

From: [Moysey, Sean](#)
To: [Turk, Josh](#); [Apps, Peter](#); [Zeller, Sam](#); [Bond, Mathew](#); [Connors, Brian](#); [Swale, Jonathan](#); [O'Neill, Brendan](#); [Southwell, Chris](#); [Herbert, Jodie](#); [Tetley, Glenys](#); [Rochford, Kevin](#); [Gaze, Reuben](#); [Andric, Radmila](#); [Bond, Sam](#)
Cc: [Middlemiss, David](#); [Simmons, Craig](#)
Subject: A direction: Interim Enforcement Policy
Date: Tuesday, 18 June 2013 3:52:00 PM
Attachments: [20130611_CSB_Compliance Enforcement Policy_Interim.doc](#)

Dear Josh, Peter, Sam, Matt, Brian, Jon, Brendan, Chris, Jodie, Glenys, Kevin, Reuben, Radmila and Sam

Caseload

As you would be aware our caseload has reached enormous proportions both in terms of number and difficulty.

I have briefed our Director and Executive Director on the issues and the DG will be briefed soon. That briefing will eventually form into a paper to EPC on the matter which will include a proposed enforcement policy for our Branch.

In the meantime I have been instructed to give effect to the policy as proposed from now until further directed.

Direction

Attached is the interim policy which I direct you and your teams to follow from this point until further notice.

Impact and implementation

The most immediate impact of the policy is that we will not pursue matters that do not fulfil the criteria or are the lowest on the hierarchy and are beyond our current resources.

Some of you may have ideas to improve or change the policy. There will be a time to work through those ideas — now is not the time.

I expect everyone to apply the policy with integrity. This is not an opportunity to set aside difficult cases or avoid difficult complainants. What this is an opportunity to do is to work through the current caseload and discontinue investigations on the basis of the policy.

Josh and Glenys, over the next two or three weeks could you please start working through cases to discontinue and prepare a standard letter for those cases.

Josh could you provide Dave Middlemiss with your estimate of how many jobs would be discontinued so Dave can let Craig and John know of our estimates of cases we anticipate will be cut.

As an aside, from my perspective the quality of investigations and exercise of our powers is improving despite the fact that our workload is putting great strain upon us. For that, please accept my thanks for the hard work done by you all.

Regards
Sean



UNCLASSIFIED

To:	Minister for the Environment and Sustainable Development
From:	Director-General [redacted] 7/12 Executive Director, Regulation Services [redacted] 5/12 Director, Construction Services Branch [redacted]
Subject:	ESDD Enforcement Policy

Recommendation

That you:

- Note the current workload of the investigation and breach management teams within Construction Services Branch;
- Note the revised Enforcement Policy for Construction Services Branch to manage current case loads; and
- Note that ESDD is undertaking policy work as a basis for recommendations to you on a new suite of municipal laws to address low level planning and land breaches with proportionate resources.

Critical Date

In the normal course of business. The Enforcement Policy has commenced and is currently being implemented. It is planned that the municipal laws package will be developed in the first half of 2014.

Background

Utilities, Land and Lease Regulation Section within Construction Services Branch has carriage for compliance and enforcement of construction laws, planning and land use laws and technical regulation of the Territory's utilities.

The section investigates formal complaints made under the *Construction Occupations (Licensing) Act 2004* or the *Planning and Development Act 2007*.

The section's dedicated investigation team of eight inspectors investigates breaches of building laws, planning laws and leases.

In the 2011–2012 financial year the investigation team completed 647 investigations into building, planning and Crown lease breaches and received 684 new complaints.

The vast majority of investigations are instigated through the statutory formal complaint process set out in the relevant Act. Of the investigations approximately half engage construction laws and half engage planning laws.

Performance Assessment

DUE DATE:/...../..... DATE RECEIVED:...../...../.....

SATISFACTORY

UNSATISFACTORY

According to criteria specified in *ACT Government Policy Performance Measures*

2 of 23

Signature / .../....

The team also receives 'section 50' notices from building certifiers. These notices inform the Construction Occupations Registrar of work that is not compliant with building approvals or planning approvals.

In 2011 Construction Services Branch received 19 complaints regarding multi-unit, multi-story buildings, known as class 2 buildings under the Building Code of Australia. In May and June 2012 Construction Services Branch received a further 13 complaints for class 2 buildings.

Seven of the complaints engage high risk issues of safety and property for the occupants of the 876 units affected. At the end of 2013 there are nine major matters involving class 2 buildings, all of which involve lengthy investigation and are subject to litigation, or highly likely will be litigated.

Investigation and rectification of class 2 buildings is expensive and very resource intensive. Most rectification orders result in litigation. Completion of these investigations takes between 12 and 24 months to complete. The Empire Apartments rectification order, for example, took approximately 18 months to compile.

Issues

The Branch has been working over the last four years to professionalise the investigation and enforcement function. This has involved a process of modernising the way investigations are undertaken and the governance framework for investigations.

Best practice training over the last two years has shown that the governance arrangement needed to include an enforcement policy and that it is not possible to reconcile the proper requirements for an investigation with the numbers of complaints and the resources available.

The workload has reached unsustainable proportions. Among eight officers there are currently 481 active investigations. Many of those investigations are of a nature that require increasingly complex evidence gathering.

The current compliment of inspectors are highly trained and are improving productivity as their experience grows.

The permanent members of the investigation team currently hold a certificate IV in investigation to a criminal standard; asbestos awareness training; working from heights training; confined spaces training. The majority of inspectors are also undertaking degrees at a tertiary level in construction or certification. One inspector also has a law degree.

The application of orthodox investigation practice, such as taking witness statements, interviewing persons of interest, exercising statutory powers to obtain documentary and physical evidence has resulted in an increased capacity to uphold orders before the ACAT, to take licensing action and to prosecute offences.

However, the rate of complaints has now outstripped the team's rate of completing investigations and as such they are banking up with dramatically decreasing prospect of completion within reasonable time frames.

This problem is common to most regulatory regimes. However, a factor specific to the Territory is the cost to private individuals and body corporate enforcing contracts and the cost of other civil action. The case law shows very few building contract cases compared to other jurisdictions.

The time and cost to take a civil action to the Supreme Court is also very prohibitive for individuals and body corporates.

The regulator is for many people the last and only resort. Consequently, those matters that have a grave impact upon people need to be addressed at the expense of those who do not suffer any physical or material detriment.

Case Load Management Policy

To mitigate the immediate problems identified, an enforcement policy has been developed and implemented to determine a case load that can be completed within budget (Attachment A). The policy sets out criteria for investigating matters on the basis of risk. The policy is based upon the approach taken by the Australian Competition and Consumer Commission, NSW Fair Trading, and many NSW local councils.

It is proposed that eight criteria inform the priority given to each investigation:

- conduct that causes harm, or risk of harm to life or health
- conduct that causes significant damage to property or is of significant public interest or concern;
- conduct demonstrating a blatant disregard for the law;
- conduct that is, or is becoming, industry-wide or Territory-wide and is likely to have a detrimental effect on large classes of people or companies;
- conduct that engages the Territory's role as guardian of land on behalf of the Commonwealth
- conduct by person or entity that has a history of contraventions of construction, planning or land law;
- conduct that detrimentally affects disadvantaged or vulnerable groups of people; and
- whether the resources required to prove conduct is proportionate to the alleged offending behaviour and the utility of taking enforcement action.

To make the best use of Territory resources, and to maximise public benefit, it is proposed that compliance activities target the first seven areas of priority set out above. Those matters not covered by the criteria would only be investigated if resources allow.

The policy will be made available to the public via the ESDD website.

Examples of what would be pursued or excluded

Examples of recent cases that would meet priority 1 or 2 include: class 2 buildings with structural and water ingress issues; fraudulent Development Approvals; demolition and renovation involving the disturbance of asbestos; incorrect certification leading to construction dangerously close to power lines; significant increase in height or storeys of a development without approval.

Examples of recent cases that would meet priority 3: private certifiers approving plans that purport to be exempt development; the use of land for a purpose contrary to a lease or the Planning and Development Act 2007, such as storing white goods, car parts etc.

Examples of recent cases that would not be pursued: Maintenance or cleaning on private land of a minor nature: eg bird droppings, displaced pavers, temporary storage for building work. Matters that are able to be addressed by private legal actions, such as nuisance, that involve neighbouring properties, eg boundary disputes, water flow through back yards, etc. Building defects that are within prescribed standards and tolerances under the Building Act 2004 and are compliant with lawful approvals or exempted under the Act, eg painting, cracking via age.

Other matters that may not be pursued would depend upon the case load at the time. For example, matters involving minor set-back breaches and matters relating to garages and other class 10 structures that can be resolved in the small claims jurisdiction of ACAT.

ACAT is a no-cost jurisdiction and enables people to represent themselves. Matters where it is not possible within existing resources to obtain evidence to prove offending conduct or who committed the offence, such as dumping of construction waste or some allegations of unlawful home business.

Impact

The policy will reduce the number of cases as a matter of course. The natural balance of cases will be those that can be investigated and acted upon within available resources. In the long-term a sustainable case load would be 250 to 350 cases per year. This works out to be 40 to 45 investigations per inspector.

In the short term the policy should reduce the existing case load by 100 and reduce new investigations by about 20 percent.

The risk at present is the fact that many investigations are commenced but the sheer volume and complexity of cases is reducing capacity to complete them and instigate action. It is the action against those who breach the law and the publicity around sanctions that raise compliance, reduce offending conduct and increase community confidence in the regulator.

Municipal powers

On 19 September 2013, you noted a brief prepared by ESDD in collaboration with TAMS and JACS to develop policy and a Cabinet Submission to propose municipal powers for the ACT. It is planned that the Submission will be scheduled for Government consideration in the first half of 2014.

These powers would be akin to powers that exist for most municipal councils in Australia and would provide cost-effective means to address matters that fall under the headings of contaminated land, undeveloped land, unclean leaseholds and municipal nuisances.

Creating a new suite of powers and procedures proportionate to these problems will reduce the cost of investigating and enforcing low level matters. It will also enable matters to be dealt with in shorter time-frames.

Building Quality reform

The pro-rectification and pro-prosecution policy set by you, in addition to the statutory reforms to-date, are having a positive impact on the ability of ESDD to regulate effectively and are impacting industry.

At present, the recalcitrant elements of industry remain determined to spend more on legal resources to try and stifle the regulator as early as they can in the investigation process.

However, the recent Supreme Court cases settled in favour of the regulator (e.g. Supreme Court Appeal – B & T Constructions v Construction Occupations Registrar & The Owners – Units Plan 3324[2013] ACTSC 219 (6 November 2013)) provide further momentum to improve the conduct of the industry and raise the stakes for those in the industry who persist in unlawful conduct.

Financial Implications

The policy will greatly assist to keep the costs of investigations to be undertaken within existing budget.

Internal Consultation

No internal consultation was undertaken to develop the policy.

External Consultation

No external consultation was undertaken to develop the policy.

Benefits/Sensitivities

The benefits of the policy are to enable resources to be effectively focussed on high risk incidents potentially impacting on health and life safety. The community at large is likely to support this focus, but some individuals will complain that Government is drawing back from investigations and action on local residential issues.

Media Implications

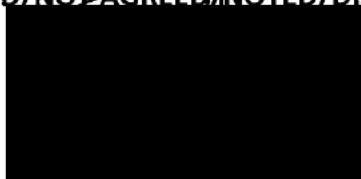
The policy will be made available to the public via the ESDD website. It is likely that at some point the policy will attract media attention. However, the policy is consistent with most NSW councils and a number of regulators who receive high volumes of complaints.

Sean Moysey
Manager
Utilities, Land and Lease Regulation
Construction Services Branch

Action Officer: Sean Moysey
Phone: 50873

25 November 2013

AGREED/NOT AGREED/NOTED/DISSCUSS



16/11/13

Simon Corbell MLA/...../.....



UNCLASSIFIED

To:	Minister for Planning
From:	Director-General [redacted] 9/8/14 Executive Director, Construction and Client Services [redacted] 7/8/14
Subject:	Investigation of construction and planning of [redacted]

Recommendation

That you note:

- a) the workload and method of operation of the investigation team within Construction Services Branch of EPD; and
- b) note the common law and statutory obligations upon EPD to conduct investigations and act on admissible evidence.

Critical Date

In the normal course of business.

Background

Utilities, Land and Lease Regulation Section within Construction Services Branch has carriage for compliance and enforcement of construction laws, planning and land use laws and technical regulation of the Territory's utilities.

The section investigates formal complaints made under the *Construction Occupations (Licensing) Act 2004* and the *Planning and Development Act 2007*.

The section's dedicated investigation team of nine inspectors investigates breaches of building laws, planning laws and leases. In the 2012–2013 financial year the team completed 668 investigations into building, planning and Crown lease breaches and received 787 new complaints.

The vast majority of investigations are instigated through the statutory formal complaint process set out in the relevant Acts. Of the investigations approximately half engage construction laws and half engage planning laws.

In early 2010 the Construction Services Branch had a small number of complaints about multi-story, multi-unit buildings (known as class 2 buildings). By 2013 the Branch had received approximately 57 complaints regarding class 2 buildings.

Investigation and rectification of class 2 buildings is highly resource intensive and highly litigious. Most rectification orders result in litigation. Completion of these types of investigations take between 12 and 24 months to complete. The *Empire Apartments* rectification order, for example, took approximately 18 months to compile.

Performance Assessment

DUE DATE:/...../..... DATE RECEIVED:...../...../.....

SATISFACTORY

UNSATISFACTORY

According to criteria specified in ACT Government Policy Performance Measures

Signature [redacted]

[Handwritten Signature]

Issues

Historical Criticism of Enforcement Action: breaking the pattern

The Commonwealth's and the Territory's enforcement of building and land laws has been the subject of criticism for decades. In 1979 the Commonwealth Ombudsman made criticisms about lack of enforcement. In 1995 a Territory commissioned report on the leasehold system (the Stein Report) made criticisms on enforcement of land laws. In 1999 a review of construction, land and planning enforcement was also highly critical.

In general all of the criticisms relate to a lack of action or sanctions imposed following a complaint.

In 2008 an audit of the Territory functions was undertaken and advocated the formation of a new Branch to consolidate and improve enforcement functions. From that audit came the Construction Services Branch.

In all of the reports and criticisms over the decades no review of the investigation methodology to enforce building and planning laws was ever undertaken.

In 2010 to 2011 the Construction Services Branch started a process of professionalising the investigation role to catch up with national best practice and improve both the outcomes and rate of completion of investigations. There is an Australian Government Investigation Standard and the Branch's long-term goal is to achieve the minimum requirements of that standard.

The focus on investigation and securing evidence that can be admitted to a court or tribunal has been instrumental in both the number of orders issued and the number of successful Tribunal and Court outcomes. Of 16 major matters in the Court or Tribunal since 2011, only one case has been lost. In relation to prosecutions, of the three that have gone to trial, two were won and one was lost. Also, in that time, the branch provided ACT Policing with two comprehensive investigation reports on offences under the *Criminal Code 2002*, which are with ACT Policing's fraud team.

Over the last two and a half years investigating and enforcement officers in the Branch have undertaken contemporary investigation training programs with the ICETS organisation. All relevant officers now either have a certificate IV in investigation to a criminal standard, or will shortly be qualified. Three officers are also studying for a diploma of investigation to a criminal standard. The training has assisted officers to identify systemic gaps in how evidence is obtained and how investigation powers are not being used to their full extent. It has also shown that a lot more time and care is needed to build cases to enforce relevant laws.

As a minimum, investigators must also complete asbestos awareness training; working from heights training and confined spaces training.

The majority of inspectors are also undertaking tertiary level qualifications in construction or certification. Tertiary education in the subject matter is critical because of the breadth of professionals covered by the legislation administered by the Construction Services branch. The team has to be able to match the expertise of groups such as engineers, certifiers, builders, plumbers and electricians.

The cases run before the Tribunal and the Supreme Court have also shown that the time and resources invested in the cases establish important precedents that reduce the number of spurious arguments that are used to evade responsibility.

The fundamentals of investigation

The majority of regulatory schemes in the ACT have at their heart criminal offences as the sanction for breaching a law, license or orders. The land and construction laws work this way and the onus is on the regulator to both prove the breach and disprove any defence or excuse put by the alleged offender.

Obtaining evidence to prove offences is the crux of investigation work. This requires proving evidence of the common law elements of an offence, namely time, date, person and jurisdiction as well as the specific statutory elements. Obtaining evidence must also be carried out in a way that meets the common law, human rights and statutory procedures.

Most investigations of building and development matters can establish whether a breach has occurred or not. For example, a leaking building is in the first instance a breach of the Building Code. However, obtaining evidence of who committed the breach, or who directed the breach, is very difficult. This becomes harder if a number of parties provide a version of events that obscures the identity of the party.

Unsustainable caseloads

The rate of complaints outstrips the team's rate of completing investigations. Consequently, cases are banked up with a sharply decreasing prospect of completion within reasonable time frames.

This problem is common to many regulatory regimes around the country.

In September 2013 the Directorate briefed Minister Corbell on the fact that the investigation workload had reached unsustainable proportions. Among eight officers there were 481 active investigations. Many investigations are of a nature that require increasingly complex evidence gathering, such as building defects in class 2 buildings.

The Directorate advised Minister Corbell that out of necessity it had adopted an enforcement policy for the management of the number of complaints and a basis for selecting or declining the investigation of complaints.

The policy is based upon policies administered by the Australian Competition and Consumer Commission, NSW Fair Trading, and many NSW local councils. The policy sets out criteria for investigating matters on the basis of risk. The strategic goal of the policy is to establish a case load that can actually be completed within existing budget. The enforcement policy is at Attachment A.

Consequently, there are complaints that have been assessed as minor and would cost more to investigate than the value of the problem itself. In many cases these matters can be addressed by the complainant through small claims actions or nuisance in ACAT.

Community beliefs and complaints

Most members of the community who complain to the Directorate do so with the belief that the Directorate has the power and capacity to issue orders within days or weeks. Making orders on the grounds of a complaint alone, without any admissible evidence and without any natural justice process is unlawful.

The only way orders can safely be made and sanctions applied is to obtain evidence that proves the breach.

This reality is often confronting to complainants. It is especially the case when it is explained that the complainant is a witness and may have to give evidence.

For example, in a number of cases complainants have taken photos of their house during construction, or taken photos of unlawful development. The photos are evidence. But they must be proven to be photos taken at the place and time of the alleged conduct. Consequently, the person who has taken the photos must be prepared to give evidence that they took the photo at the time and place alleged.

This is also the case for evidence of conversations, e-mails, letters, documents, invoices etc.

The statutory complaint provisions in the relevant Acts provide a means to obtain the first essential pieces of evidence and the first witness. However, the formality of this process requires a written complaint on a prescribed form. This approach is necessary to ensure that a complaint correctly identifies the problem, address and other relevant details and is admissible as part of the evidence gathering process. It also enables officers to keep the complainant informed of progress and obtain witness statements as required.

However, the requirement for complaints in a prescribed form has attracted some criticism, especially when they are directed to members of the Government or the Legislative Assembly. The Directorate has changed its processes to require our inspectorate officers to contact the complainant to assist them to provide the required information and explain the investigation process and typical time frames. This has proven to be a better level of customer service.

The future of building and land use compliance

As indicated in this brief, the current workload and resource intensive approach to compliance is unsustainable. With this in mind, the Directorate briefed Minister Corbell on a proposal to develop a Municipal Services Regulation legislative package which would give Directorates powers more akin to municipalities across the border in New South Wales (**copy Attached**). This would mean that a wide range of matters currently under investigation, including the tidiness of blocks, would be the subject of infringement notices rather than the long and protracted process of investigation and prosecution currently needed. There would be an opportunity to cross skill inspectors across the Government Service for certain activities and have many more 'eyes in the field' identifying possible breaches and taking proactive action. This would free up resources to focus on building safety and quality matters as well as more serious land use breaches. This package will be developed over the next 12 months for your consideration.

Financial Implications

None, noting the case load management issues with existing resources

Internal Consultation

Government Solicitor's Office and the Legislation Policy and Programs Branch of the Justice and Community Safety Directorate were consulted around the law and methodology informing investigations in the ACT.

External Consultation

None.

Benefits/Sensitivities

A number of complainants and members of the community have expressed concern about the lack of action in response to complaints. A number of complainants have also expressed concern in relation to the application of the enforcement policy.

There is a long-standing perception that the Territory is ineffective in addressing land and building breaches.

There is an opportunity to address some of the case load management issues and priorities with the development of the Municipal Services Package.

Media Implications

Issues around complaints management in the Territory are periodically raised by the media. Currently these are responded to on a case by case basis.

Craig Simmons
Director, Construction Services Branch
6207 6322
5 August 2014

Project/Action Officer: Sean Moysey
Senior Manager
Utilities, Land and
Lease Regulation
Ph 50873

*CAME, CAN WE SEE IF THIS CAN BE
ACTED IN SHORTER TIME FRAME?*

*ALSO, CAN WE TRY A
COMMUNITY EDUCATION CAMPAIGN IN
THE SHORT TERM?*

AGREED/NOT AGREED/NOTED/DISCUSS



Mick Gentlem



18/8/14



Agreed.
- see note on p. 5. D.

SUBJECT Enforcement Policy for Construction Services Branch

DIRECTOR-GENERAL [redacted] *1/19 - Craig, could we please discuss.*

DEPUTY DIRECTOR-GENERAL, POLICY, CORPORATE AND REGULATION

EXECUTIVE DIRECTOR, REGULATION AND SERVICES *CS 6/9*

*write
- need to consider
case studies.*

PURPOSE

To:

- a) brief you on the workload of the investigation team within Construction Services Branch;
- b) to recommend you agree to an enforcement policy that enables the management of complaints on the basis of risk to life, health and property; and
- c) recommend you advise the Minister of the intended policy.

BACKGROUND

Utilities, Land and Lease Regulation Section within Construction Services Branch has carriage for compliance and enforcement of construction laws, planning and land use laws and technical regulation of the Territory's utilities.

The section investigates formal complaints made under the *Construction Occupations (Licensing) Act 2004* or the *Planning and Development Act 2007*.

The section's dedicated investigation team of eight inspectors investigates breaches of building laws, planning laws and leases.

In the 2011–2012 financial year the investigation team completed 647 investigations into building, planning and Crown lease breaches and received 684 new complaints.

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Of the investigations approximately half engage construction laws and half engage planning laws.

The team also receives 'section 50' notices from building certifiers. These notices inform the Construction Occupations Registrar of work that is not compliant with building approvals or planning approvals.

In 2011 Construction Services Branch received 19 complaints regarding multi-unit, multi-story buildings, known as class 2 buildings under the Building Code of Australia. In May and June 2012 Construction Services Branch received a further 13 complaints for class 2 buildings. Seven of the complaints engage high risk issues of safety and property for the occupants of the 876 units affected.

None in
2013/14

Investigation and rectification of class 2 buildings is expensive and very resource intensive. Most rectification orders result in litigation. Completion of these investigations takes between 12 and 24 months to complete. The *Empire Apartments* rectification order, for example, took approximately 18 months to compile.

ISSUES

The workload has reached unsustainable proportions. Among eight officers there are currently 481 active investigations. Many of those investigations are of a nature that require increasingly complex evidence gathering.

The current compliment of inspectors are highly trained and are improving productivity as their experience grows.

The permanent members of the investigation team currently hold a certificate IV in investigation to a criminal standard; asbestos awareness training; working from heights training; confined spaces training. The majority of inspectors are also undertaking degrees at a tertiary level in construction or certification. One inspector also has a law degree.

The application of orthodox investigation practice, such as taking witness statements, interviewing persons of interest, exercising statutory powers to obtain documentary and physical evidence has resulted in an increased capacity to uphold orders before the ACAT, to take licensing action and to prosecute offences.

However, the rate of complaints has now outstripped the team's rate of completing investigations and as such they are banking up with dramatically decreasing prospect of completion within reasonable time frames.

This problem is common to most regulatory regimes. However, a factor specific to the Territory is the cost to private individuals and body corporate enforcing contracts and the cost of other civil action. The case law shows very few building contract cases compared to other jurisdictions.

The time and cost to take a civil action to the Supreme Court is also very prohibitive for individuals and body corporates.

The regulator is for many people the last and only resort. Consequently, those matters that have a grave impact upon people need to be addressed at the expense of those who do not suffer any physical or material detriment.

Examples of recent cases that would meet priority 3: private certifiers approving plans that purport to be exempt development; the use of land for a purpose contrary to a lease or the Planning and Development Act 2007, such as storing white goods, car parts etc.

Examples of recent cases that would not be pursued: Maintenance or cleaning on private land of a minor nature: eg bird droppings, displaced pavers, temporary storage for building work. Matters that are able to be addressed by private legal actions, such as nuisance, that involve neighbouring properties, eg boundary disputes, water flow through back yards, etc. Building defects that are within prescribed standards and tolerances under the Building Act 2004 and are compliant with lawful approvals or exempted under the Act, eg painting, cracking via age.

Other matters that may not be pursued would depend upon the case load at the time. For example, matter involving minor set-back breaches. Matters relating to garages and other class 10 structures that can be resolved in the small claims jurisdiction of ACAT. ACAT is a no-cost jurisdiction and enables people to represent themselves. Matters where it is not possible within existing resources to obtain evidence to prove offending conduct or who committed the offence, such as dumping of construction waste or some allegations of unlawful home business.

Impact

The policy will reduce the number of cases as a matter of course. The natural balance of cases will be those cases that can be investigated and acted upon within available resources. In the long-term a sustainable case load would be 250 to 350 cases per year. This works out to be 40 to 45 investigations per inspector.

In the short term the policy should reduce the existing case load by 100 and reduce new investigations by about 20 percent.

The risk that is manifesting itself at present is the fact that many investigations are commenced but the sheer volume and complexity of cases is reducing capacity to complete cases and instigate action. It is the action against those who breach the law and the publicity around sanctions that raise compliance, reduce offending conduct and increase community confidence in the regulator.

POTENTIAL MEDIA IMPLICATIONS

There are always matters under investigation that attract media attention. Even the Directorate's successes are usually portrayed in a negative manner.

It is possible that complaints rejected for investigation may attract negative media coverage. However, this needs to be balanced against the significant negative coverage for matters dealing with life and health safety that are not investigated in good time.

Proposed approach

To resolve the problem an enforcement policy has been drafted to determine a case load that can be completed within budget (Attachment A). The policy sets out criteria for investigating matters on the basis of risk. The policy is based upon policies administered by the Australian Competition and Consumer Commission, NSW Fair Trading, and many NSW local councils.

It is proposed that eight criteria that inform the priority given to each investigation:

1. conduct of that causes harm, or risk of harm to life or health
2. conduct that causes significant damage to property or is of significant public interest or concern;
3. conduct demonstrating a blatant disregard for the law;
4. conduct that is, or is becoming, industry-wide or Territory-wide and is likely to have a detrimental effect on large classes of people or companies;
5. conduct that engages the Territory's role as guardian of land on behalf of the Commonwealth
6. conduct by person or entity that has a history of contraventions of construction, planning or land law;
7. conduct that detrimentally affects disadvantaged or vulnerable groups of people; and
8. whether the resources required to prove conduct is proportionate to the alleged offending behaviour and the utility of taking enforcement action.

To make the best use of our resources, and to maximise public benefit, it is proposed that compliance activities target the first seven areas of priority set out above. Those matters not covered by the criteria would only be investigated if resources allow.

It is proposed that if the policy were adopted, it would be available to the public via the website.

Examples of what would be pursued or excluded

Examples of recent cases that would meet priority 1 or 2 include: class 2 buildings with structural and water ingress issues; fraudulent Development Approvals; demolition and renovation involving the disturbance of asbestos; incorrect certification leading to construction dangerously close to power lines; significant increase in height or storeys of a development without approval.

*How would
disused petrol
stations fit?*

BUDGET IMPLICATIONS

The proposed policy will greatly assist to keep the cost of investigations within existing budget.

CONSULTATION STRATEGY

The policy is internal to ESDD, consistent with other enforcement policies around the country. No consultation on the proposal has been undertaken.

CRITICAL DATE

There is no critical date for this matter. However, it is recommended that the matter be addressed as soon as practicable given the escalating workload.

RECOMMENDATIONS

That you:

- agree to the policy set out in Attachment A; and
- note this brief, in particular the increase of matters involving class 2 buildings.



Craig Simmons
Director
Construction Services Branch

6 September 2013

AGREED/NOT AGREED/NOTED/PLEASE DISCUSS

DIRECTOR-GENERAL

Date: 1/10/13

Contact Officer: Sean Moysey
Position: Manager
Team: Utilities, Land and Lease Regulation Section
Phone: 6205 0873

Date: 5 September 2013

- Craig, as discussed, please prepare a brief for Minister which shows how we propose to deal with matters under current resources and legislative framework Vs. how we would deal with matters under the proposed "municipal" reforms.

Thanks,
Date.

Construction Services Branch

Enforcement Policy

Policy purpose

This policy sets out the principles to be used by the Construction Services Branch in its enforcement work. The policy objective of enforcement work is to uphold the Territory's laws assigned to Construction Services Branch.

A unique feature of the Territory is that the executive arm of the Government has responsibility for functions that are divided between States and local councils in other jurisdictions. The Construction Services Branch exercises functions that in other jurisdictions would be functions under State governments or local councils.

At the apex of the purposes of the legislation assigned to Construction Services Branch is a responsibility to protect life, health and property of individuals and the community.

The key operational task of the Branch is to promote and ensure significant compliance with Territory law in achieving the purposes of the legislation.

This policy also outlines the Branch's regulatory priorities, strategies and goals.

The Construction Services Branch

The Construction Services Branch regulates:

- the ACT building industry
- architectural, asbestos, building, building energy assessment, electrical, plumbing, gas, and associated services (including assessment and inspection of hydraulic and gas installations and auditing building certifiers, hydraulics certifiers and electrical self-certifiers)
- licensed trades
- land use
- utilities across the Territory.
- As part of its regulatory functions, the branch responds to requests for:
 - regulatory services, including complaints about construction, planning and development matters
 - failures by licensed building surveyors providing a certification service under the fully privatised building certification process in the Territory

- all licensable work is undertaken by appropriately licensed entities
- developments not in accordance with approvals
- breaches of Crown leases
- extensions of time for lease commencement and completion provisions
- calculation of associated fees for outstanding compliance certificates.

The Branch investigates formal complaints made under the *Construction Occupations (Licensing) Act 2004* and the *Planning and Development Act 2007*. The Branch has a dedicated investigation team of inspectors and investigates breaches of building laws, planning and development laws and leases.

The Branch also has a dedicated Breach Management Team to manage complex cases and litigation arising from enforcement action.

The Building Audit Team consists of officers who audit paperwork and associated work undertaken by the various licensed construction occupations with a particular emphasis on building surveyors and building assessors.

They conduct administrative audits on building approvals issued by licensed Building Certifiers for residential dwellings approved under exempt development provisions and a range of residential energy ratings issued by licensed building assessors (energy raters) on new houses, alterations and additions to houses and on sale of premises. The team also conducts physical inspections on a selection of those properties subjected to the administrative audit.

The Construction Occupations Licensing Team is responsible for managing the issuing of a range of licences, registrations and accreditations associated with the construction industry under the *Construction Occupations (Licensing) Act 2004* and the *Architects Act 2004* including Architects, Asbestos Assessors, Asbestos Removalists, Builders, Building Assessors, Building Certifiers, Electricians, Gasworkers, Plumbers, gasfitters and drainers, Plumbing Plan Certifier and Works Assessors.

The Utilities Technical Regulation team regulates utilities licensed under the *Utilities Act 2000* for compliance with technical requirements. The Utilities Technical Regulation team works closely with the Independent Competition and Regulatory Commission (ICRC) to regulate and audit utilities. The ICRC has carriage of licensing and pricing regulation of utilities.

The Branch also has an Electrical Inspectorate and a Plumbing and Gas Fitting Inspectorate. These inspectorates inspect work undertaken by licensed practitioners and investigate incidents such as fire or electrical shock. The teams also take disciplinary action on licence holders where a breach of technical standards are found.

Available enforcement options

The legislation assigned to the Branch provides for two broad categories of enforcement actions:

- administrative action; and
- criminal proceedings.

Administrative Action

Planning and Development Act 2007

Formal written warning

Under the *Planning and Development Act 2007* leaseholders and other parties who are identified as being in breach of planning laws or a Crown lease are afforded two warning letters.

Orders

The *Planning and Development Act 2007* includes a number of orders that can be made against leaseholders and others to enforce the Act and Crown leases.

The orders are:

Controlled activity orders — a direction to a person or entity to do one or more things set out in section 358(3) of the Act;

Prohibition orders — an order that prevents or stops a person or entity from undertaking prohibited development or development that is otherwise unlawful as set out in section 377 of the Act.

Rectification work direction — a direction to a person or entity to undertake rectification work to ensure compliance with a development approval or a controlled activity order.

Other powers authorised by the Act are:

Termination of lease for contravening orders or the Crown lease.

Termination of licences to use land given by the Commonwealth or the Territory.

A power for the Supreme Court to issue an injunction upon application from ACTPLA.

Construction Occupations (Licensing) Act 2004

Licence Conditions

The Registrar may condition construction licences under circumstances of public protection or in response to finding a disciplinary breach.

The ACAT is also empowered to impose conditions on licences during or as a consequence of disciplinary proceedings.

Suspension of licence

The *Construction Occupations (Licensing) Act 2004* includes automatic suspension of licences for three months under circumstances set out in part 5. Licences can also be suspended as a disciplinary action.

Cancellation licence

Licences can be cancelled as a disciplinary action.

Demerit points

The *Construction Occupations (Licensing) Act 2004* includes a demerit point scheme which registers points for disciplinary breaches. A licensee must be advised in writing when they have accrued 10 or more demerit points within a three year period. At 15 points worth of disciplinary breaches accrued within a three year period, the Registrar must suspend, cancel or take other disciplinary action.

Rectification orders

The Registrar may make emergency rectification orders or rectification orders that require a licence holder or former licence holder to undertake rectification work.

Publication

The *Construction Occupations (Licensing) Act 2004* requires the Registrar to keep a register of licensees that is available to the public. The register must include particulars, such as suspension or rectification orders, as set out in Part 9 of the Act.

Reprimand

The Registrar may issue a reprimand to a licence holder to the holder of a construction occupations licence holder as a form of occupational discipline.

Criminal proceedings

Infringement notices

An infringement notice is an offer from an authorised entity not to prosecute to a person or entity determined to be in breach of a criminal offence in exchange for a pecuniary penalty set by statute.

Payment of an infringement notice is not an admission of guilt nor does it constitute a conviction. However, failure to pay an infringement notice and disputing an infringement notice leaves the option of prosecution open.

The *Planning and Development Act 2007*, the *Construction Occupations (Licensing) Act 2004* and the *Building Act 2004* include some offences that are part of the Territory's infringement notice scheme.

Prosecution

The *Utilities Act 2000*, the *Electrical Safety Act 1971*, the *Gas Safety Act 2000*, and the *Water and Sewerage Act 2000*, the *Planning and Development Act 2007*, the *Construction Occupations (Licensing) Act 2004* and the *Building Act 2004* all include criminal offences that can be prosecuted by CSB by referral of a brief to the Director of Public Prosecutions.

Alleged offences under the *Criminal Code 2002* or the *Crimes Act 1900* committed in the context of the legislation administered by CSB are referred to ACT Policing for investigation.

Prioritisation of cases

Formal Complaints

Investigations are commenced by the exercise of the formal complaint provisions in the *Construction Occupations (Licensing) Act 2004* and the *Planning and Development Act 2007*.

Anonymous complaints will not be investigated. However, information provided anonymously may be used to enquire into an allegation if the matter is directly related to life safety and the information is credible. Other credible information received may also be used to assist existing investigations.

Regulatory goals

The goals of the Branch on behalf of the Territory are to:

- stop unlawful conduct;
- deter future offending conduct;
- repair the harm, damage or loss caused by the offending behaviour as authorised by the law, for example by making appropriate orders;
- protect the community from harm, including safety, health, loss of value and loss of amenity;
- encourage self-correction of offending conduct; and
- where warranted, punish the offender by the imposition of penalties or fines.

Priority of cases

Construction Services Branch has a priority hierarchy for resources allocated to investigation and enforcement. Eight criteria inform the priority given to each case:

1. conduct of that causes harm, or risk of harm to life or health
2. conduct that causes significant damage to property or is of significant public interest or concern;

3. conduct demonstrating a blatant disregard for the law;
4. conduct that is, or is becoming, industry-wide or Territory-wide and is likely to have a detrimental effect on large classes of people or companies;
5. conduct that engages the Territory's role as guardian of land on behalf of the Commonwealth
6. conduct by person or entity that has a history of contraventions of construction, planning or land law;
7. conduct that detrimentally affects disadvantaged or vulnerable groups of people; and
8. whether the resources required to prove conduct is proportionate to the alleged offending behaviour and the utility of taking enforcement action.

Construction Services Branch will also actively uphold compliance with fundamental regulatory and investigation powers, such as information requirements, conditions on licence, stop work notices etc.

Matters that do not meet any of the eight criteria for priority will be addressed if resources allow. Some matters, where the issue is simply aesthetic, will not be able to be investigated.

Matters that only raise an issue of access to views, the appearance of buildings; or the appearance of land will not be investigated.

Construction Services Branch takes a risk-based approach to undertaking investigations and enforcement activity. It is not possible to pursue all allegations of non-compliance received by the Branch. While all complaints are considered, discretion is exercised to determine if investigation and action should be taken. This ensures that resources are applied to the greatest overall benefit to the Territory.

To make the best use of our resources, and to maximise the public benefit, our compliance activities target the first seven areas of priority set out above.

Triage

Upon the receipt of a complaint, there will be an initial assessment of the complaint. The assessment will ascertain if the complaint is a matter covered by construction, planning or land law and if so will assign an inspector.

If the matter is covered by another law, a referral to the relevant agency will be made and the complainant informed of the referral.

If the matter is not covered by Territory law, or is covered by private law only, the complainant will be informed that a service cannot be provided.

There are three categories of priority. Priority 1: Life or health safety, Priority 2: engages all or many of the criteria, Priority 3: engages only one criteria other than criteria 1.

Timing

The length of an investigation is inherently difficult to pre-determine. This is due to the fact that as an investigation progresses there are sometimes contradictory or differing information that needs to be tested and examined in detail. For example, investigations that rely on witnesses will in some cases require further investigation to corroborate particulars if there are differing accounts.

Protecting the integrity of investigations

As a principle well settled in the area of investigation of criminal offences and civil breaches, investigations are conducted confidentially. Construction Services Branch will not release or comment on information that forms part of any active investigation.

Investigations are a search for facts based upon demonstrable evidence. The aim of any investigation is to reveal the full detail of an allegation. The process of an investigation is to gather information from as many different sources and establish what information can be regarded as evidence. The evidence in turn then informs what facts could be established to prove, fail to prove, or disprove a breach.

Confidentiality and security of information and evidence is critical to the integrity of the investigation. During an investigation, information or evidence will not be disclosed except by lawful direction of an authorised body such as the Ombudsman, Tribunal or Court.

Natural justice is also protected by the investigation process. If the investigation results in evidence that demonstrates offending conduct, the allegations will be formally put to the alleged offender prior to allow the person to offer contrary information or evidence or any defences to the offending conduct.

At the conclusion of an investigation if the evidence demonstrates offending conduct an appropriate course of action will be determined. Should orders be made or prosecution commenced, any individuals or entities subject to that action will be able to exercise their fair trial rights accordingly.

All of the investigative functions exercised by Construction Services Branch are amenable to judicial review and in some cases merits review. All orders or directions that can be issued by authorised officers under statute are amenable to judicial review and the majority are amenable to merits review.

Apart from the normal accountability processes through the governance of the Directorate, Construction Services Branch is also accountable to the Ombudsman, the Auditor General's Office and the Human Rights Commission.