



ENFORCEMENT POLICY

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<i>Relevant Document Reference</i>	Action on Default Standard Operating Procedure Expiation Standard Operating Procedure

1. PURPOSE

- 1.1. Eastern Health Authority (“EHA”) Enforcement Policy (“the Policy”) outlines the compliance and enforcement strategies adopted by EHA to ensure that enforcement decisions best achieve applicable legislative objectives and are in the broader public interest.
- 1.2. The objectives of the Policy are to:
 - 1.2.1. assist, encourage or require individuals, organisations and businesses to fulfil their legal responsibilities without imposing unnecessary burdens;
 - 1.2.2. ensure that enforcement action is proportionate to the alleged breach in each case;
 - 1.2.3. ensure that EHA carries out its duties in a fair, equitable and consistent manner;
 - 1.2.4. ensure that EHA is transparent in dealing with customers; and
 - 1.2.5. ensure that EHA works with others where appropriate to develop effective partnerships in achieving these objectives.
- 1.3. EHA recognises that enforcement decisions are dependent on a number of variables. The decision regarding what enforcement action to take (if any) to address a breach of legislation is at the discretion of EHA (and its delegates). This Policy is intended to guide EHA officers in

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making such a decision, noting that due regard must always, be had to the particular circumstances in question.

2. SCOPE

- 2.1. The Policy provides guidance for pursuing compliance and enforcement strategies in relation to all legislation administered by EHA including:
 - 2.1.1. *Food Act 2001*;
 - 2.1.2. *South Australian Public Health Act 2011*;
 - 2.1.3. *Supported Residential Facilities Act 1992*;
 - 2.1.4. *Environment Protection Act 1993*; and
- 2.2. For the avoidance of doubt the Policy applies to all enforcement decisions made by EHA, including decisions by a delegate or person appointed as an authorised officer under any of the above legislation.

3. PRINCIPLES OF ENFORCEMENT

EHA officers will have regard to the principles set out below in making decisions to enforce and encourage a person's compliance with his/her legislative obligations.

3.1. ***Graduated Response***

- 3.1.1. Wherever possible, EHA adopts a graduated approach to enforcement. This envisages the initial use of informal (non-legislative) enforcement options such as education, verbal advice and/or written warnings. If these options do not achieve compliance, EHA may pursue more significant enforcement options such as issuing statutory notices, orders or expiation notices, and/or commencing a prosecution.
- 3.1.2. Decisions about a graduated response must be balanced against the severity of the alleged offence. In circumstances where a breach is considered serious and/or the risk to public health arising from the breach is high, a graduated response may not be appropriate. In these circumstances, EHA may take immediate and firm action against those who are responsible for the breach. For example, a food premises that is infested with cockroaches and/or vermin and continues to operate and process food for sale, may warrant the issuing of an immediate Prohibition Order under the *Food Act 2001*.

3.2. ***Proportionality***

- 3.2.1. EHA will endeavour to ensure that action taken to address any breach of legislation is proportionate to the problem it seeks to address and considers how culpable, or responsible the offender is for the breach.

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Expiation amounts for offences are determined by State Government within each piece of legislation administered. EHA does not have the discretion to reduce or set these fees.

- 3.2.2. In determining what action to take, regard will be had to the following factors:
- the seriousness of the breach;
 - whether there are serious risks to public health or safety;
 - whether potential hazards are adequately controlled;
 - the measures taken to avoid the breach (if any);
 - the extent and urgency of any remedial action required (including the cost of such action);
 - as far as the law allows, the circumstances and attitude of offenders (such as compliance history and willingness to co-operate with EHA); and
 - the impact the breach has had on others.

3.3. **Consistency**

- 3.3.1. To ensure that individuals, organisations and businesses are treated fairly and equally, EHA will adopt an approach that aims to achieve a similar outcome in similar circumstances.
- 3.3.2. Decisions regarding enforcement action require use of professional judgement and discretion to assess varying circumstances. To best achieve consistency EHA will:
- observe the Policy and follow standard operating procedures where possible (noting that circumstances may warrant departure from such procedures and this Policy for good reason);
 - ensure fair, equitable and non-discriminatory treatment of individuals; and
 - record the reasons for any deviation from the Policy and standard operating procedures.
- 3.3.3. In addition, EHA will facilitate the review of complex cases by senior management and seek advice from legal advisors, if deemed to be appropriate.

3.4. **Transparency**

- 3.4.1. EHA will be open and transparent, and will assist individuals, organisations and businesses to understand what is expected of them and what they can expect from EHA. For this purpose, a copy of the Policy is available to the public on EHA website.
- 3.4.2. EHA will ensure that (where applicable) any 'best practice' advice that is offered to recipients is distinguished from the recipient's legal obligations and rights to appeal. EHA remains open to discussing potential and actual compliance failures, before, during and after formal action has been taken.

3.5. **Conflict of Interest**

Where an EHA officer has a personal association or relationship with an alleged offender or any other person involved in an investigation conducted by EHA:

- 3.5.1. an alternative person will make decisions where possible; and

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3.5.2. the facts about any conflict / relationship will be recorded.

3.6. **Authorised Officers**

Only officers who are competent by training, qualification and/or experience will be Authorised to take enforcement action. Officers will also have sufficient training and understanding of Council's policies and procedures to ensure a consistent approach to their duties. Any decision to act other than in accordance with this policy must have approval from the relevant Manager and the reasons for action recorded in accordance with Council's Records Management protocols.

Officers are required to show their Authorised Officer/Person identification card on request.

4. DECISION MAKING

- 4.1. Enforcement decisions must be fair, consistent, balanced and uphold accepted industry standards.
- 4.2. In making a decision on the most appropriate enforcement strategy, EHA shall consider, amongst other relevant considerations the following:
 - 4.2.1. the seriousness of the harm or potential harm resulting from the breach (including the risk to public health);
 - 4.2.2. the degree of wilfulness of the offender and/or the offender's knowledge of the breach;
 - 4.2.3. that actions taken by the offender to avoid or mitigate the breach or, any failure by the offender to take reasonable action where the breach (or the potential for it to occur) was known to him/her;
 - 4.2.4. the offender's past history including the seriousness and timeframe of previous non-compliance, as well as the responsiveness of the offender in taking corrective action;
 - 4.2.5. the consequences of non-compliance;
 - 4.2.6. the likely effectiveness of the various enforcement options;
 - 4.2.7. general and specific deterrence; and
 - 4.2.8. consistency of approach to similar breaches/offences.
- 4.3. Factors that are irrelevant when making a decision on the most appropriate enforcement strategy (and that will not, therefore, be taken into account) are:
 - 4.3.1. previous enforcement decisions made in dissimilar circumstances;
 - 4.3.2. any element that would lead to the discrimination of or bias against a person such as ethnicity, nationality, political association, religion, gender, sexuality or beliefs; and

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- 4.3.3. possible political advantage or disadvantage to a government or political group or party.
- 4.4. Reasons for enforcement decisions will be recorded and, where appropriate, will be notified to affected persons. However, this information will not be provided if to do so may prejudice enforcement action (including action that may be taken at a future date) or the outcome of any investigation conducted by EHA.

5. COMPLIANCE AND ENFORCEMENT OPTIONS

5.1. *General Considerations*

- 5.1.1. There are a range of actions available to EHA to achieve and encourage compliance, including:
- taking no action;
 - education;
 - informal action such as offering verbal or written advice, issuing verbal or written warnings and requests for action; and increasing inspection frequency for premises; and
 - formal action including issuing a statutory order or notice, taking action in default, revoking or cancelling a licence, issuing an expiation notice and/or commencing a prosecution.
- 5.1.2. Mediation services may also be recommended where EHA determines that the complaint is incapable of resolution through other informal or formal means.
- 5.1.3. EHA has the flexibility to select the appropriate action based on the factors outlined above and may use multiple actions to obtain compliance. In some cases, the actions of an alleged offender in response to enforcement action may lead to further action being taken. For example, a failure to comply with a statutory notice may result in an additional offence and result in EHA issuing an expiation notice or commencing a prosecution.
- 5.1.4. Compliance and enforcement actions will be selected and implemented in a way that best achieves the objectives of and compliance with the respective legislation.

5.2. *No Action*

- 5.2.1. It may be appropriate for EHA to take no action where:
- after investigation, no breach of a legislative provision was discovered;
 - the alleged offence is outside of EHA's area of authority;
 - a complaint is frivolous, vexatious or trivial in nature; or
 - taking action may prejudice other major investigations.
- 5.2.2. Where a decision is made to take no action, the decision and reasons must be recorded by EHA.

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5.3. *Education*

- 5.3.1. EHA uses education as a tool to increase people's skills and knowledge, thereby enhancing compliance with legislation and other requirements. Education may be provided by various means, including through verbal and written advice on-site during inspections and complaint investigations, publications, media releases, newsletters and EHA's website.
- 5.3.2. EHA observes business trends and implements training opportunities as a tool to encourage improvement in areas of poor performance. For example, EHA food safety training.

5.4. *Informal Action: Provision of Compliance Advice*

- 5.4.1. Verbal advice from EHA will be put clearly and simply and will be confirmed in writing.
- 5.4.2. The provision of advice to achieve compliance may be appropriate in circumstances where it is considered that conduct gives rise to a breach of the law, but the matter does not justify the prioritisation of resources to pursue further action.
- 5.4.3. Compliance advice provided by EHA will:
- where applicable, outline the nature and cause of the complaint(s) received or the concerns held by EHA;
 - specify the relevant legislative provision(s), including those they may have allegedly been breached;
 - explain the applicable general principles that should guide the recipients future conduct;
 - specify the penalties that may be imposed for breaches of the relevant legislation; and
 - clearly differentiate between legal requirements and recommendations of good practice.
- 5.4.4. Compliance advice is not legal advice. EHA will advise the recipient that if further information or guidance on the matter is required that they should seek independent legal advice.

5.5. *Informal Action: Warnings and requests for action*

- 5.5.1. Verbal warnings should only be used to address minor and first time breaches of legislation and confirmed in writing.
- 5.5.2. Informal warnings or requests for action may be an appropriate enforcement option where:
- the act or omission is not serious enough to warrant formal action;
 - the offender's past history reasonably suggests that informal action will secure compliance;
 - confidence in the individual, business or organisation is high;

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- the consequences of non-compliance will not pose a significant risk to public safety;
 - informal action is more appropriate or effective than a formal approach. This may be particularly relevant in the case of voluntary organisations using volunteers; and
 - where statutory action is not possible but it would be beneficial in a wider public health context to urge a particular outcome.
- 5.5.3. Written warnings must outline:
- the nature of the offence alleged to have been committed;
 - the relevant legislative provision(s) allegedly breached;
 - the actions required to ensure compliance with the relevant legislation;
 - the proposed timeframe for compliance; and
 - a clear warning regarding the penalties that may be imposed for further breaches of the relevant legislation and the intention of EHA to enforce the legislation if compliance is not achieved.
- 5.5.4. EHA will follow up after the timeframe for compliance has expired, to ensure that required actions have been undertaken.
- 5.5.5. Failure to comply with a warning or request for action will generally result in the implementation of more serious enforcement action.

5.6. **Formal Action: Statutory Notices & Orders**

- 5.6.1. In inspecting public health activities, EHA may issue statutory notices or orders. Examples include an improvement notice or prohibition order under the *Food Act 2001* or, a notice to secure compliance with the General Duty under the *South Australian Public Health Act 2011*.
- 5.6.2. EHA will generally pursue this option where informal action has not achieved compliance or the circumstances otherwise justify this approach (taking the considerations outline in this Policy into account).
- 5.6.3. Statutory notices and orders will be issued in accordance with any applicable statutory preconditions. For example, some legislation may specify that a notice of intention to issue an order/notice must first be issued together with an invitation to the recipient to provide submissions in relation to the matter.
- 5.6.4. Ordinarily a statutory notice/order will outline actions that are required to be taken by the recipient. This may include directing that specified work is carried out, that activities are modified, or that the recipient cease and desist from taking certain action. Where a statutory notice/order is issued, the recipient is obligated to comply with its terms and failure to do so may give rise to an offence
- 5.6.5. Officers will use professional judgement and discretion to assess the requirements that should be included in an order/notice and the timeframe within which the requirements are to be complied with.

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- 5.6.6. In circumstances where there is an immediate threat to public health or safety, an authorised person may consider taking emergency action (without giving prior notice to the affected persons). An example is an Authorised Officer issuing an Emergency Order or taking emergency action under the *South Australian Public Health Act 2011*. In these circumstances immediate compliance to resolve a situation may be required.
- 5.6.7. Statutory notices and orders will generally outline:
- the relevant legislative provision(s) that the issuing officer believes is being, or has been breached;
 - a description of the relevant breach and the legislative grounds for issuing the notice/order;
 - the action that is required in order to rectify the non-compliance; and
 - the consequences of failing to comply with the requirements of the notice.
- Where practicable they will be accompanied by a covering letter that outlines the reasons why the notice/order has been issued.
- 5.6.8. The timeframe allowed for carrying out the requirements of a notice/order will vary depending upon the urgency of the matter and the remedial action that is required. Wherever practicable, an officer will discuss the notice/order with the responsible person.
- 5.6.9. Extending the time for compliance provided in a notice/order may be granted at the discretion of EHA. A request for an extension will be considered where the request is received before the timeframe for action as stipulated in the notice/order has expired.
- 5.6.10. In many instances, the recipient of the notice/order may have a right of appeal. If this is the case, EHA will advise the recipient in writing of the right to appeal and the relevant legal provisions (such information may be included in the notice/order itself).
- 5.6.11. Where an offence has been committed EHA may, where considered appropriate, issue an Expiation Notice or commence a prosecution in addition to serving a statutory notice or order.

5.7. Formal Action: Action in default

- 5.7.1. In many cases, a failure to comply with a statutory notice or order may enliven EHA's power to take action in default. This is where EHA itself arranges for the requirements of the order/notice to be carried out.
- 5.7.2. EHA will consider this option:
- only where it is provided by legislation; and
 - to secure compliance with the requirements of a statutory notice or order where the necessary works have not been carried out in the time allowed without good reason.
- 5.7.3. A decision as to whether or not to take action in default will be made weighing up the benefits of taking such action and the costs of doing so. Further, before carrying out work itself EHA will consider whether there is a realistic prospect that the person, business or organisation responsible will complete the works within a reasonable time.

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- 5.7.4. Where EHA carries out works in default the respective Constituent Council will seek to recover all costs over a fair period, using all statutory means available.
- 5.7.5. Failure to comply with a notice or order may allow EHA to expiate or prosecute the person who failed to comply in addition to taking action in default. EHA will only pursue such action where the conduct of the recipient justifies this approach. In coming to a decision, EHA will consider whether the persons responsible have been cooperative or have otherwise obstructed EHA officers and/or deliberately provided false information and, the degree of harm or risk of harm caused by delaying the required action.
- 5.7.6. The decision to carry out action in default will be made by the Chief Executive Officer or Team Leader Environmental Health in consultation with a representative of the relevant Constituent Council.

5.8. Formal Action: Cancellation of a Licence

- 5.8.1. This option may be considered where EHA is the authority responsible for issuing a licence or permit to authorise a person to conduct an activity. An example is licences issued under the *Supported Residential Facilities Act 1992*.
- 5.8.2. A decision to revoke or cancel a licence or permit will generally be made as a last resort where alternative enforcement strategies have not achieved compliance or where EHA is satisfied that the legislative grounds to cancel/revoke the licence/permit (if any) are made out.
- 5.8.3. Before a decision is made to cancel/revoke a licence/permit, EHA will first provide the licence/permit holder with notice of its intention to do so and will invite and consider submissions from him/her regarding the proposal.

5.9. Formal Action: Expiation Notices

- 5.9.1. An expiation notice may be appropriate where:
- the offence(s) committed are considered to be significant;
 - a person has failed to correct an identified problem after having been given reasonable opportunity to do so by EHA;
 - a person has failed to comply with the requirements of a statutory notice or order without a reasonable excuse;
 - confidence in the individual, business or organisation is low; and/or
 - a warning has been given for a similar offence.
- 5.9.2. The recipient of an expiation notice is entitled to elect to be prosecuted for the alleged offence that is subject of the notice. Accordingly, before issuing an expiation notice, EHA will ensure that there is substantial, reliable and admissible evidence to establish the alleged offence.
- 5.9.3. Expiation notices will generally not be issued 'on the spot' and may be served some time after an alleged offence (note that an expiation notice must be issued within 6 months of the offence date pursuant to the *Expiation of Offences Act 1996*).

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Authorised Officers are required to complete an Expiation Matrix (checklist) to allow relevant evidence and information to be considered consistently, fairly and objectively. The Expiation Matrix is submitted to the Chief Executive Officer and/or Team Leader of Environmental Health to assist with ensuring an informed decision is made in relation to the issue of an Expiation notice.

5.10. Formal Action: Prosecution

- 5.10.1. A Prosecution will generally be pursued for more serious legislative breaches or where a graduated response has not been sufficient to address non-compliance. A prosecution will only proceed where there is a reasonable likelihood of securing a conviction against the alleged offender (i.e. where there is sufficient evidence to prove the relevant offence(s) beyond reasonable doubt).
- 5.10.2. The following are circumstances that may justify EHA commencing a prosecution:
- a flagrant breach of the law where the health, safety and welfare of the community or individuals has been put at risk;
 - the alleged breach is too serious or the risks too great to be dealt with by means of an expiation;
 - a person has failed to correct an identified serious problem after having been given reasonable opportunity to do so;
 - a person has failed to comply with the requirements of a statutory notice or order;
 - the alleged offender has an established and recorded history of similar offences; or
 - the alleged offender has demonstrated or expressed an unwillingness, on, to prevent a recurrence of the problem and/or to address established non-compliance.
- 5.10.3. Before a prosecution is recommended there must be substantial, reliable and admissible evidence to establish that the alleged offender committed the alleged offence. All relevant evidence and information will be considered to enable a consistent, fair and objective decision to be made.
- 5.10.4. A decision to prosecute must be in the public interest. In considering whether a prosecution is in the public interest, the following additional factors will be considered:
- whether the offence was premeditated;
 - the need to influence the offender's future behaviour;
 - the seriousness of the offence;
 - the availability and efficacy of any alternatives to prosecution;
 - the prevalence of the alleged offence and the need for deterrence, both personal and general; and
 - the likely length, expense and outcome of a trial.

The decision to commence a prosecution will be made by the Chief Executive Officer in consultation with the Team Leader Environmental Health. The respective Constituent Council will be advised of the decision to prosecute prior to proceedings commencing

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6. REVIEW OF THE ENFORCEMENT POLICY

Every 24 months or as needed.

7. STATEMENT OF ADOPTION

This Policy was adopted by the Board of the Eastern Health Authority on 22 October 2008.

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