

## Compliance and Enforcement

**DIVISION:** Environment & Planning  
**SECTION:** Development & Building Services, Environment & Health  
**SUBJECT:** Compliance and Enforcement Policy  
**FILE NOS:** 104/5, 5210/6  
**APPROVAL DATE:** 10<sup>th</sup> February 2010      **MINUTE NO:** 31/10

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### OBJECTIVE

The policy will provide guidance to staff in dealing with Compliance and Enforcement issues, as well as informing the community about the processes available to resolve them.

### POLICY

The policy sets out the procedures for Council staff to follow in different enforcement scenarios. The flow charts are guidelines on how staff will handle various matters relating to this aspect of Council operations.

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*This policy has been written to conform to the standards as recommended in the NSW Ombudsman's Enforcement Guidelines for Councils, 1<sup>st</sup> Edition, June 2002.*

## **1.0 About this Policy**

### **1.1 Purpose of this Policy**

This policy aims to:

- i. Assist council to act ***promptly, consistently and effectively*** in response to allegations of unlawful activity.
- ii. Outline the procedures which are fair, just and allow staff to administer Council's legal responsibilities effectively.
- iii. Enhance cost effectiveness by ensuring all necessary preparatory work is completed prior to a matter being referred to Council's solicitor by staff to Council.

### **1.2 Variations from this Policy**

The enforcement of development control policies and other regulations is often complex and may, in some cases, require Council to depart from the guidelines in this policy. Therefore Council may, where it deems appropriate, allow a variation to this Policy in order to achieve its aims and objectives.

### **1.3 Objective of Policy**

The aim of this policy is to establish clear guidelines for the exercise of discretion in dealing with action requests or complaints about unlawful activity. It provides workable guidelines on:

- i. How to assess whether complaints of unlawful activity require investigation;
- ii. Options for dealing with unlawful activity; and
- iii. How to decide whether enforcement action is warranted.

### **1.4 Application of Policy**

This policy applies to the investigation and enforcement of complaints about unlawful activity or a failure to comply with the terms or conditions of approval, consent, licences and orders issued under the following legislation:

- i. Environmental Planning and Assessment Act 1979;
- ii. Local Government Act 1993;
- iii. Protection of the Environment Operations Act 1997;
- iv. Swimming Pools Act 1998;

- v. Wingecarribee Local Environmental Plan;
- vi. Any Development Control Plans; and
- vii. Any Local Orders Policy created under the Local Government Act.

## **1.5 Responsibilities**

All Council staff who deal with written and verbal action requests or complaints alleging unlawful activity are responsible for implementing these policy guidelines.

All notifications of alleged unlawful activity should be logged in the **Corporate Action Request** system and directed to the responsible person. Schedule 1 lists the appropriate referral positions for the different types of unauthorised or unlawful activity.

## **1.6 Definitions**

Unlawful activity is any activity or work that has been or is being carried out:

- i. Contrary to the terms or conditions of a development consent, approval, permission or license;
- ii. Contrary to an environmental planning instrument that regulates the activity or work that can be carried out on particular lands;
- iv. Contrary to a legislative provision regulating a particular activity or work; or
- v. Without the required development consent, approval, permission or license.

## **1.7 Investigating unlawful activity**

Not all complaints will warrant investigation. Council will consider a range of factors when deciding whether to investigate. These include:

- i. Is the matter within the jurisdiction of Council?
- ii. Is the complaint premature, eg: does it relate to some unfinished aspect of work that is still in progress?
- iii. Is the activity or work permissible with or without consent?
- iv. If the activity is permissible with consent, is there a consent in place?
- v. Is it possible to determine from the information available to council whether the activity or work is permissible with without consent and/or whether all conditions of consent are being complied with?

- vi. Is the complaint trivial, frivolous or vexatious?
- vii. Has too much time elapsed since the events that are the subject of the complaint took place?
- viii. Is there another body that is a more appropriate agency to investigate and deal with the matter?
- ix. Is the activity having a significant detrimental effect on the environment or does it constitute a risk to the public health and safety?
- x. Does the complaint indicate the existence of a systemic problem eg: If the complaint is one of a series, could there be a pattern of conduct or a more widespread problem?
- xi. Has the person or organisation complained of having been the subject of previous complaints?
- xii. Does the complaint have special significance in terms of Council's existing priorities?
- xiii. Are there any significant resource implications in relation to an investigation and any subsequent enforcement action?
- xiv. Is it in the public interest to investigate the complaint?

If a decision is made not to investigate, the decision must be recorded with the reasons for that decision.

The detailed recording of investigations is critical for public accountability and is the official record of future legal or council actions. A proforma that details the expected information to be obtained is provided in Schedule 2. All investigation actions, records and correspondence is to be recorded in the Corporate records system

## **1.8 Responding to complaints**

All action requests or complaints about alleged unlawful activity should be acknowledged within 10 working days and a decision made within a reasonable time period depending on the complexity of the issues involved, or what action Council has or plans to take. Complainants should be kept informed of Councils actions.

## **1.9 Options for dealing with confirmed cases of unlawful activity**

Council will try to use the quickest and most informal option to deal with unlawful activity whenever possible unless there is little likelihood of compliance with such options.

Approaches to be considered will include:

- i. Referring the complaint to external agencies for further investigation or prosecution.
- ii. Taking no action on the basis of a lack of evidence or for some other appropriate reason.
- iii. Counselling the subject of the investigation to educate them on the relevant Council requirements.
- iv. Negotiating with the subject of the investigation and obtaining some undertaking to address the issue of concern arising from the investigation eg: An application for modification of development consent.
- v. Issuing a letter requiring work to be done or activity to cease in lieu of more formal action.
- vi. Issuing a notice of intention to serve an order or notice under the relevant legislation, followed by service of an appropriate order or notice under the relevant legislation.
- vii. Issuing a notice requiring work to be done under various legislation.
- viii. Starting proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the relevant Act or Regulations.
- ix. Seeking injunctions from the Land and Environment Court or the Supreme Court.
- x. Issuing a summons in the local court.
- xi. Issuing a Penalty Infringement Notice.
- xii. Commencing proceedings for an offence against the relevant Act or Regulations.
- xiii. Carrying out works specified in an order under the relevant acts at the cost of the person served with the order.

### **1.10 Using Discretion in considering enforcement actions**

In forming a decision as to whether a prosecution or enforcement action should occur, Council staff and Councillors need to be aware of the objectives of both the Local Government Act 1993, and Environment Planning and Assessment Act 1979. These are reproduced in part below:

#### Local Government Act 1993

*A council has the following charter:*

- i. To exercise community leadership*

- ii. *To properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development*
- iii. *To have regard to the long term and cumulative effects of its decisions*
- iv. *To facilitate the involvement of councillors, members of the public, users of facilities and services and council staff in the development, improvement and co-ordination of local government.*
- v. *To keep community and the State government (and through it, the wider community) informed about its activities.*
- vi. *To ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly where an activity of the council is affected.*

#### Environmental Planning and Assessment Act 1979

To encourage

- i. *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment, and*
- ii. *the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and*
- iii. *ecologically sustainable development, and*
- iv. *to provide increased opportunity for public involvement and participation in environmental planning and assessment.*

Council has discretion in deciding whether to take enforcement action in response to evidence of unlawful activity. Council will exercise this discretion in the context of its broad regulatory responsibilities for the administration of justice and the enforcement of the law.

The use of discretion was covered in the judgement of the NSW Court of Appeal in *Ryde City Council v Echt and Anor* (2000) NSWCA 108. The following is a summary of some of the key issues.



- *While the Council in question had a responsibility to enforce the law, this does not mean that there is a legal obligation to act or a statutory power which is enforceable at the insistence of a third party.*
- *Statutory bodies, and those exercising the prerogatives of the Crown, which have responsibility for the administration of justice and the enforcement of the law may choose not to enforce the law in particular circumstances or at all.*
- *A repository of a statutory power may commit a relevant legal error by failing to turn his or her mind to the exercise of that power.*

Like any discretionary decision, there are several important requirements that Council must observe for the decision to be lawful.

- i. The power must be used for proper purpose (i.e.: within the scope and purpose for which the power was given).
- ii. The decision-maker must give proper, genuine and realistic consideration to the merits of the particular case.
- iii. The decision-maker must consider only relevant considerations and must not consider irrelevant considerations in reaching a decision (i.e.: the decision must not be manifestly unreasonable).
- iv. The decision-maker must give adequate weight to a matter of great importance but not give excessive weight to a relevant factor of no great importance.
- v. The decision-maker must not exercise a discretion in a way that is so unreasonable that no reasonable person could have exercised the power (i.e.: the “Wednesbury” principle of irrationality).
- vi. The decision-maker must not make a decision that is arbitrary, vague or fanciful.
- vii. The decision-maker must exercise a discretion independently and not act under the dictation or at the behest of any third person or body.
- viii. The decision-maker must not fetter its discretion by, for example, adopting a policy that prescribes its decision-making in certain circumstances.
- ix. The decision-maker must observe the basic rules of procedural fairness (i.e.: natural justice).
- x. The decision-maker must not act in a way that is biased or conveys a reasonable perception of bias.

### **1.11 Taking enforcement action**

When deciding whether to take enforcement action, Council will consider the circumstances of the case. These include:

- i. Has Council created an estoppel situation?
- ii. Is the breach a technical breach only?
- iii. When was the unlawful activity carried out and for how long?
- iv. How does the unlawful activity affect the natural or built environment and the health, safety and amenity of the area?
- v. Would consent have been given if it had been sought?
- vi. Can the breach be easily remedied?
- vii. Does the person in breach show contrition?
- viii. Are there any particular circumstances of hardship affecting the complainant or the person the subject of the complaint?
- ix. Has the person the subject of the complaint received a previous warning or other non-coercive approach, or has formal legal action been taken?
- x. Would an educative approach be more appropriate than a coercive approach?
- xi. What are the costs and benefits of taking formal enforcement action as opposed to taking informal or no action?
- xii. What are the chances of success if the proposed enforcement action is challenged in court?
- xiii. Is there a draft environmental planning instrument on exhibition that would make the unauthorised use legal?
- xiv. What action would be reasonable and proportionate in this case?
- xv. What would be in the public interest?

### **1.12 Delegations for enforcement action**

Council staff with delegation to initiate various levels of enforcement action are set out in Schedule 3. This schedule lists who has decision-making power to issue stop work orders, to serve notices, serve orders, and infringement notices, and to initiate proceedings etc.

## **2.0 Process Flow Charts- Development and Building Services.**

The flow charts provided are to be used as a guide to the steps to be followed when dealing with unlawful activities, under the Environment Planning and Assessment Act 1979, Swimming Pools Act 1992, Local Government Act 1993.

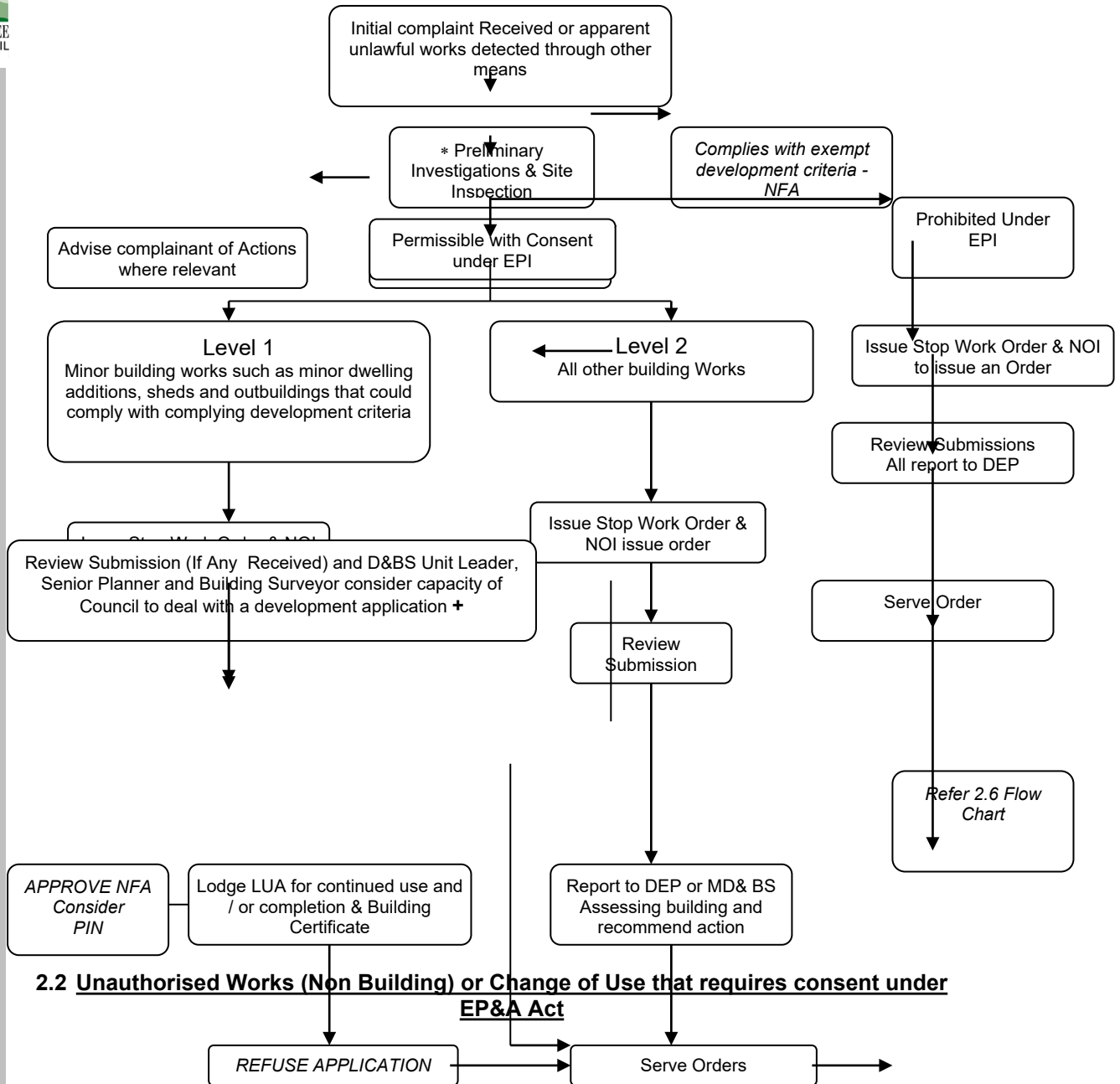
### Abbreviations used in Flow Charts

<b>PIN</b>	Penalty Infringement Notice
<b>NOI</b>	Notice of Intention to issue Order or Notice
<b>NFA</b>	No further Action
<b>LUA</b>	Land Use Application
<b>EPI</b>	Environmental Planning Instrument
<b>EPA</b>	Environmental Planning & Assessment Act 1979
<b>DEP</b>	Director Environment & Planning
<b>MD&amp;BS</b>	Manager Development and Building Services
<b>DCP</b>	Development Control Plan
<b>BCA</b>	Building Code of Australia

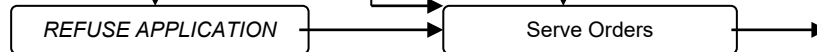
Preliminary Investigations include:

- i. Taking Statements
- ii. Research Legislation
- iii. Surveillance
- iv. Confirming Owners
- v. Legal Advice
- vi. Evidence eg: Diary, Noise reading, Photos
- vii. Admission

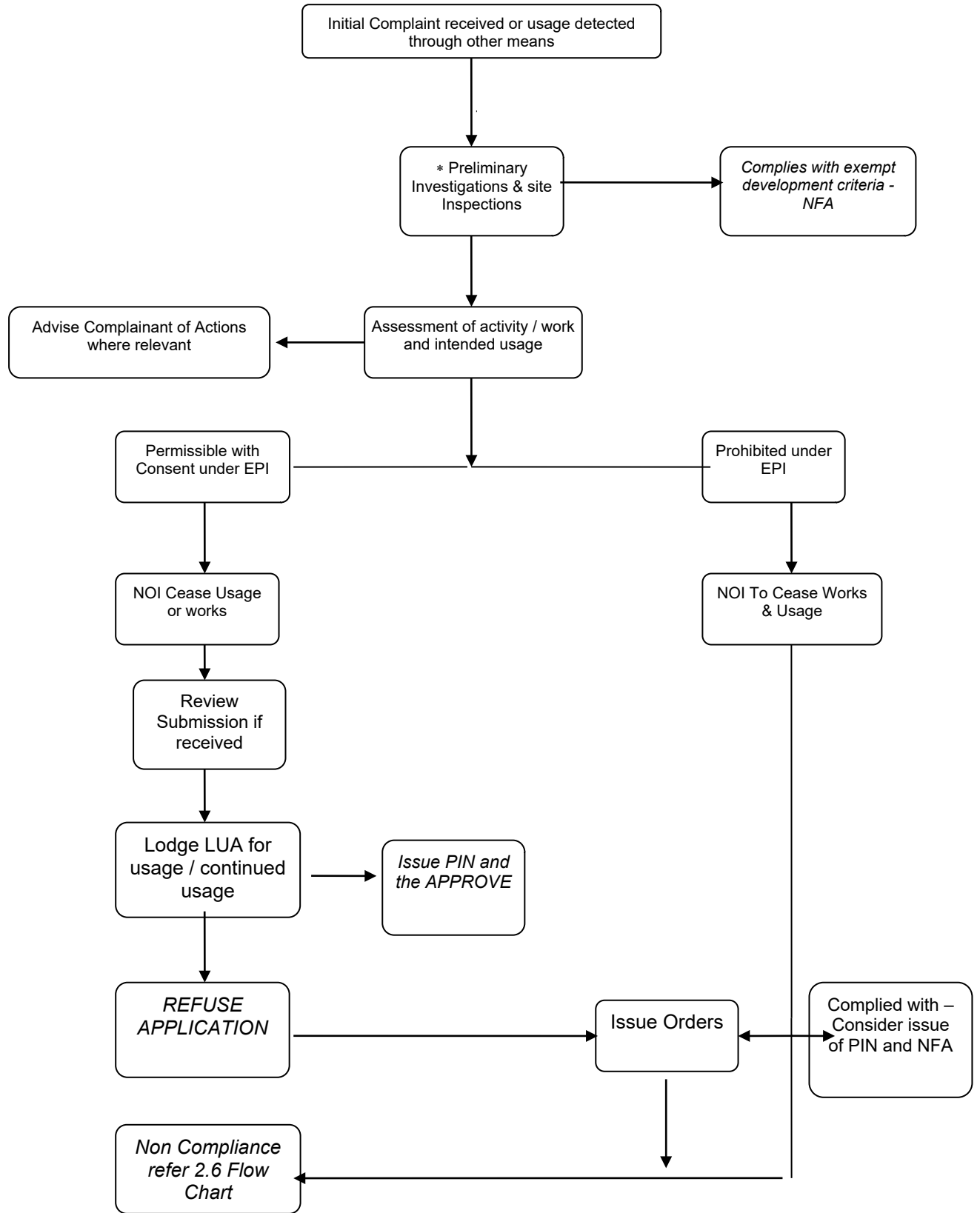
## 2.1 Building work without consent – Flow Chart



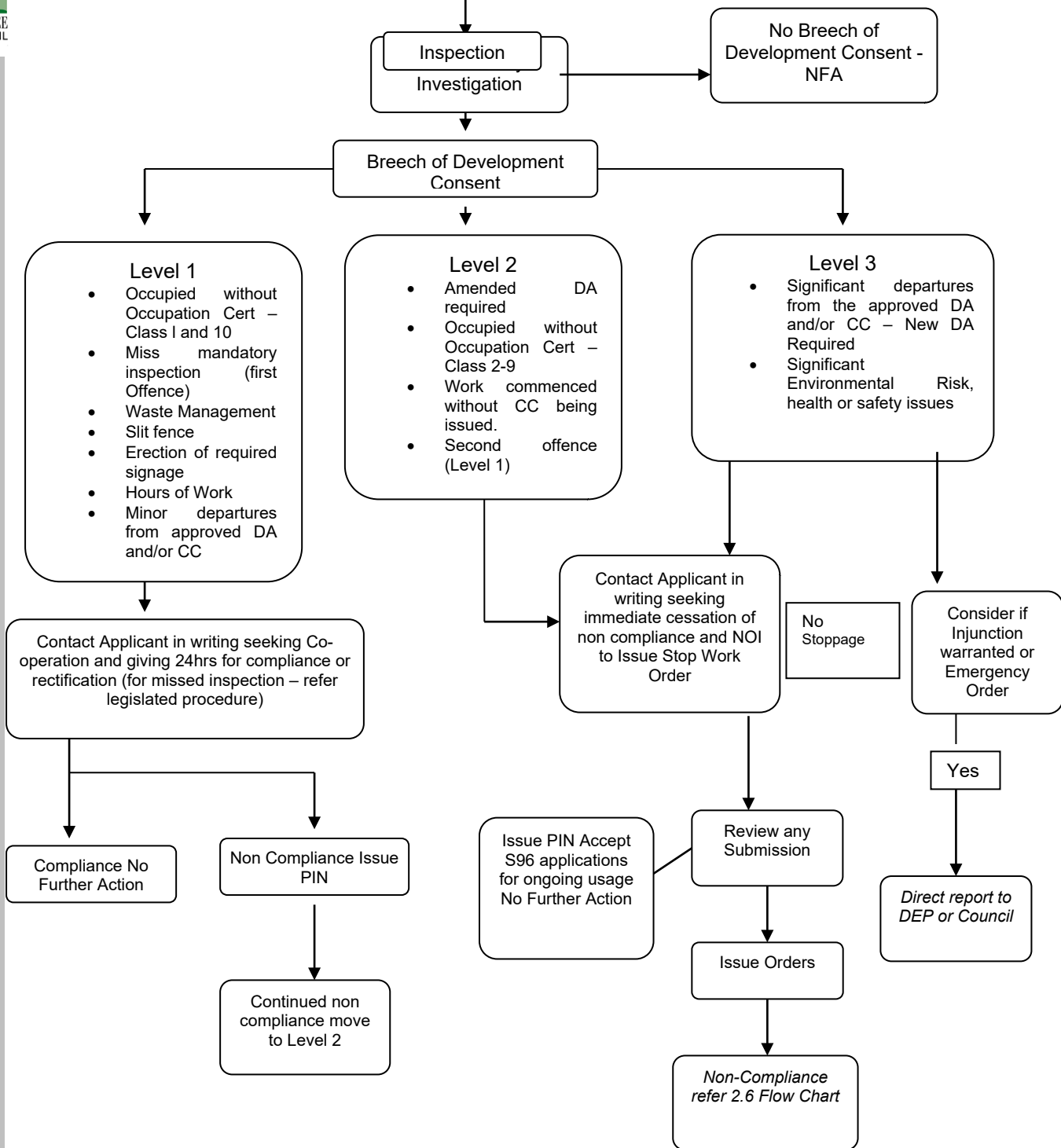
## 2.2 Unauthorised Works (Non Building) or Change of Use that requires consent under EP&A Act



+ Considerations include EPI, Constraints on the land, impacts on diversity, Council DCP's, BCA, Offender's history.



### 2.3 Development not in accordance with a development consent, certificate or approval by Council – Flow t



**POLICY**

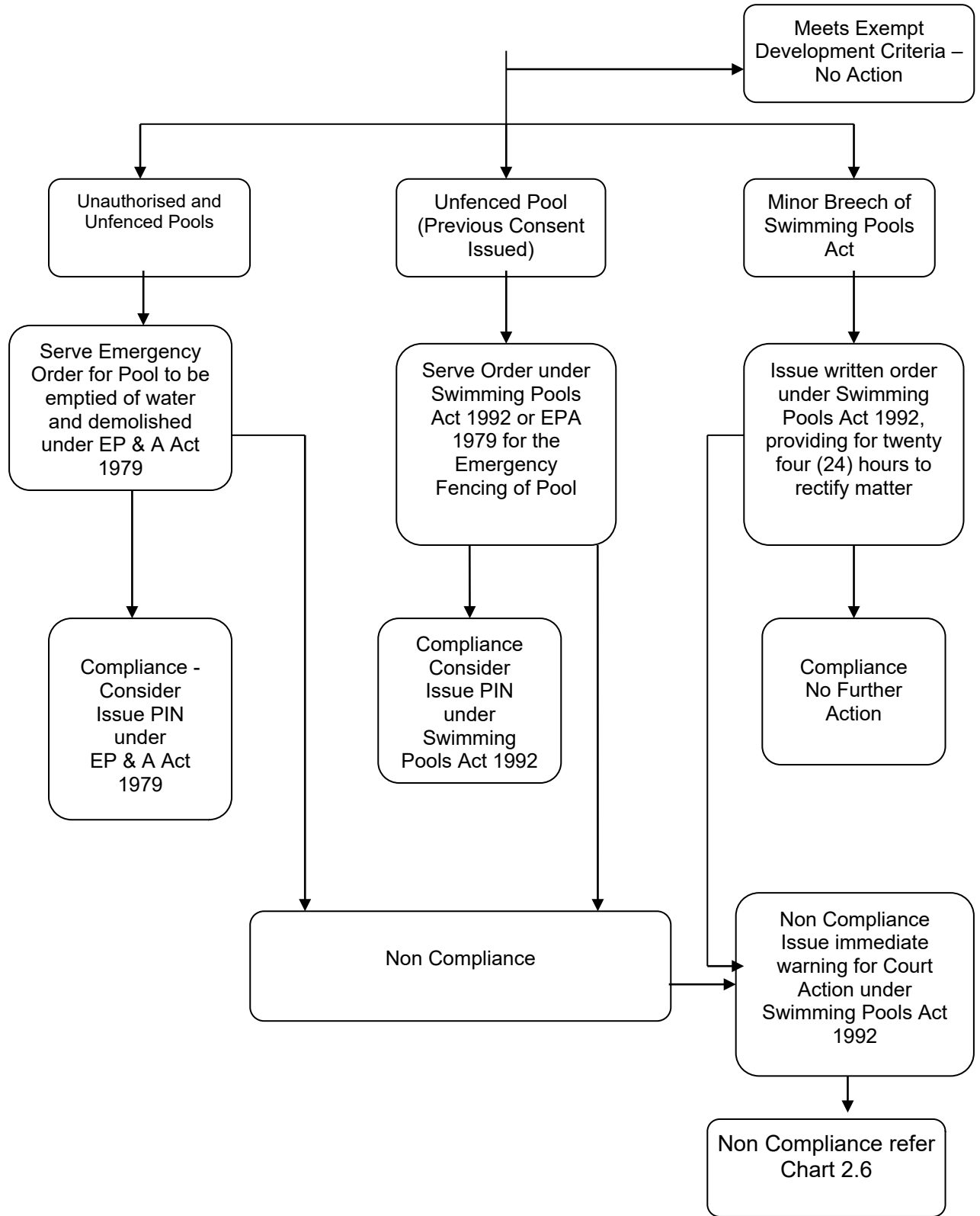
### 2.4 Swimming Pools and Fencing – Flow Chart

\*Preliminary Investigation / Inspect Site

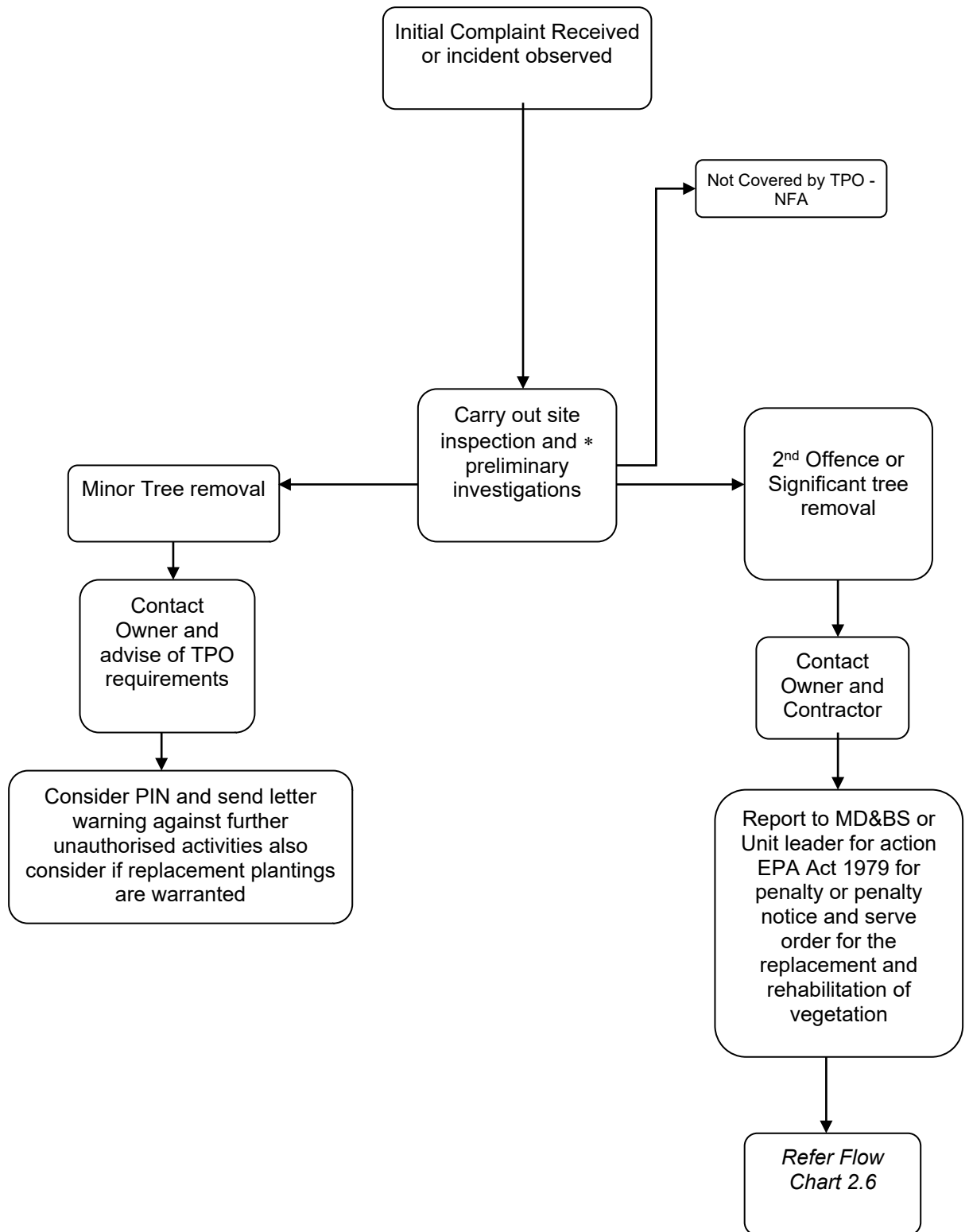
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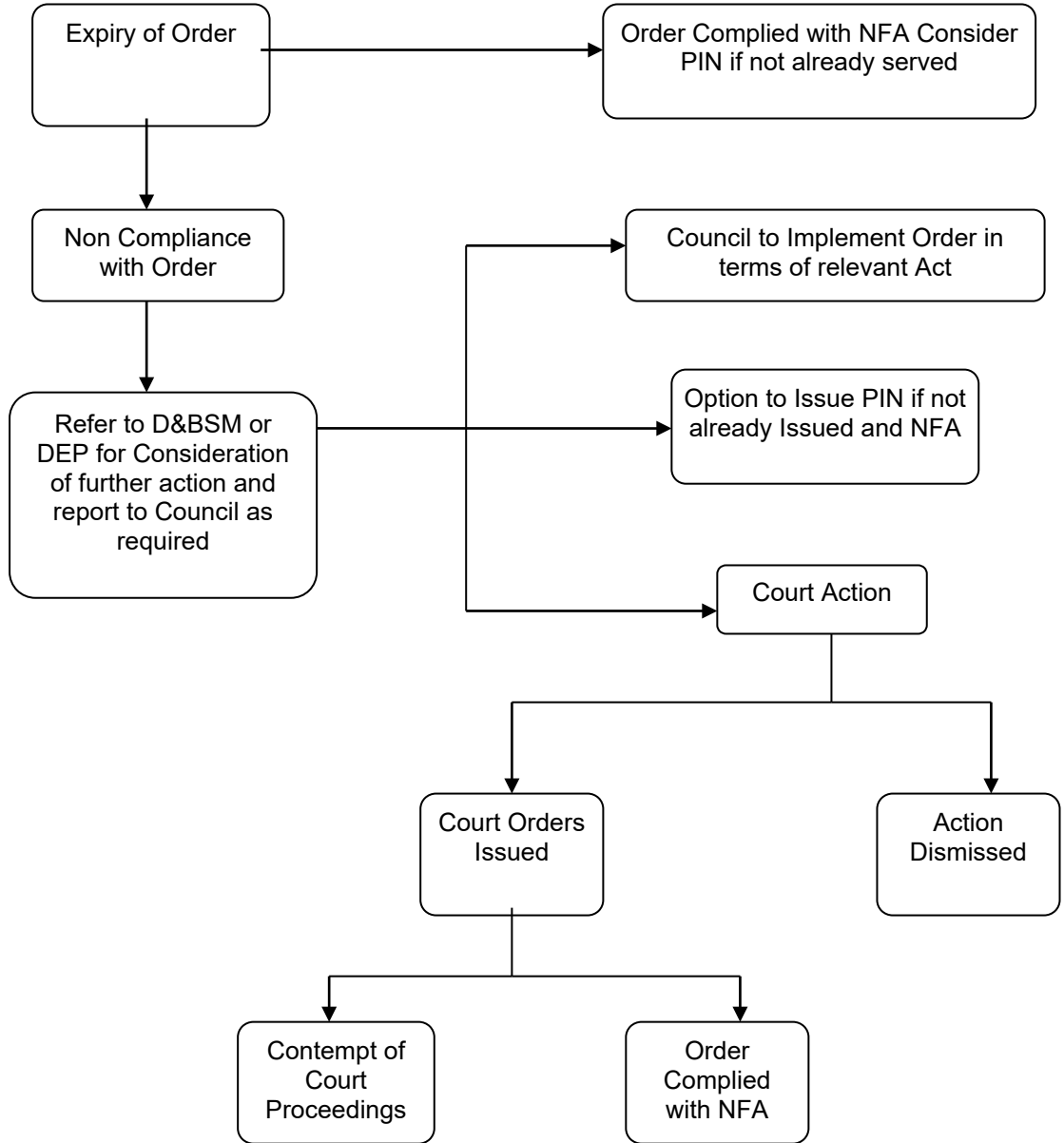


**2.5 Unauthorised removal / clearing of trees – Flow Chart**



**2.6 The Last Step – Finalising the Compliance Process**

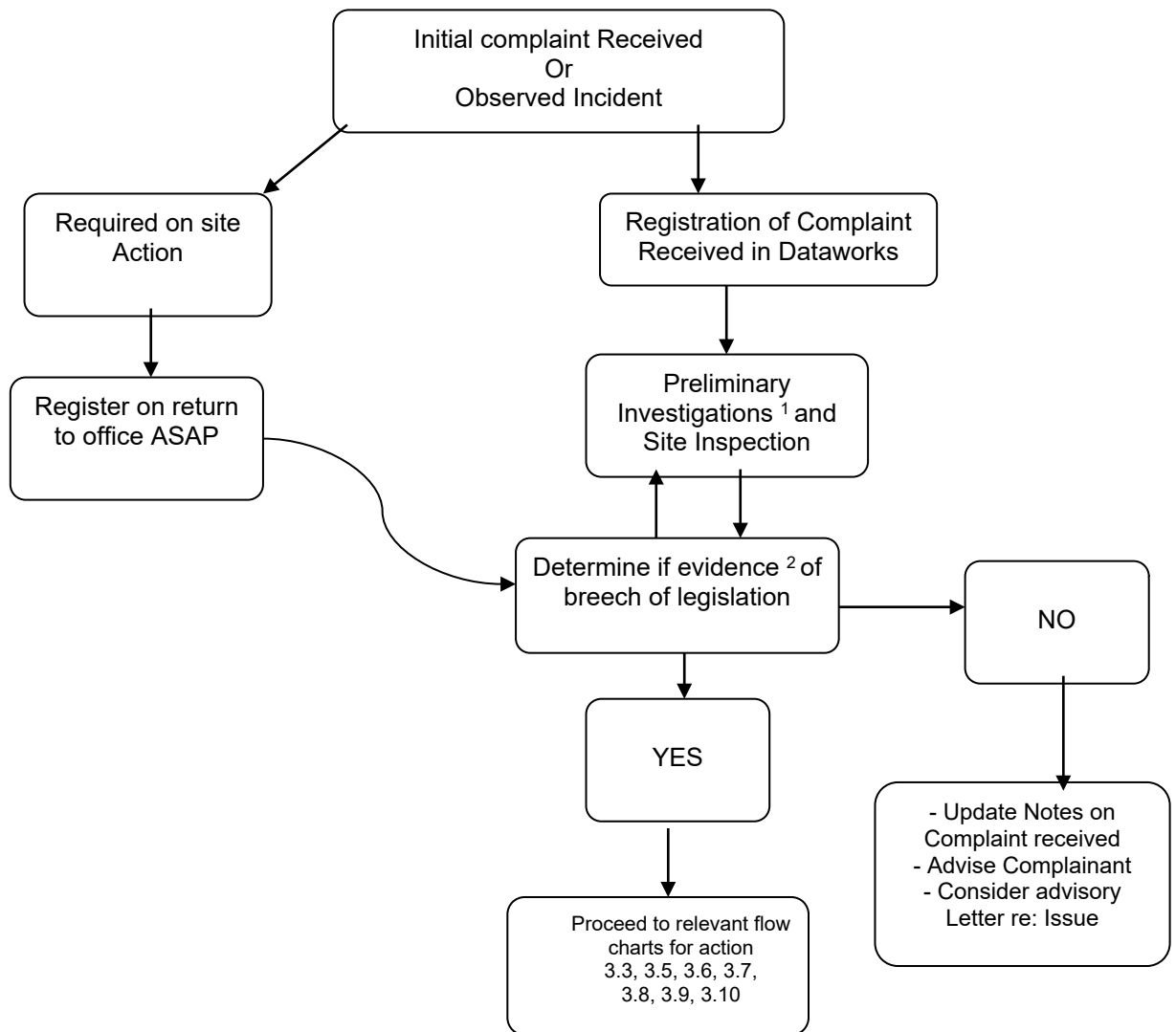




### 3.0 Environment and Health Flowcharts

### 3.1 Environment & Health Issuing Orders (Generic)– Flow Chart

LGA, EP&A Act, POEO Act, CAA, Food Act, Impounding Act

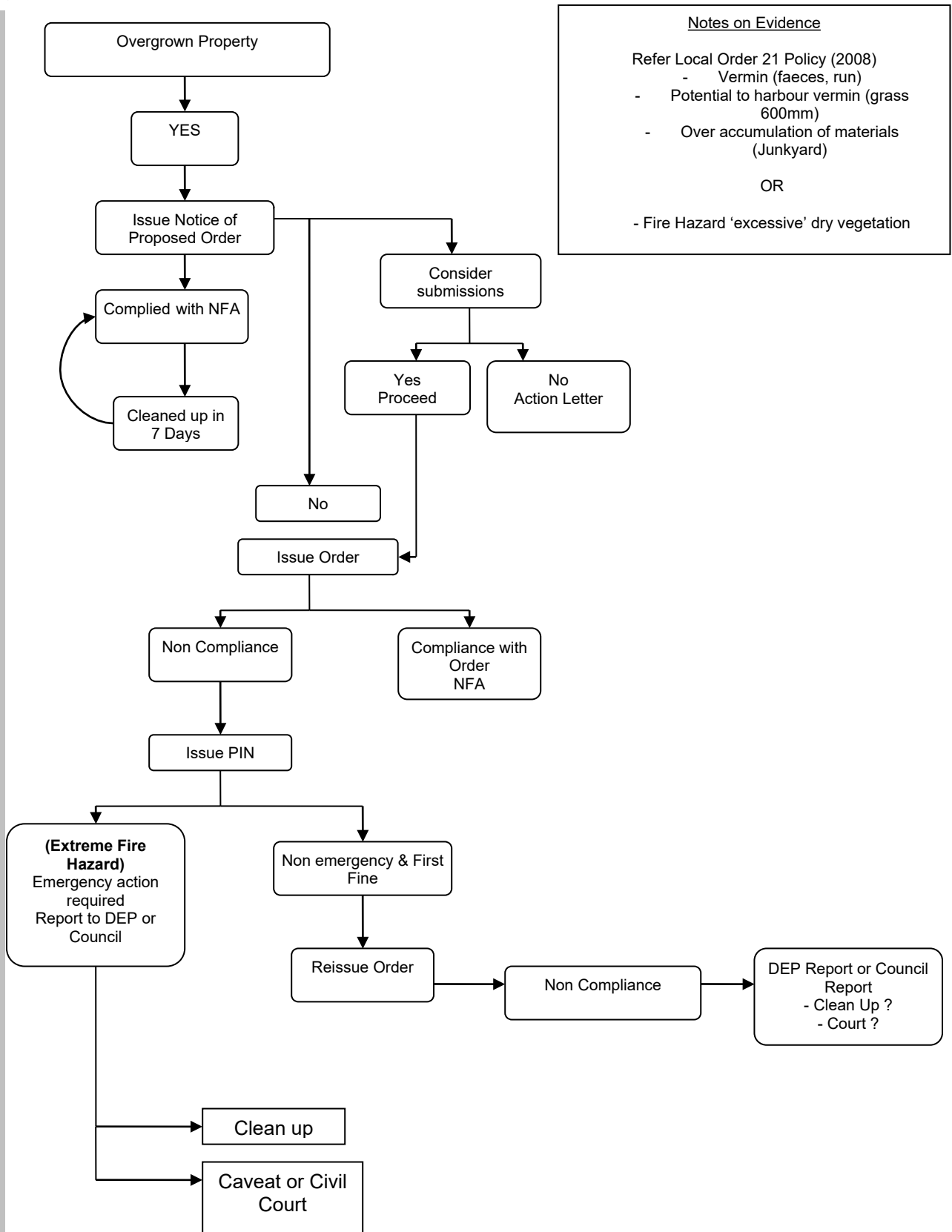


1. Includes:
- Taking Statements
  - Research Legislation
  - Surveillance
  - Confirming Owners
2. Proof of Breach Includes:
- Legal Advice
  - Evidence eg: Diary, Noise reading, Photos
  - Admission

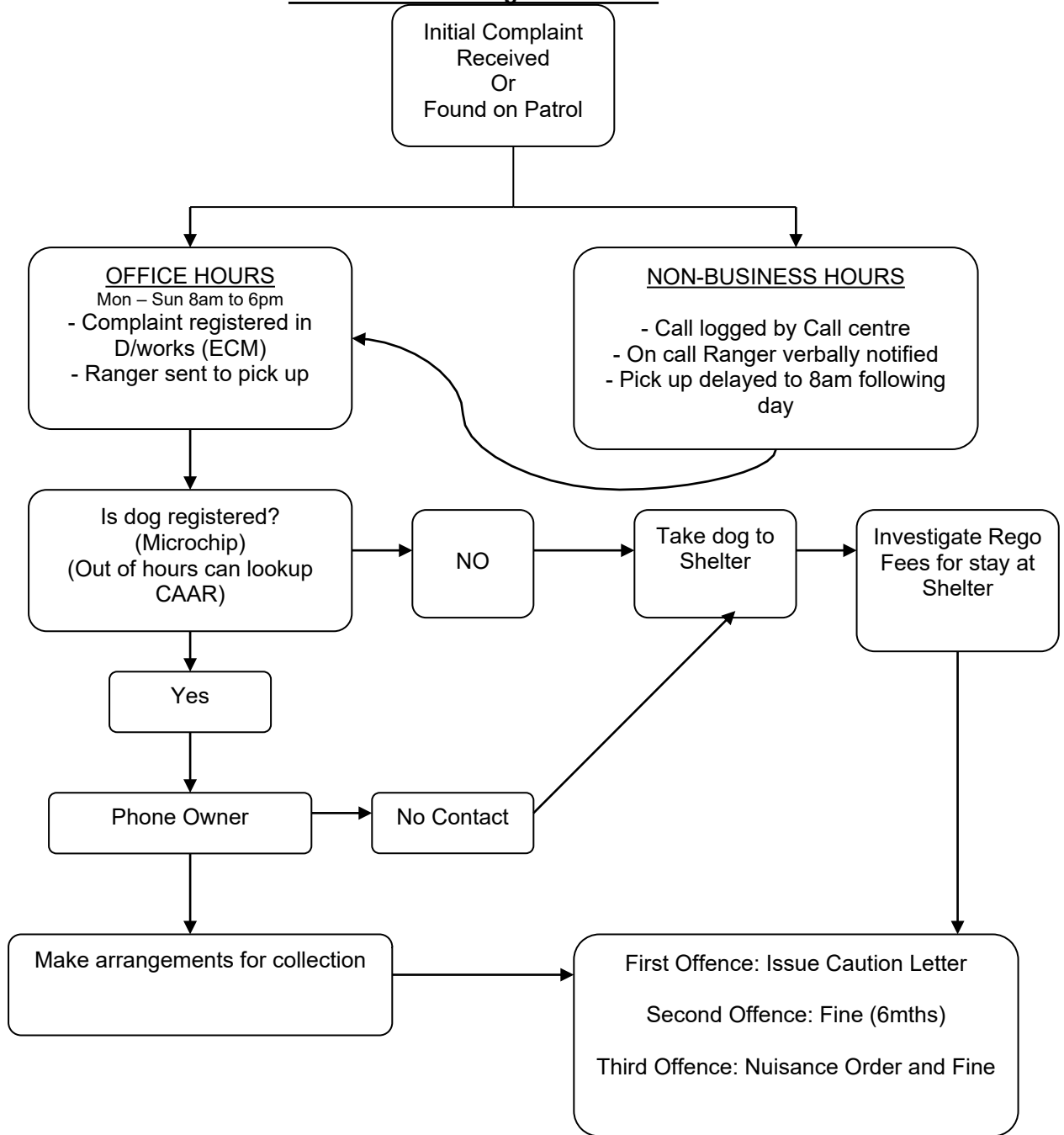
### 3.2 Unauthorised burning – Rural Fires Act 1997, POEO act 1997 – Flow Chart

### 3.3 Overgrown Property – Flow Chart

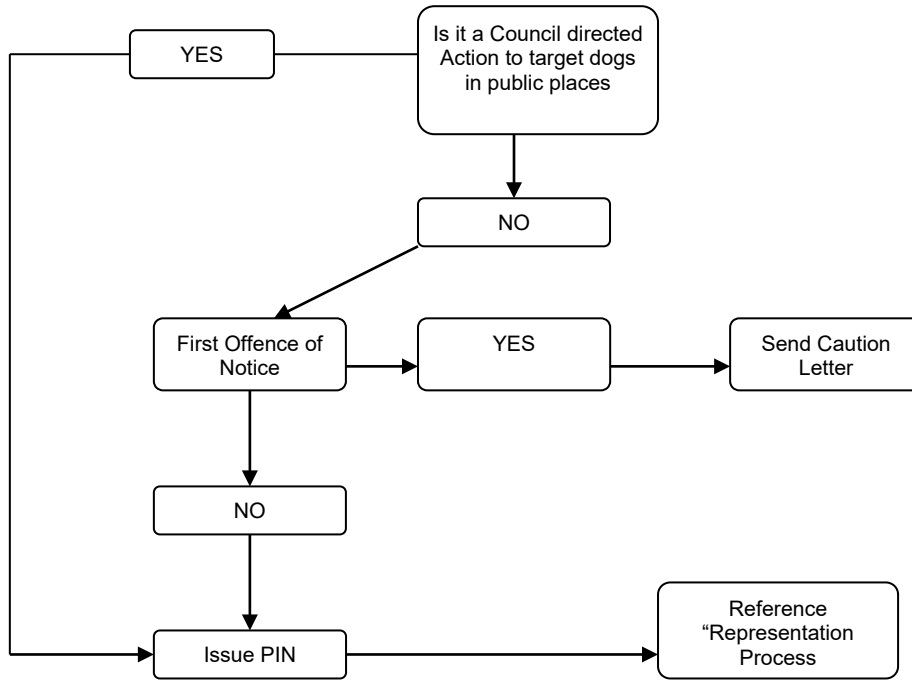
**POLICY**



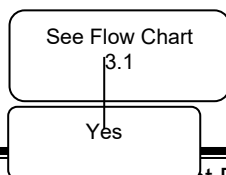
### 3.4 Unattended Dog – Flow Chart

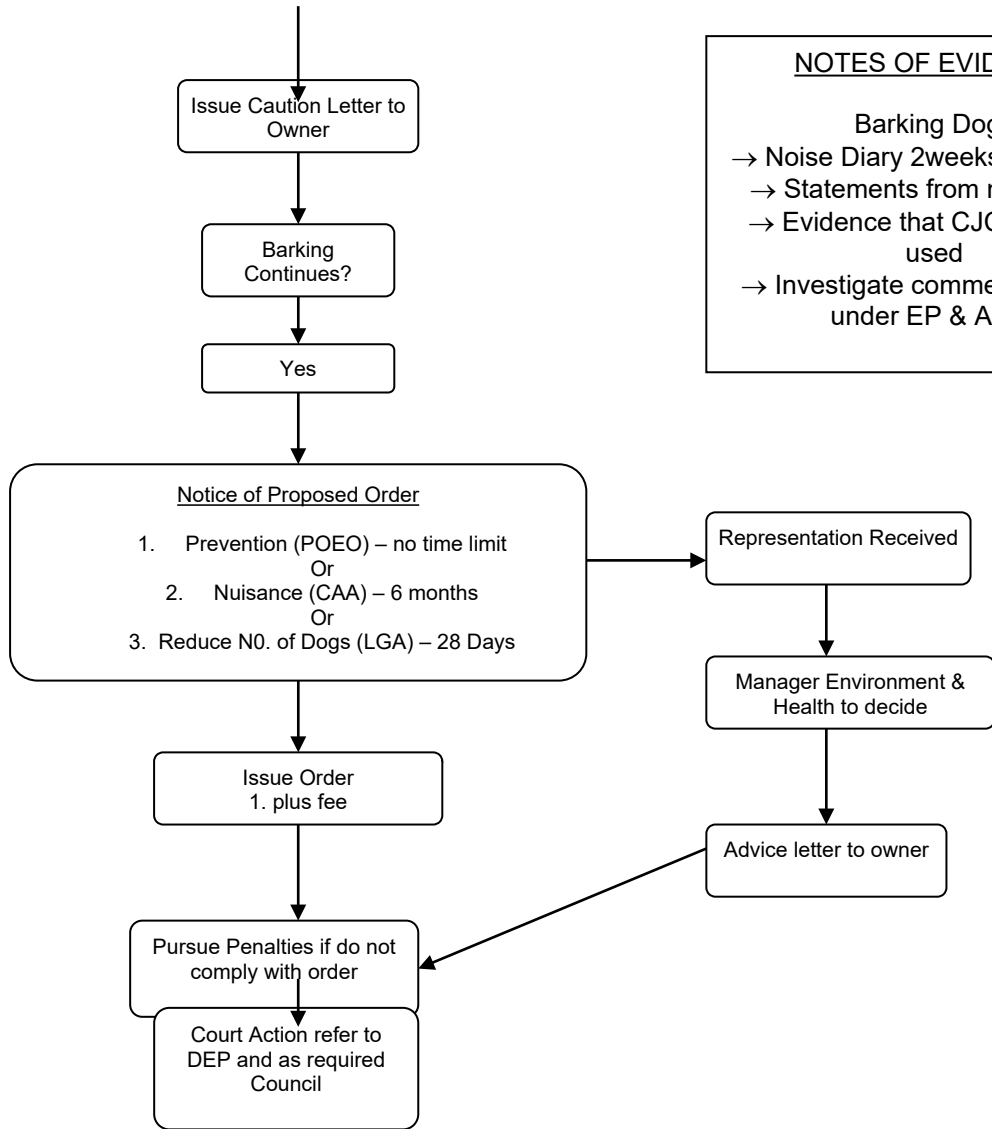


### 3.5 Dog 'Under Effective Control' in Public Places – Flow Chart



**3.6 Noise (Barking Dogs) – Flow Chart**



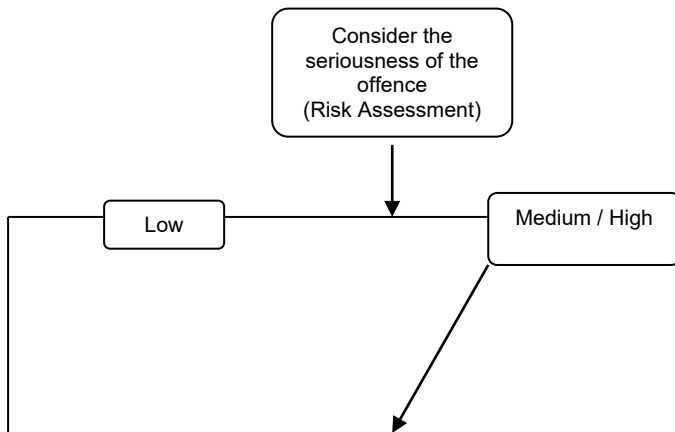


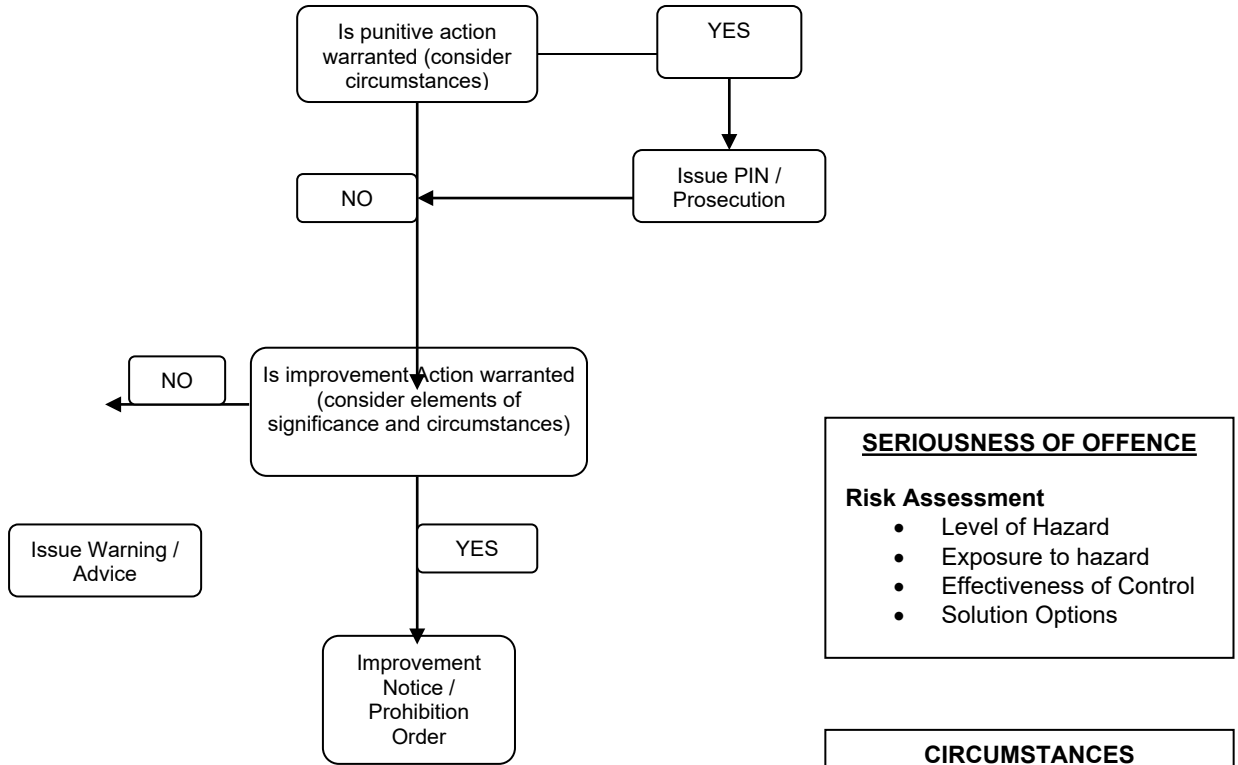
**NOTES OF EVIDENCE**

**Barking Dogs**

- Noise Diary 2weeks continuous
- Statements from neighbours
- Evidence that CJC has been used
- Investigate commercial usage under EP & A Act

**3.7 Food Investigation**





**SERIOUSNESS OF OFFENCE**

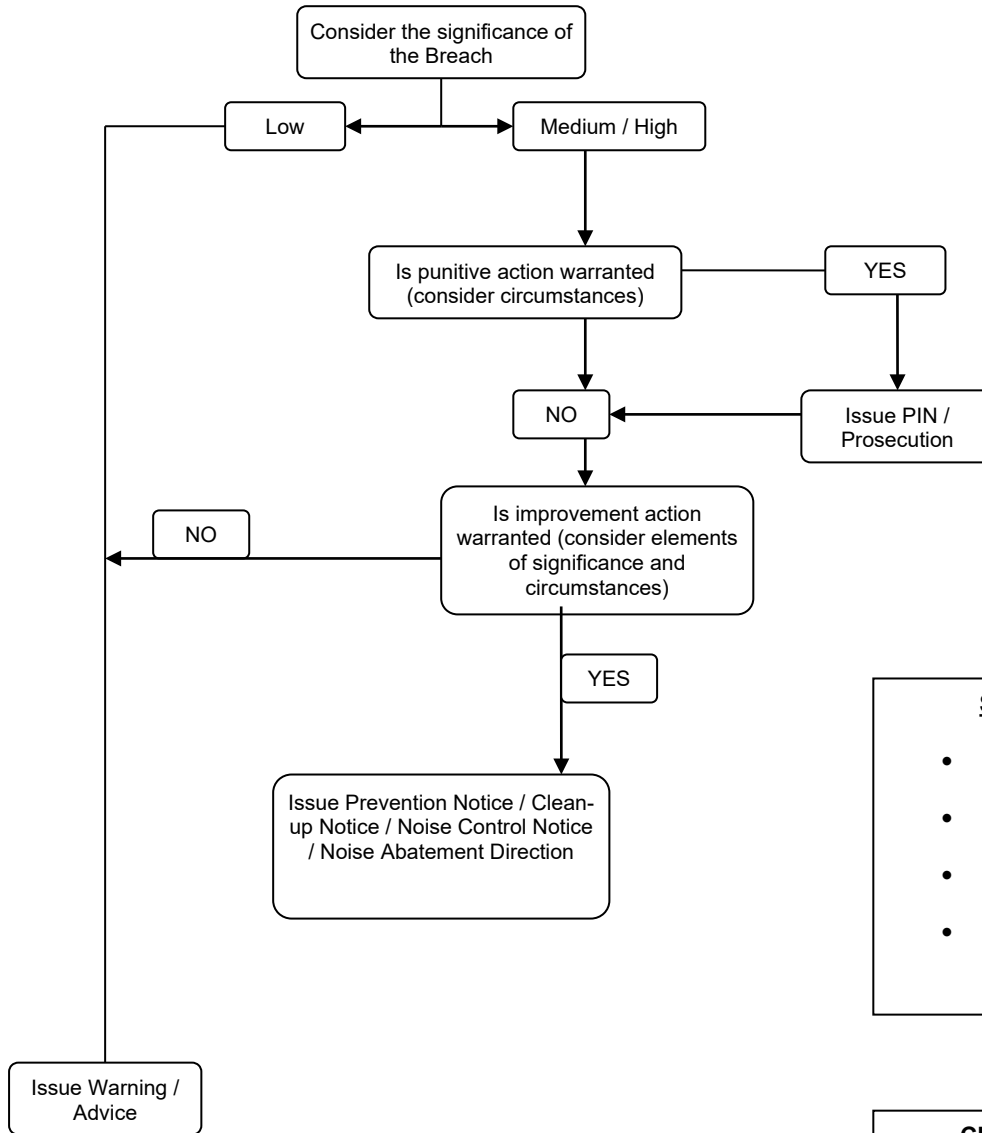
**Risk Assessment**

- Level of Hazard
- Exposure to hazard
- Effectiveness of Control
- Solution Options

**CIRCUMSTANCES**

- Prior History
- Offenders Contrition
- Timely response
- Steps taken to prevent Recurrence
- Flagrant disregard for compliance
- Consistency with previous actions
- Likelihood of recurrence
- Intent /cause leading to breach

**3.8 Environment Investigation**



- SIGNIFICANCE**
- Impact on neighbours / public
  - Pollution incident impact
  - Environmental significance
  - Level of actual or potential environmental harm

- CIRCUMSTANCES**
- Prior History
  - Timely response / steps taken by offender to prevent recurrence
  - Public interest
  - Likelihood of recurrence
  - Intent / cause leading to Breach

### 3.9 Local Government Act Orders Investigation

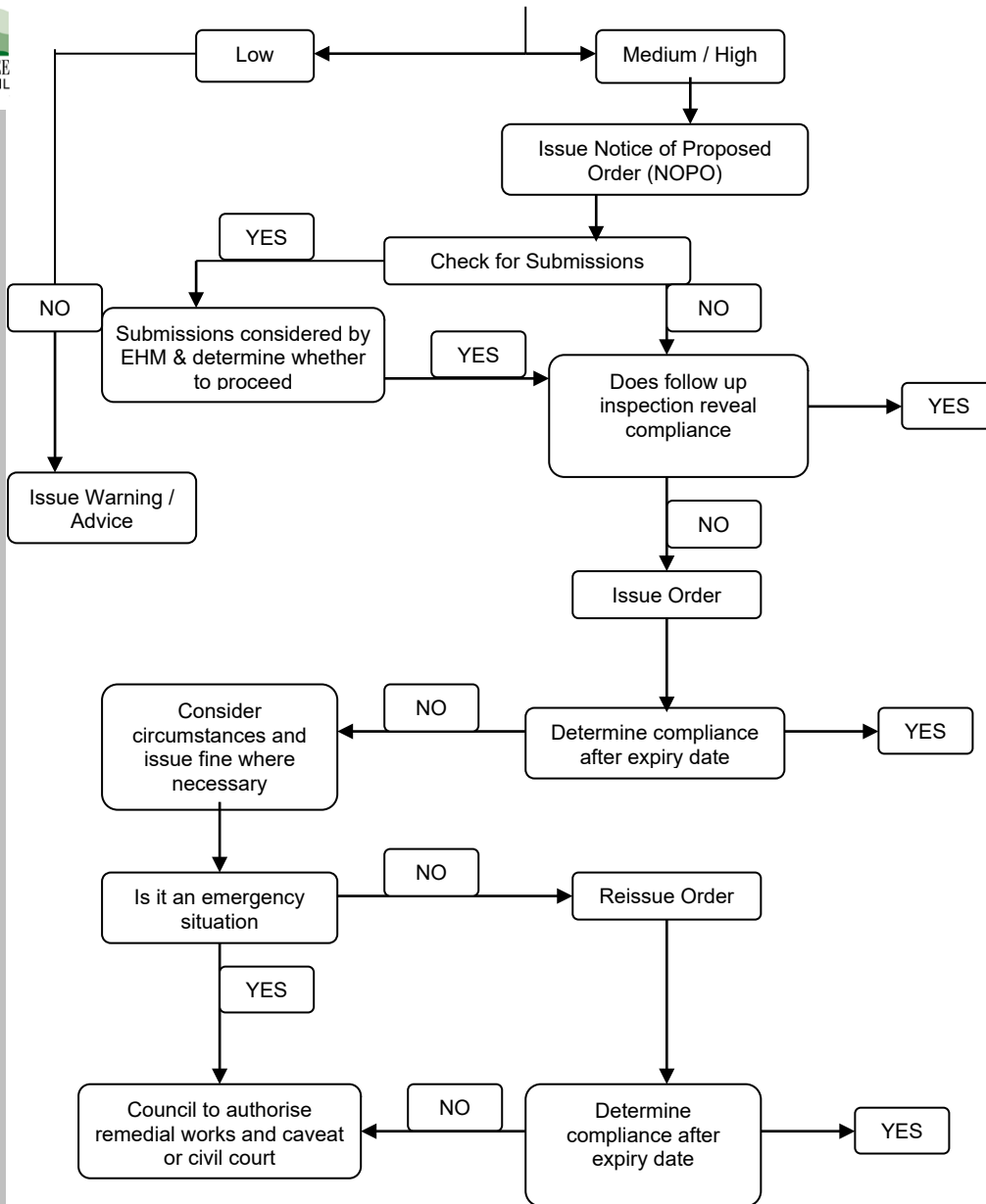
Consider the Significance and circumstances of the offence

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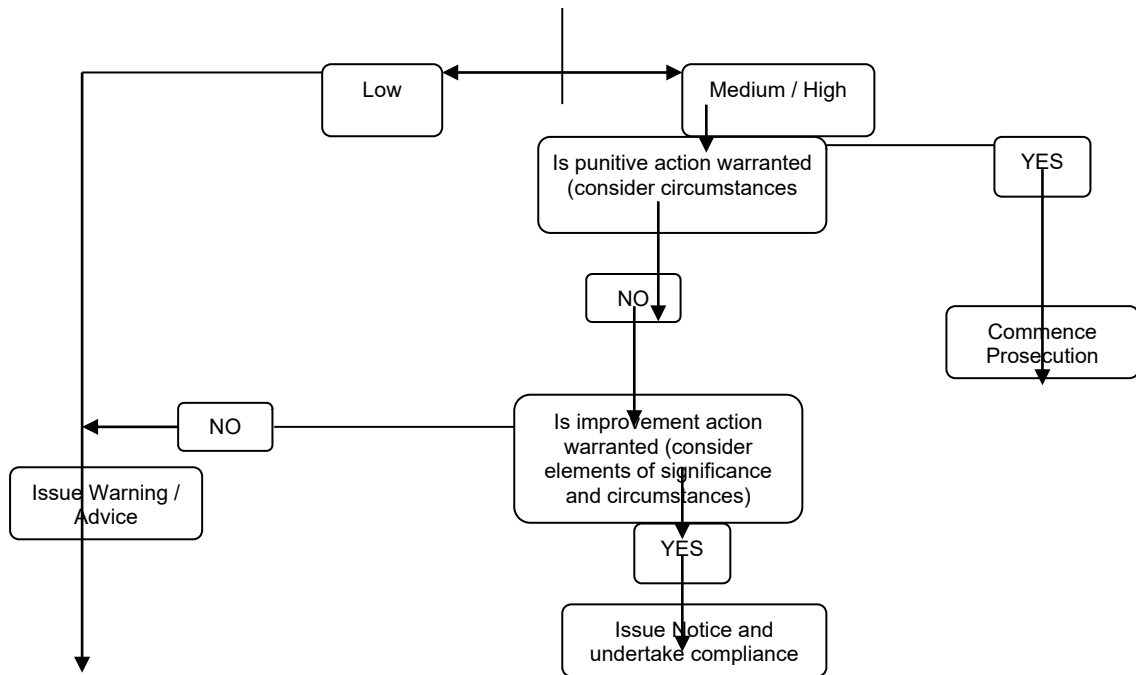


- SIGNIFICANCE**
- Level of Impact on neighbours / public
  - Condition in relation to Local Orders Policy / regulation / other guideline

- CIRCUMSTANCES**
- Prior History
  - Offenders Contrition
  - Timely response by offender
  - Steps taken to prevent recurrence
  - Public Interest
  - Intent / Negligence leading to the breach
  - Consistency with previous actions
  - Likelihood of recurrence
  - Intent / cause leading to breach

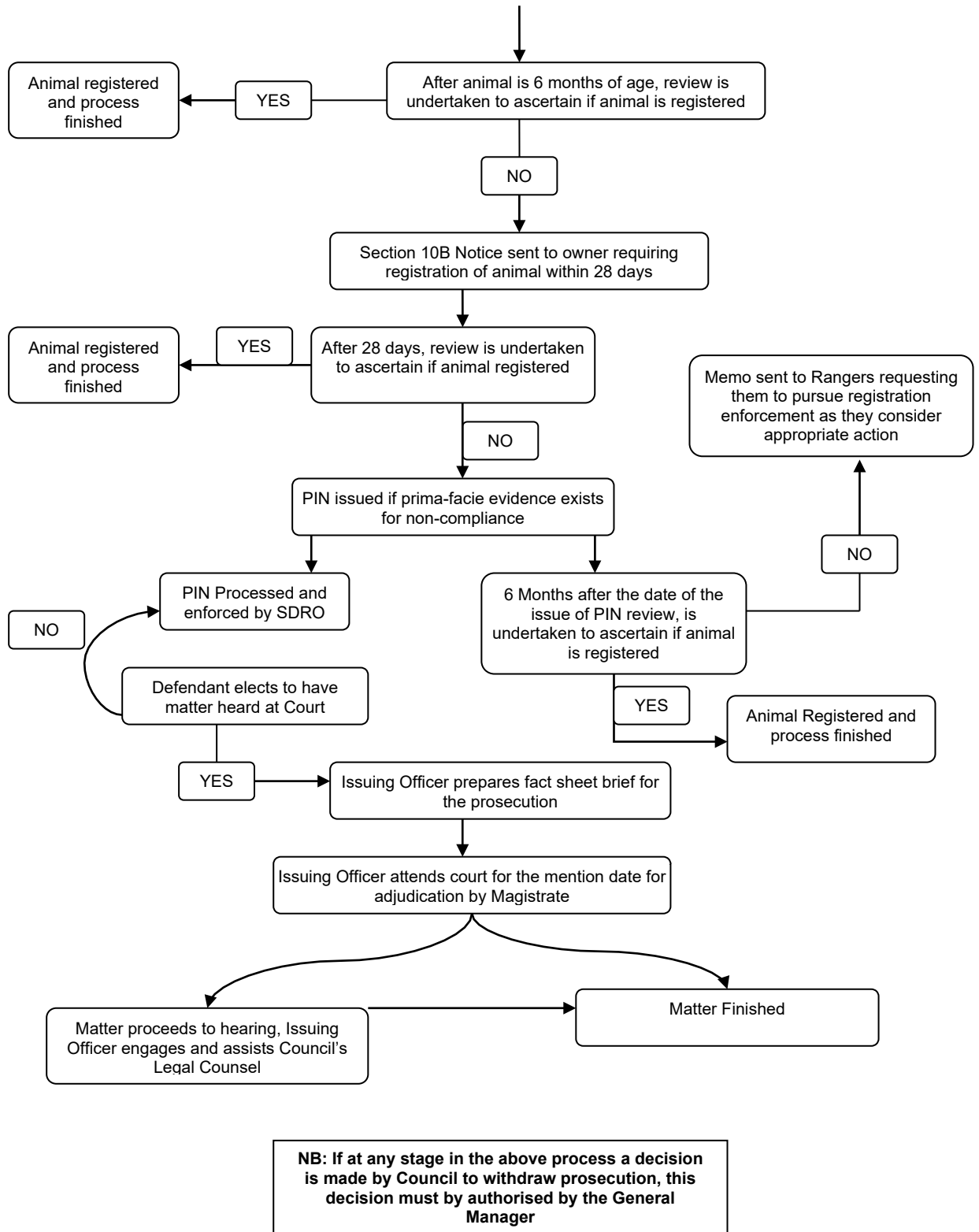
### 3.10 Public Health Act Investigation

Consider the significance of the Breach  
(Consider Risk Assessment)



**3.11 Companion Animal Registration**

Council becomes aware of identified animal and issues a letter advising owner to register animal from 6 months of age



## **4.0 Guide to inclusions to be covered with the issue of Notices, Notices of Intention & Orders**

### **4.1 Name**

The Notice of Intention (NOI) to serve and Order or an Order must be served on an appropriate legal entity that is an individual or an incorporated body, such as a company (Pty Ltd or Ltd), statutory authority, incorporated association, co-operative or other body corporate. An Order must not be served on a trading name, business name or care of a person. Full names of individuals must be used.

### **4.2 Address**

The Notice of Intention to serve an Order or an Order must be served on an appropriate legal entity at its correct residential, business or registered office address. The Service of the Notice of Intention or an Order can be effected by prepaid post, by serving it personally, by fixing it to a conspicuous part of the premises to which the Order is addressed or by facsimile transmission.

### **4.3 Salutation**

Where you are sure about the recipients' gender you may use the salutation for example *Dear Mr Smith* otherwise use only *Dear Sir or Madam*.

### **4.4 Property/Premises Description**

The property / premises description must include full details as it appears on Council's records, for example where applicable Lot, DP (Deposited Plan), Section, SP (Strata Plan), street number and / or rural addressing number.

#### **4.5 Order / Notice Number**

Ensure that the Order / Notice number you choose is the most appropriate in the situation. Often a similar action can be taken under a number of different pieces of legislation however the legislation Act that is most appropriate for the situation must be used.

#### **4.6 Terms of the Order / Notice**

The requirement must be in consistent terms, be specific, written in plain English and be easily understood by the recipient. It may be necessary to attach a plan, diagram or photographs to the Order to assist the recipient in understanding the requirement/s. With a development consent plans should be referenced and / or conditions repeated.

You should carefully check the requirement/s you specify as the terms of the Order as described for in the tables of Acts. If there are certain requirements that are not provided under one Act, then you should specify these requirement/s under the terms of a separate Order.

#### **4.7 Period for Compliance with Order / Notice.**

It is preferable to specify a date for compliance rather than for example *28 days from the date of this Order / Notice*, as this gives a clear indication of when the Order / Notice is to be complied with. The time frame for compliance must be reasonable in the circumstances. The time for the compliance can be less than the appeal period, however legal action cannot commence until the appeal period has expired or an appeal is dismissed.

An Emergency Order / Notice can require immediate compliance.

#### **4.8 Period for Representation (Notice of Proposed Order).**

It is preferable to specify a date for the receipt of representations rather than a number of days from the date of the Notice or Order as this

gives the recipient a clear indication of when the representation is to be submitted to council.

#### **4.9 Reasons.**

It is not sufficient reason to just include the circumstances for which an Order / Notice may be served as specified in the tables of the Acts. The reason must specifically reflect the terms of the Order, and should include inspection results and conditions and the impact of the non-compliance.

#### **4.10 Officer's Name.**

The contact name for the officer responsible for the issue and enforcement of the Order / Notice must be stated in the Order / Notice

#### **4.11 Reference/s (Ref).**

Council's property file number, as well as any landuse application number and / or any other file number must be included in the Order / Notice.

### **5.0 Penalty Infringement Notices.**

#### **5.1 Guide to inclusions to be covered with the issue for a Penalty Infringement Notice**

All PIN's must always be filled out using block letters with a black Pen.

##### **(a) Infringement Type.**

Place a cross in the appropriate box (2) general.

**(b) Offenders Details.**

Full name and residential address of the offender as listed in Council's records (including postcode). Where multiple names are listed in Council's records, the first name listed is to be used.

- a) Surname or Company Name (not trading names).
- b) Given Name/s.
- c) Address, must be residential or registered address, *PO box numbers are not acceptable.*

**(c) Offence Details.**

This must be described in full and should not be abbreviated. Date and time of offence is required as prima facie evidence for Court enforcement. Day of offence is used to verify the correct date has been recorded. Show time as AM or PM, *24hour clock not to be used.* Location including full legal description including Lot and DP numbers.

- a) Time
- b) Date
- c) Location

**(d) Additional Information.**

This field gives extra information. Eg: "In relation to development without consent".

**(e) Offence Code.**

Offence code 4-8 numeric characters that identify the offence as supplied in the Fixed Penalty Handbook. Work left to right and leave unused boxes blank.

**(f) Regulation Code.**

Three alpha characters that help to verify that the correct offence code was used. Work left to right and leave unused boxes blank. If either the Offence Code or Regulation Code is incorrectly recorded the Notice will not be processed.

**(g) Short Title.**

The short title of the offence as set out in the Fixed Penalty Handbook.

**(h) Penalty Amount.**

As set out in the Fixed Penalty Handbook.

**(i) Signature of Officer.**

Only an authorised officer to sign.

**(j) Initials of Act**

Initials of Act under which the infringement is written.

*Remove Part C before Continuing*

**(k) Name.**

Name of the authorised reporting officer (initials and the surname).

**(l) Issuing Authority.**

Organisations names, **WSC** is sufficient.

**(m) Client Code.**

Six (6) numeric characters, **100812** to identify Council as the issuing organisation.

**(n) Client Edit Code.**

Two alpha characters, **AW** to identify Council as the issuing organisation.

**(o) Description of Offence.**

A full description of the offence, ensuring sufficient Prima Facie evidence to prove the offence (i.e.: who did what, where and when). It is acceptable to refer to notes contained in a note book or to reference a report contained within a file. Any comments recorded of the



offender should only be included in any report or notes if they are recorded verbatim, in the first person (eg: “he said”, “I said”).

**(p) Complete Part C**

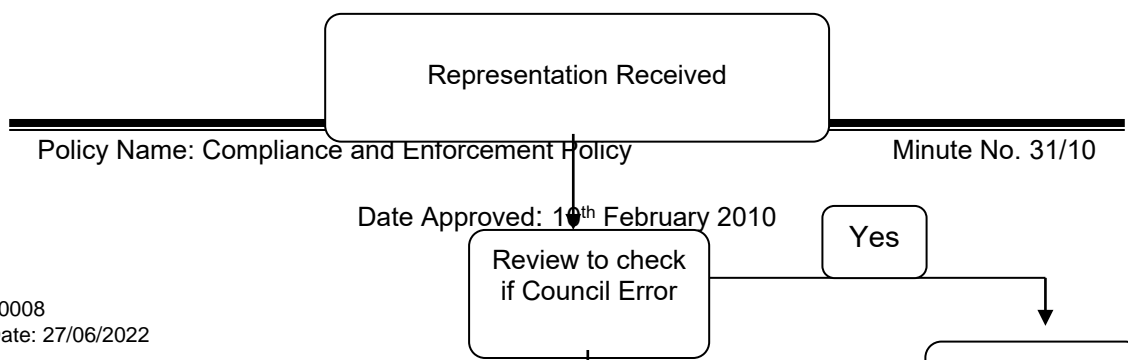
Complete date as per 4.3 a. Complete offence code as per 4.5. Complete Penalty as per 4.8.

**(q) Posting Notice.**

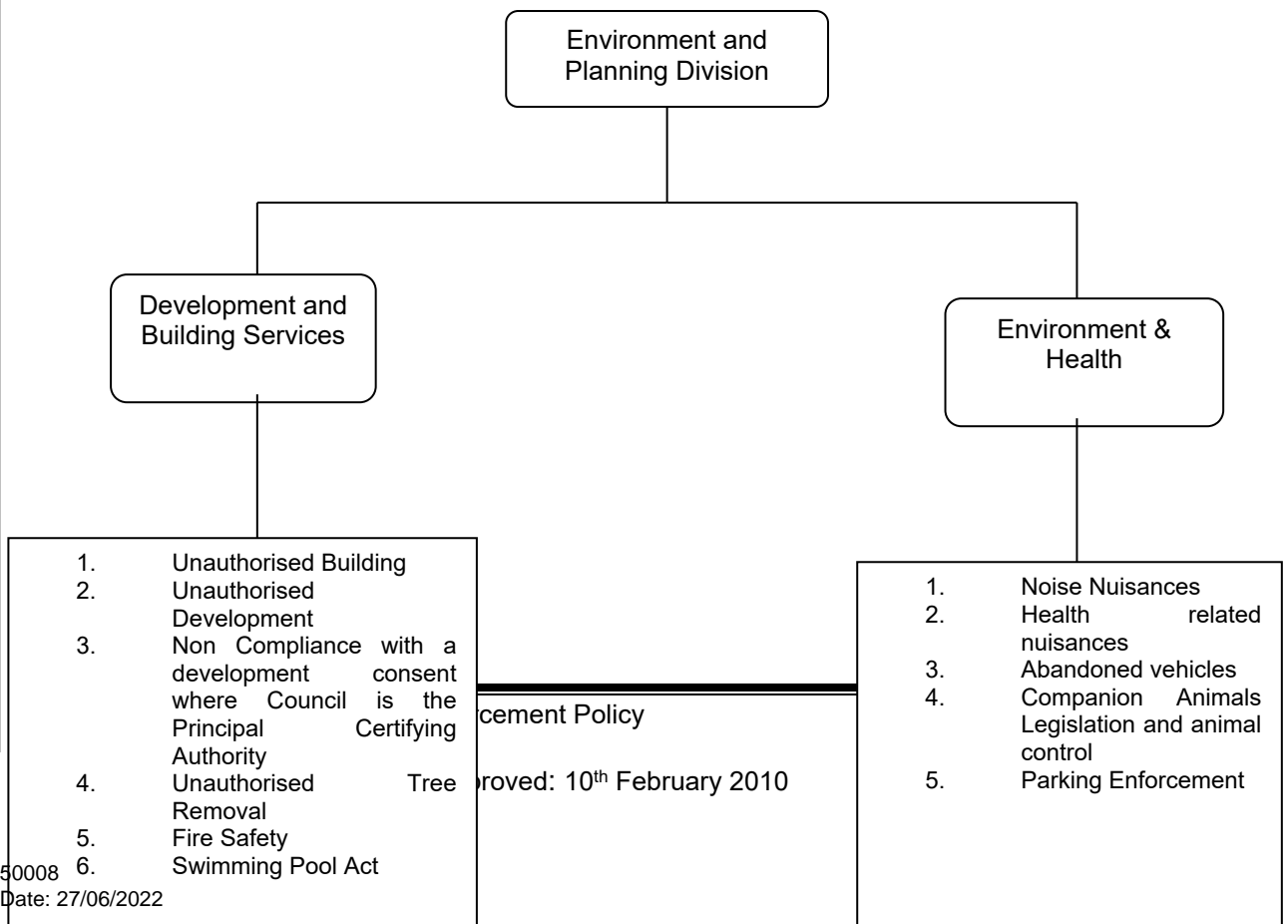
If posting the infringement notice complete date posted box.

**5.1 Penalty Infringement Notice – Flow Chart**

**REPRESENTATIONS PROCESS**



## 6. Schedule 1: Referrals for Action Requests



## **Schedule 2 – Delegations and Authorisation**

1. Council is responsible for higher level consideration of unlawful activity. Potentially these matters would in the 'Closed Committee' agenda.
2. Wide delegation to initiate court action and undertake Regulatory compliance
  - i. General Manager
  - ii. Director Environment and Planning
  - iii. Manager Development and Building Services and Unit Leader
  - iv. Manager Environment and Health
3. Delegation to serve Orders, Penalty Notices under LGA 1993 and EPA Act 1979.
  - i. Senior Building and Planning Staff in Development Control
  - ii. Environmental Health Officers  
Rangers
4. Delegations for general offences under various legislation – investigation, recording, documentation.
  - i. All Development and Building Services and Environment and Health Professional staff.