground that the record, information or answer might incriminate you or make you liable to a penalty.⁵
6. However, you may object to answering my questions or providing me with information on the ground that it may incriminate you. If you do this at the time that you answer the question, then that information or answer is not admissible in evidence against you personally in criminal proceedings unless those proceedings relate to the provisions of answers which are false or misleading.⁶
7. Do you understand?
If a recorded interview, issue the warnings 1 to 7 above, and add:
8. This interview will be recorded. You will be provided with a copy of the recording [as soon as is practicable, i.e. either at the conclusion of the interview, or, we would suggest, within 5-7 working days].

Notes:

Since the provisions of Part 7.5 of the POEO Act and Division 1A the EP&A Act are almost identical in substance, the warnings required to be given under each Act are the same.

When exercising enforcement functions under the POEO Act or EP&A Act, only the first part of the Warning above is relevant if Council has already decided that remedial (civil enforcement proceedings) rather than punitive action (criminal prosecution) will be taken. That is, paragraphs 5 and 6 of the script need not be used where Council intends to, for example, issue an order under the EP&A Act to require certain works to be done, or to seek orders of the Land and Environment Court requiring certain remedial works to be done.

Warnings 2, 3 and 4 of the script, while not necessary to ensure the admissibility of evidence collected in **civil proceedings**, should nevertheless be used as a matter of course at the commencement of all interviews under the POEO Act and EP&A Act because:

- a) they are likely to be useful in encouraging the interviewee to co-operate, answer your questions and to do so truthfully; and
- b) if these warnings are not given, Council will not be in a position to issue a PIN or otherwise prosecute for failure to answer the questions or the provision of false or misleading information.

¹ POEO Act, section 203(1) and EP&A Act, section 118BA(1)
² POEO Act, section 212(1) and EP&A Act, section 118N(1)
³ POEO Act, section 211(2) and EP&A Act, section 118N(1)(c)
⁴ POEO Act, section 211(3) and EP&A Act, section 118N(1)(b)
⁵ POEO Act, section 212(2) and EP&A Act, section 122U(2)
⁶ POEO Act, section 212(3) and EP&A Act, section 122U(3)(a)



APPENDIX 4. ELECTRONIC STORAGE OF PHOTOGRAPHIC EVIDENCE

Appendix 4 Electronic storage of photographic evidence

Digital camera:

- Reformat the memory card at the start of a new job.
- Keep a log for each photo taken, noting the GPS location, direction the camera is facing, brief description of photos content, time and photographers name. (see attachment A: Photo log)
- Never delete photos relevant to an investigation or surrounding those that are relevant to an investigation. The memory card keeps a log of all the photos taken and there will be a recorded gap in the sequence of photographic evidence.
- On return to the office, down load the photos and save to disk. Save a working copy to your network drive.
- Place the disk in an envelope and seal using a completed Master CD Seal sticker. Place the master copy CD in the filing cabinet under the appropriate master number.
- Delete the images from the camera and reformat the memory card.
- Update case management system to indicate where CD is stored.

Printing images:

- Printing will be dependant upon your resolution requirements. For working purposes printing onto standard A4 paper using a colour printer will usually suffice.
- For all briefs of evidence, print a 'thumb nail' numbered overview of all the photos.
- For court purposes, exhibit the master CD to your statement/affidavit. Print a selection of images for use in your statement. Mark the location and direction of each numbered photograph on a site plan (see following for an example of a presentation form).
- Avoid waste by only printing up single copies of images and images on photo quality paper when you are sure that you need them for a specific purpose.



Photographic log

Investigation:		
Day:	Date:	Photographer:

Photo	Time 24hr	Location (from where you took the photo)	Direction (Bearing)	Subject (what it is)

Page: _____ of _____



TITLE



Date:		Time:	
Photographer:			
Description:			

