

Item No:	R4 Recommendation to Council
Subject:	COMPLIANCE AND ENFORCEMENT OF UNAUTHORISED WORK, INCLUDING A REVIEW OF COUNCIL'S ENFORCEMENT POLICY 2007
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File No:	22/42564
Purpose of the Report:	To respond to a Notice of Motion requesting a review of Council's Enforcement Policy including options to better protect heritage items. To respond to a NOM requesting ways to make private certifiers more accountable for addressing unauthorised work. To obtain Council's approval to exhibit Draft Woollahra Enforcement Policy 2022.
Alignment to Delivery Program:	Strategy 4.6: Ensure that planning and building requirements are complied with.

Recommendation:

THAT Council:

- A. Receive and note the report on the review of Council's Enforcement Policy and approach to unauthorised work on heritage items, and private certifiers.
- B. Endorse exhibition of the Draft Woollahra Enforcement Policy 2022 as contained at Attachment 2 of the report to the Environmental Planning Committee of 4 April 2022 for a period of 28 days.
- C. Note that a further report be submitted to Council following the conclusion of the exhibition period for final consideration and adoption of a new Enforcement Policy.

Executive Summary:

Council has long been concerned about unauthorised works including breaches of consent and requested that staff:

- identify ways to strengthen Council's compliance and enforcement actions, particularly in relation to heritage items
- require that DAs involving heritage items submit a conservation management plan (CMP), and
- look at the role of private certifiers and identify how they can be made more accountable for addressing unauthorised work and other non-compliances.

In response, Council's *Enforcement Policy 2007* has been reviewed and the *Draft Woollahra Enforcement Policy 2022* has been prepared by Lindsay Taylor Lawyers in consultation with key staff. The Draft Policy reflects best practice, as set out in the *NSW Ombudsman's Compliance and Enforcement Model Policy* (2015) and better articulates Council's processes and response to compliance matters including alleged unlawful activity on heritage items.

The *Draft Woollahra Enforcement Policy 2022* is provided at **Attachment 2** for Council to consider for endorsing for the purpose of public exhibition.

Staff have looked at the DA process and identify that Council cannot require an applicant to submit a CMP as part of the DA, and the Department of Planning and Environment (DPE) would not support any such proposal to allow this. The current provisions in Woollahra LEP clause 5.10

provide appropriate scope for Council's heritage officers to require a CMP (or a HIS) having regard to the heritage item and the development proposal.

Similarly, staff have looked at the role of private certifiers and identify that Council cannot introduce additional requirements to make certifiers more accountable, as they have clear statutory obligations and functions under the legislation.

Background:

At its meeting of 27 July 2020 Council adopted the following Notices of Motion (NOM) relating to enforcement and compliance matters which are addressed in this report:

- **Conservation of heritage listed items**

That Council:

- a. Notes Council's heritage items listed under Schedule 5 of Woollahra LEP 2014, the character they give our local area, and the high value the Woollahra community places on heritage.*
- b. Notes the Woollahra Local Strategic Planning Statement captures Council's intent to proactively manage the conservation of our area's rich and diverse heritage.*
- c. Notes its powers under clause 5.10(6) to request a Conservation Management Plan in connection with proposed development of listed heritage items.*
- d. Requests staff prepare a report covering the following:*
 - (i) review of Council's current approach on enforcement in relation to unauthorised works on listed heritage items per Schedule 5 of Woollahra LEP, including review of Council's 2007 Enforcement Policy.*
 - (ii) recommended options to strengthen Council's role in taking action against unauthorised works on listed heritage items.*
 - (iii) recommended options to embed the requirement for a Conservation Management Plan in appropriate circumstances in connection with proposed development applicable to all heritage listed items per Schedule 5 of Woollahra LEP.*

- **Private certifiers**

THAT a report be presented to the appropriate committee on how private certifiers may be held to better account in relation to breaches of development consents.

Discussion:

Review of the Woollahra Enforcement Policy

Woollahra Council's *Enforcement Policy 2007* (the current Policy) at **Attachment 1** sets out Council's approach to the investigation and enforcement of alleged unlawful activity. The current Policy was adopted in April 2007 and was informed by Council's *Policy on Unauthorised Uses, Buildings and Works* (1999), the NSW Ombudsman's Model Policy and Enforcement Guidelines for Councils (2002) and advice from Lindsay Taylor Lawyers (LTL).

The current Policy has been a useful document but after 15 years and changes to the various statutes, including the *Environmental Planning & Assessment Act 1979* and Regulations, and increased concerns from Councillors, it was time for the policy to be updated.

LTL were engaged to review the current Policy having regard to:

- issues raised at the Councillor briefing and Q&A session on compliance and enforcement options held on 31 May 2021 and presented by representatives of LTL
- the need to have a practical document that assists enforcement officers to make consistent enforcement decisions

- best practice as set out in the NSW Ombudsman's updated [*Model Policy and Enforcement Guidelines for Councils*](#) (2015)

In consultation with Council's staff, LTL have prepared the *Draft Woollahra Enforcement Policy 2022 (Attachment 2)* for Council's consideration.

Draft Enforcement Policy

The *Draft Woollahra Enforcement Policy 2022* (Draft Policy) is informed by Council's current Policy and the NSW Ombudsman's Model Policy, but also includes additional content. In particular, the Draft Policy has been structured so that it is a more active document that directly assists Council staff in making decisions; adopting a 'compliance model' approach that focuses on the seriousness of the breach (e.g. low, medium, high) and the enforcement outcome to be achieved.

The following is a summary of each section in the Draft Policy:

1. **Introduction** – sets out the purpose and objective of the Policy, and other matters including principles that underpin Council actions relating to compliance and enforcement.
2. **Responding to reports about Unlawful Activity** – identifies how Council will respond to reports alleging unlawful activity, what Council expects from people who report allegations of unlawful activity and what people can expect from Council officers. It also includes a section on neighbour disputes with information about how neighbours can resolve their disputes including referral information resources.
3. **Investigating alleged unlawful activity** – set outs out the investigation powers and tools available to Council officers and establishes the factors to determine whether further investigation is required. Includes a table setting out "*A - Factors which support further investigation*" and "*B - Factors which do not support further investigation*".
4. **Taking enforcement action** – highlights that taking enforcement action is discretionary and where Council elects not to take action any person can commence their own proceedings. Importantly the section sets out the matters that need to be considered (i.e. determining the seriousness of the breach, the level of harm, culpability of the offender and the impact and public interest of any enforcement action), introduces the use of a rating scale of low, medium and high, and discusses the range of individual enforcement options available. The enforcement response will escalate based on the seriousness of the breach and appropriateness of enforcement action in the circumstances.
5. **Commencing legal proceedings** – sets out the matters to consider in deciding whether to commence criminal or civil proceedings including the outcome being sought, the reasonable prospects of success, whether the public interest requires legal action be pursued and the time within which to commence proceedings.
6. **Prosecutions – additional matters** – prosecution is the strongest regulatory response to a breach of the legislation because of the criminal liability that may be imposed. This section sets out the additional matters that need to be considered if this action is taken.
7. **Accountability** – enforcement activities necessarily involve the use of discretion by Council officers. This section identifies that only officers with the appropriate appointment or delegation are authorised to approve an enforcement action and that Council will seek legal advice prior to proceeding with the more serious enforcement action such as prosecution.
8. **Shared enforcement responsibilities** – sometimes unauthorised activity will involve other authorities (e.g. EPA, NSW Building Commissioner, NSW Police, Liquor and Gaming NSW etc.) and the Policy proposes that Council will adopt a collaborative and co-operative

approach where there are shared legislative responsibilities.

9. **Role of the Principal Certifier** – advises that where a private certifier is appointed as the Principal Certifier (PC) for a development, the PC is responsible for ensuring compliance and that any concerns about non-compliance should be directed to the PC in the first instance. Further highlights that the regulator of private certifiers is NSW Fair Trading, not Council.
10. **Role of Councillors in enforcement** – identifies that individual Councillors do not have the right to direct Council Officers in their day-to-day activities, but Councillors can help individuals who raise concerns with them by satisfying themselves that Council's policies are being complied with.
11. **Acknowledgements** – acknowledges the other policies and publications that the Policy has been informed by.

Heritage items and the Draft Enforcement Policy

Council is particularly concerned with compliance and enforcement actions relating to heritage items listed in Woollahra LEP. Council's above mentioned NOM (Part d(i) and (ii)) requested that staff review the current approach on enforcement in relation to unauthorised works on heritage items and provide options to strengthen Council's role in taking action.

The Draft Policy does not establish a separate approach for investigating and enforcing unauthorised work to heritage items, because not all cases of alleged unauthorised works to heritage items need to be prioritised or escalated – it all depends on the circumstances of the case. This approach is consistent with the NSW Ombudsman's Model Policy and the approach of other councils.

However the Draft Policy highlights the importance of the heritage status of a property and/or its location within a heritage conservation area and forms a critical head of consideration in setting priorities for investigations and determining the available enforcement options.

It is considered that the Draft Policy provides a strong decision-making framework for staff to follow in relation to unauthorised work to heritage items. This framework acknowledges the importance of heritage to the Woollahra LGA whilst also ensuring that Council takes individual circumstances into account when determining the enforcement response so that the level of enforcement action is proportionate to the level of risk and seriousness of the breach.

Even with the clear decision-making framework set out in the Draft Policy the process for taking action in regards to potential breaches and unauthorised work to heritage items may take longer than Council and community would like. This is because of legislative provisions that can delay or create barriers to Council's investigations, such as provisions relating to power of entry to 'premises used for residential purposes'. In June 2021 these concerns were raised in Council's submission to the NSW Government inquiry into the *Review of NSW Heritage Legislation: Discussion Paper* (April 2021), where Council advocated for a range of enhanced enforcement powers for heritage items including greater power to access premises to inspect premises for breaches, and broad ability to use penalty enforcement notices to provide on the spot fines.

The [NSW Government published its response to the inquiry](#) on 9 December 2021. It identifies support to improve intermediate enforcement powers under the Heritage Act, including specific support to "*clearly confer and define powers of entry and inspection, introduce the ability to issue penalty infringement notices and restoration orders, allow an order restricting harm to be notified verbally in the first instance and confirmed in writing*" (page 5). These legislative amendments have not yet been drafted. If they are made available for consultation, Council's staff will make a further submission having regard to how the proposed changes will improve investigation and enforcement of unauthorised work on heritage items in Woollahra.

Role of the conservation management plan

Council's NOM (Part d(iii)) asked staff to identify options to embed the requirement for a Conservation Management Plan (CMP) for DAs involving heritage items listed in Woollahra LEP.

The DA framework for heritage items has been reviewed and it is considered that Council cannot embed requirements for CMPs because such a change would:

- be inconsistent with the intent of clause 5.10 Heritage conservation, which is a compulsory standard clause under the *Standard Instrument (Local Environmental Plans) Order 2006* (SI Order); and
- be inconsistent with the NSW Heritage Council's current position to move away from use of CMPs in favour of other shorter conservation management documents.

Woollahra LEP

[Woollahra LEP, clause 5.10 Heritage conservation](#), is a compulsory standard clause under the SI Order, and if Council wants a provision for heritage conservation in its LEP it must use this standard clause without amendment or alteration. The following terms are also defined in the [Woollahra LEP dictionary](#) and cannot be changed: *heritage conservation management plan*¹, *heritage impact statement*² and *heritage management document*³.

The Department of Planning and Environment (DPE) would not support any change to clause 5.10 to embed a requirement for a CMP. To the contrary, in March 2011 clause 5.10(5) was amended to include a reference to "*heritage management documents*" for the specific purpose of providing "*more flexibility to determine the level of analysis required to support an application where heritage is involved, and reduce costs to the applicant wherever possible*". (Department of Planning Circular (PS 11-011)) The clause currently states the following;

- (5) *The consent authority may, before granting consent to any development—*
- (a) *on land on which a heritage item is located, or*
 - (b) *on land that is within a heritage conservation area, or*
 - (c) *on land that is within the vicinity of land referred to in paragraph (a) or (b),*
- require a **heritage management document** to be prepared that assesses the extent to which the carrying out of the proposed development would affect the heritage significance of the heritage item or heritage conservation area concerned.*

In Woollahra, all development applications (DAs) involving heritage items require a heritage impact statement (HIS). Council's heritage officers advise on a case by case basis whether the HIS submitted is sufficient and whether a CMP is also required having regard to matters including the significance of the item and its elements, complexity of the item being managed and its conservation needs, the nature and scope of work and potential impacts on heritage significance. This decision making is guided by long established best practice documents published by the NSW Government including [Local Government Heritage Guidelines \(2002\)](#), [Conservation Management](#)

¹ *heritage conservation management plan* means a document prepared in accordance with guidelines prepared by the Public Service agency responsible to the Minister administering the Heritage Act 1977 that documents the heritage significance of an item, place or heritage conservation area and identifies conservation policies and management mechanisms that are appropriate to enable that significance to be retained.

² *heritage impact statement* means a document consisting of—

- (a) a statement demonstrating the heritage significance of a heritage item or heritage conservation area, and
- (b) an assessment of the impact that proposed development will have on that significance, and
- (c) proposals for measures to minimise that impact.

³ *heritage management document* means—

- (a) a heritage conservation management plan, or
- (b) a heritage impact statement, or
- (c) any other document that provides guidelines for the ongoing management and conservation of a heritage item, Aboriginal object, Aboriginal place of heritage significance or heritage conservation area.

[Documents - Guidelines on Conservation Management Plans and Other Management Documents](#)
and [Statements of Heritage Impact](#).

A CMP and HIS have different functions in the assessment and management of heritage items. Not all types of work or heritage items warrant preparation of a CMP, and it is not a proportionate response to require all DAs to submit a CMP. Furthermore, the requirement for a CMP will not prevent anyone from undertaking unlawful activity, regardless of the documentation needed at the DA stage.

Heritage Council review of CMPs

The Heritage Council reviewed CMP practices in 2019/20, with the aim of streamlining the preparation of CMPs, reducing costs to property owners, and identifying where shorter conservation management documents such as conservation management strategies, HISs and other similar documents may be used in place of CMPs. Council's request to embed requirements for CMPs in the Woollahra LEP would be inconsistent with the Heritage Council's current position on the use of CMPs.

Having regard to the above matters, it is found that there is no heritage or planning justification for embedding additional requirements for CMPs to heritage items listed in Woollahra LEP and any such proposal would not be supported by the DPE or the Heritage Council.

Private certifiers and accountability for unauthorised work

In reviewing Council's Enforcement Policy consideration has also been given to the role of private certifiers and how they can be made more accountable for addressing unauthorised work and other non-compliances.

In the Woollahra Municipality a private certifier is appointed as the Principal Certifier on most building sites. That means that the principal certifier has the day-to-day responsibility for ensuring that building work complies with the development consent, complying development certificate and/or construction certificate.

In NSW a certifier is a public official that is registered by NSW Fair Trading. Certifiers have clear statutory obligations and functions under the *Building and Development Certifiers Act 2018* (B&DC Act), the *Environmental Planning and Assessment Act 1979* (EPA Act) and associated regulations. Within this legislative framework there is no scope or authority for Council to introduce additional requirements to make private certifiers accountable beyond their statutory obligations and functions.

However the NSW Government, in response to the *Independent Review of the Building Professionals Act 2005* (also known as the 'Lambert Review'), has commenced a suite of reforms to improve the accountability of private certifiers. These make it clear that certifiers must act in the public interest, while establishing stronger accountability, governance and oversight mechanisms which seek to improve building and development compliance.

In particular, the following two (2) key changes have been introduced which will make private certifiers better account for breaches of development consents and other non-compliances;

- Mandatory obligation on the principal certifier to issue a written directions notice (WDN) within 2 days from when the certifier becomes aware of a breach or a possible breach. The requirement to issue a WDN removes any uncertainty about the role of the principal certifier in enforcing conditions of development consent.

- Publication of the *Practice Standard for Registered Certifiers* which provides a clear and specified standard of what is expected of certifiers in undertaking their role and functions as public officials. While the Practice Standard is limited to 'new residential apartment buildings' it includes a number of generic provisions that would relate similarly to any class of building.

Written directions notice (WDN) under EPA Act

The WDN is a compliance power for principal certifiers under section 6.31 of the EPA Act, which establishes a mandatory obligation on the certifier to act on non-compliant aspects of a development. These powers commenced on 1 December 2019 and replace the more limited and discretionary power that the principal certifier previously had to issue a 'notice of intention to issue an order' to a builder/owner which set out the proposed terms of the breach and period for compliance.

A non-compliance for the purpose of a WDN is any work that does not accord with the relevant development consent or complying development certificate, including departures from any approved plans, development consent conditions and the approved construction certificate together with its approved plans and specifications which ultimately form part of the development consent.

Examples of non-compliances for which a WDN should be issued include:

- A builder has poured the footings and they are not located correctly. Without remedial action the building walls will be too close to the boundary.
- The tree-protection zone required by the development consent has not been provided.
- An internal floor layout is inconsistent with the development consent. For example, the lounge, kitchen and dining area layout has been reversed.
- A heritage protected building façade has not been painted to the approved colour scheme.
- A dwelling has been approved with an upper storey ceiling height of 2.4m but wall frames have been installed with a ceiling height of 2.7m.

Source - Department of Planning, Industry and Environment "*Guidelines for Written Directions Notices November 2019*"

Once the principal certifier becomes aware there is a likely non-compliance, the certifier must issue a WDN to the person responsible (i.e. the principal contractor or owner-builder) within 2 days. The WDN must be issued in the form approved by the Planning Secretary and include a description of the non-compliance, action to be taken to remedy the non-compliance and the timeframe to remedy. Within a reasonable period after the expiry of the time permitted to remedy the non-compliance, the principal certifier must return to site to assess whether the WDN has been complied with, making a record of the inspection and provide a copy to the responsible person.

If the responsible person fails to comply with the WDN, the principal certifier must provide a copy of the completed WDN and supporting evidence to Council within 2 days after the inspection was carried out. Council then becomes responsible for any further enforcement action.

Council has a range of enforcement powers under the EPA Act, with the particular enforcement action to be initiated being determined in accordance with Council's Enforcement Policy.

New Practice Standard and mandatory obligation to act on non-compliances

The [Practice Standard for Registered Certifiers](#) came into effect on 1 September 2020. The purpose of the Standard is to improve industry practice by comprehensively setting out NSW Fair Trading's expectations regarding the conduct of certifiers performing their role as legislated under the EP&A Act and B&DC Act.

Chapter 7 of the Standard titled “Compliance” introduces new expectations for certifiers that will require them to better account for unauthorised and other non-complying work. In addition to addressing requirements for WDNs, this chapter establishes that the certifier cannot ignore non-compliances. If the certifier becomes aware of non-compliances where the ability to issue a WDN does not apply or the non-compliance relates to a matter that is not addressed through carrying out certification work e.g. unauthorised works, the certifier must:

- notify the owner and Council of the non-compliance
- make a record of action taken, and
- if the matter was the subject of a complaint made to the certifier, advise the complainant of any action taken.

The Standard also establishes requirements for the principal certifier to keep a record of complaints they receive and include any action taken or any response made in relation to the complaint. The record must be kept for 10 years from the date the complaint was received by the Principal Certifier. This is another way to help make certifiers more accountable for activities on building sites.

At this stage the Practice Standard (except for Chapters 1 and 2) focuses on residential apartment buildings (class 2 buildings under the BCA) and other multi-classified buildings, such as mixed-use developments, that contain a class 2 component. It is intended that the Practice Standard will be progressively broadened until it covers all classes of building work.

Having regard to the above, it is considered that Certifiers have very clear statutory obligations and functions under the legislation and there is no scope or authority for Council to introduce additional requirements or make private certifiers more accountable. Council’s Compliance Manager has been actively engaged with the NSW Government to inform the suite of reforms that the State Government is progressively introducing to improve the quality and compliance of construction work across NSW.

Options:

As a consequence of this report Council may resolve to do one of the following:

- Endorse the *Draft Enforcement Policy 2022* at **Attachment 2** for the purpose of placing it on public exhibition,
- Request staff to amend the Draft Policy at **Attachment 2** before it is placed on public exhibition, or
- Not endorse the Draft Policy and instead retain the current *Enforcement Policy 2007* at **Attachment 1**.

Community Engagement and / or Internal Consultation:

Staff from across Council have been consulted on the Draft Enforcement Policy 2022 and there is general support for the compliance model approach.

A Councillor briefing and Q&A session was held on 31 May 2021 where representatives from Lindsay Taylor Lawyers discussed compliance and enforcement issues to inform preparation of the Draft Policy.

If Council supports the Draft Policy it is recommend that the Draft Policy be placed on public exhibition for at least 28 days for comment.

Policy Implications:

The *Draft Enforcement Policy 2022* is intended to replace the current *Enforcement Policy 2007*.

If Council supports the Draft Policy to be placed on public exhibition, LTL will work with staff on the development of an operational manual to support and guide staff's practical application of the Policy document on a day-to-day basis. The operational manual, referred to as a Compliance Manual at the LTL Councillor briefing in May 2021, will be finalised before the final Policy document is submitted to Council for adoption following the public consultation period.

Financial Implications:

NIL

Resourcing Implications:

NIL

Conclusion:

Council's current Enforcement Policy has been reviewed. LTL have undertaken the review in consultation with Council's staff and prepared the *Draft Woollahra Enforcement Policy (Attachment 2)*. The Draft Policy takes a compliance model approach which seeks to address Councillors' feedback by more clearly setting out what type of enforcement action should be taken and when. It reflects best practice and better recognises the general importance of heritage protection in Woollahra.

If Council supports the Draft Policy it is recommended that it is placed on public exhibition for at least 28 days for comment. Following exhibition a further report will be prepared, detailing the submissions and any proposed amendment to the Draft Policy for Council's consideration.

The operational *Compliance Manual* discussed at the LTL Councillor briefing in May 2021, will be finalised before the final Policy document is submitted to Council for adoption.

Council has no authority to embed additional requirements for CMPs for DAs to heritage items and no authority to introduce additional requirements or make private certifiers more accountable. However the *Draft Enforcement Policy* will enhance Council's response to, and enforcement of, alleged unlawful activity that is within the scope of Council's authority and it is recommended that Council endorses the Draft Policy for public exhibition.

Attachments

1. Woollahra Enforcement Policy 2007
2. Draft Woollahra Enforcement Policy 2022