



Australian Government
Australian Maritime Safety Authority

Compliance and Enforcement Protocol

Shipping Registration Act

Contents

Purpose	1
Compliance and enforcement principles	1
Accountability	1
Consistency	1
Transparency	1
Impartiality	1
Proportionality	2
Fairness	2
Overview of the SRA	2
Appointment and role of Inspectors	3
Powers of Inspectors	3
Compliance and enforcement options	3
Monitoring compliance	4
Audits	4
Compliance Inspections	4
Criteria which may guide enforcement decision making	5
Circumstances under which criminal prosecution may be appropriate	5
Circumstances under which a civil penalty may be appropriate	6
Circumstances under which an infringement notice may be appropriate	6
Circumstances under which an undertaking may be appropriate	7
Circumstances under which an injunction may be appropriate	7

Purpose

1. The Purpose of this Protocol is to provide guidance on the application of AMSA's Compliance and Enforcement policy as it relates to the powers contained within the *Shipping Registration Act 1981* ("the SRA").
2. Compliance and enforcement under the SRA takes on new significance now that the SRA provides for the Australian International Shipping Register. It is important for Australia, and therefore AMSA, that ships on this register maintain high standards in regard to safety, protection of the environment and the provision of seafarer welfare. Some of these matters are addressed in other legislation (for example the *Navigation Act 2012* and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1981*), but the SRA also contains relevant provisions.
3. Ensuring compliance with the provisions of the SRA will be vital in preventing the international maritime community from viewing the Australian International Shipping Register as a 'flag of convenience'.

Compliance and enforcement principles

4. In meeting its compliance and enforcement obligations under the SRA, AMSA is committed to having systems and processes in place to support the following principles:

Accountability

AMSA's inspectors must be conscious at all times of their role and their accountability for promoting the highest level of statutory compliance.

Consistency

Like situations will be treated in a like manner. Duty holders need to have full confidence that AMSA's decision making and actions will be equitable and that comparable situations will have comparable outcomes.

Transparency

Duty holders must be in no doubt as to the criteria used by AMSA in coming to a decision. Decisions and their reasons must be communicated clearly to relevant stakeholders.

Impartiality

Decisions made by AMSA must both be impartial and be seen to be impartial. Any potential conflict of interest that might influence a decision must be disclosed. The decision to take action must not be influenced by:

- the personal views of an inspector concerning the non-compliant person or corporation;
- possible political or commercial advantage or disadvantage to the Government or any entity; or
- public, industry or political criticism, or the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

Proportionality

Decisions made by AMSA will be proportionate to the identified risk to safety or the marine environment, the seriousness of any perceived breach, and/or the level of non-compliance with legislative requirements.

Fairness

AMSA will seek to strike the right balance between assisting voluntary compliance and undertaking enforcement actions, while responding to the competing interests of stakeholders, government and the public.

Overview of the SRA

5. The SRA is the legislation under which Australian-owned ships¹, ships on demise charter to Australian operators and ships owned by Australian residents or Australian nationals² are registered.
6. The SRA provides for two registers, registration on which provides Australian nationality and allows the ship to fly the Australian flag (that is, be 'flagged' in Australia).
7. The Registers are the:
 - General Register³
 - International Register⁴
8. The General Register is used to record those ships that must always be registered, Australian-owned ships operating in Australia not required to be registered but whose owners choose to do so and ships on demise charter where the Australian operator chooses to register⁵. The General Register can also record details of ships that are not otherwise required to be registered but the owners of which are intending to leave an Australian port to a place outside Australia⁶.
9. The International Register is a voluntary register that is open to internationally trading ships of at least 24 meters in length that are owned by Australian residents, Australian nationals (including Australian corporations) or Australian operators of ships on demise charter in Australia⁷. If not choosing to be listed on the International Register these ships (other than those on demise charters) would be required to be registered on the General Register⁸.
10. Although ships on the International Register will remain subject to the *Navigation Act 2012*, certain additional matters, including employment conditions, are established for seafarers serving on these ships by the SRA⁹.

¹Section 8

²Section 3

³Section 14 ff

⁴Section 15A ff

⁵Section 14

⁶Section 68

⁷Section 15B

⁸Section 12 and section 17

⁹See Part VA

11. Shipping registration gives effect to Australia's obligation under Article 91 of the United Nations Convention on the Law of the Sea (UNCLOS), which requires that each state fix the conditions for grant of nationality to its ships, for registration and for the right to fly its flag.
12. UNCLOS Article 92 then provides that ships shall only have one nationality, and that they will generally be subject to the exclusive jurisdiction of that nation when on the high seas. This requirement is also given effect by the SRA.
13. Ships registered under the SRA are therefore subject to AMSA's jurisdiction at all times and in all locations. They may also be required to comply with the national laws applicable in all waters outside Australia.

Appointment and role of Inspectors

14. The SRA is administered by AMSA, with the Registrar of Ships (a statutory appointee) having control of the Shipping Registration Office¹⁰. The Registrar is supported by the Deputy Registrar and most registration actions are made by these officers.
15. The SRA does not provide for the appointment of inspectors. However, the *Navigation Act 2012* provides for inspectors to be appointed under that Act who may, amongst other things, board vessels and exercise monitoring powers for the purposes of determining whether that Act has been complied with, or for assessing the correctness of information provided under that Act. The SRA applies some of these powers to certain elements of the enforcement of the SRA, as spelt out below.

Powers of Inspectors

16. Inspectors appointed under the *Navigation Act 2012* may inspect ships to ascertain compliance with Part VA and s33A of the SRA.
17. Part VA and s33A each apply to ships on the International Register only. Part VA deals with seafarer working conditions whilst s33A addresses the requirement to engage Australian seafarers to carry out certain duties (master, chief mate, chief engineer or first engineer).

Compliance and enforcement options

18. The SRA utilises criminal sanctions as its general deterrent throughout. In some instances, a section will include notification that the section is an offence provision (see s12(3A) as an example). Other offence provisions are not identified in this way, but are listed in s74, along with the related penalty.
19. Part VA does not provide for criminal sanctions but includes a number of civil penalty provisions (see s61AD, s61AJ and 61AL). Breaches of these sections can result in the enforcement of the civil penalty, or the use of the alternate sanctions of infringement notices, enforceable undertakings or injunctions. Statutory details about these compliance and enforcement tools are contained in Part VB of the SRA. Guidance regarding the decision to use each of these options is provided below

Monitoring compliance

20. AMSA may adopt the following methods for monitoring compliance with the SRA:

Audits

21. An audit involves a review of all or part of a duty holder's general management and risk management systems. There is no explicit power to conduct audits under the SRA; however AMSA may develop an audit program as part of its general functions.
22. Audits may be undertaken as part of an annual or other periodic inspection program, and they may also be undertaken in response to circumstances arising at other times.
23. Outcomes of audits will be made known to duty holders to inform ongoing improvement programs.

Compliance Inspections

24. A compliance inspection assesses a duty holder's compliance with their obligations and responsibilities under the relevant legislation.
25. Inspections may be done routinely by inspectors or following a report of information that an offence may have been committed. Therefore, a compliance concern could arise as a result of an inspection or be the cause of an inspection.
26. Compliance inspections may also target areas where AMSA has observed incident trends or specific duty holder issues.
27. Where an inspector is conducting an inspection and forms the view that a criminal offence may have been committed, the inspector will take note of all relevant material and provide a report to their Manager, who will then decide whether further investigation is warranted.
28. Ships on the International Register will be subject to audit and compliance inspection in accordance with the established program for flag state inspections and any concurrent focused inspection campaign.
29. Ships on the General Register are usually not subject to inspection unless they are of a size, or on a voyage, or pattern of voyages, that would cause international conventions to be applicable to them.
30. In both cases other legislation, including the *Navigation Act 2012*, and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1981* would apply and compliance monitoring associated with those Acts would take place.
31. However, in the event that a general breach of the SRA or its associated regulations is observed or reported, AMSA will take appropriate steps to arrange for investigation of the circumstances. A decision as to whether further compliance or enforcement action is required, taking into account the principles in the AMSA Compliance and Enforcement Policy, will be made by the General Manager, Ship Operations.
32. In addition, should a registered ship be seeking port clearance to undertake an overseas voyage, officers from the Customs and Border Protection Service may visit the ship and require the production of documents relevant to voyage. The Customs and Border Protection Service, exercising its powers under other legislation, may detain a ship in a range of circumstances.

Criteria which may guide enforcement decision making

Circumstances under which criminal prosecution may be appropriate

33. The SRA includes a range of criminal offences, most of which are strict liability offences. Strict liability means there is no fault or intention element to prove.
34. Each element of each offence needs to be proven, by provision of admissible evidence, if prosecution is to proceed. The onus, or burden, of proving those elements beyond reasonable doubt is on the prosecution, not on the defendant.
35. A criminal prosecution, if pursued, may result in a fine being imposed and a period of imprisonment and the recording of a criminal conviction.
36. The decision about whether to pursue evidence for potential a criminal prosecution resides with General Manager, Ship Operations. This decision maker may consider a range of issues, including, but not limited to:
 - Does the breach exhibit a significant degree of criminality or disregard? Is the breach sufficiently serious that the Commonwealth and the community would expect it to be dealt with by prosecution?
 - Has the breach resulted in significant or real harm? Is it important to deter similar behavior? In this sense a prosecution may play an important educative role.
 - Will the prosecution act as an effective social and industry deterrent?
 - Is there a suitable enforcement alternative to prosecution? A lesser alternative may be appropriate for a first offence or if the offender reported the breach and took corrective action when the breach became known, for example.
37. If the General Manager, Ship Operations forms the view that gathering of evidence for a potential criminal prosecution should be pursued an AMSA inspector will undertake additional investigation and will prepare a brief of evidence for the Commonwealth Director of Public Prosecution (CDPP).
38. The CDPP then make the decision on whether to prosecute a particular offence. The CDPP will base their decision on whether there is sufficient evidence to support a reasonable prospect of conviction in the matter and whether the matter is in the public interest.
39. The General Manager, Ship Operations may at any time, decide to cease an investigation by AMSA of a potential offence or that a prosecution brief will not be provided to the CDPP. This decision could be based on matters such as:
 - a lack of evidence;
 - the time since the alleged offence took place;
 - mitigating factors such as self reporting or that damage was minor in nature;
 - jurisdictional considerations;
 - availability of AMSA resources.
40. As a Commonwealth Authority, AMSA implements the Australian Government Investigation Standards¹¹ (AGIS) as the benchmark for best practice in investigation of criminal offences under Commonwealth legislation.

¹¹Provision of AGIS is currently restricted to Australian Government agencies and is not publicly available.

Circumstances under which a civil penalty may be appropriate

41. The SRA provides that, where a person is alleged to have contravened a civil penalty provision, AMSA may apply to a court to order that a pecuniary penalty be imposed. Such an order is referred to as a civil penalty order¹².
42. To commence such a proceeding AMSA would need sufficient evidence to prove that, on the balance of probabilities, the alleged contravention had occurred.
43. Sections 61AJ, 61AK, 61AL and 61AM are the only civil penalty provisions in the SRA. Section 61AJ, 61AK and 61AM do not contain any fault elements, so the evidence presented to the court would only need to show that the conduct, omission or result of conduct, as set out in the relevant provision, had occurred. The remaining provision, 61AL, would require evidence of the state of mind of the offender in addition to evidence of conduction, omission or result of conduct.
44. The civil penalty for each of the above offences is higher than generally provided for criminal offences elsewhere in the SRA – up to 300 penalty units for an individual or five times that amount for a corporation¹³.
45. The decision whether to commence the court action will be made by the General Manager, Ship Operations once an initial investigation has been undertaken.
46. The decision of the General Manager, Ship Operations will include consideration of the following:
 - is there sufficient evidence of the breach to warrant further action;
 - did the breach cause actual detriment to a seafarer;
 - is there a zero tolerance policy in regard to breaches of these contraventions;
 - is taking action against the offender important for deterrent purposes – both in regard to the individual and in regard to setting a standard for broader compliance;
 - will failure to take civil action diminish the reputation of the International Register;
 - is a corporation involved in the breach (as the higher penalties that are applicable to corporations can act as a disincentive to non-compliant behavior); and
 - is a lesser compliance option appropriate (see following sections).

Circumstances under which an infringement notice may be appropriate

47. As an alternative to commencing the court action outlined above, Section 61BQ allows for the issue of an infringement notice in circumstances where AMSA has reasonable grounds to believe that a person has contravened a civil penalty provision.
48. The maximum penalty that may be applied in an infringement notice is one fifth of the civil penalty.
49. If the infringement notice penalty is paid, section 61BU states that no civil proceeding can be commenced for the same breach.

¹²Section 61BA

¹³A penalty unit is currently valued at \$180.

50. The rules surrounding the operation of the infringement notice scheme are set out in section 61BQ to 61BV.
51. However, as a matter of policy AMSA will not issue an infringement notice for a suspected breach of a civil penalty provision in the SRA. This is because the relevant provisions, which deal with seafarer wages, leave entitlements, compensation and victimization are thought to warrant the full force of the law when a breach can be proven.

Circumstances under which an undertaking may be appropriate

52. Section 61BW allows AMSA to accept written undertakings as an alternative to taking civil action to have a civil penalty order made by the court. This decision will be made by the General Manager, Ship Operations.
53. The undertaking is voluntarily given but its acceptance can be cancelled by the General Manager, Ship Operations and the General Manager, Ship Operations can then commence a court action to have the undertaking enforced or to have a civil penalty order made in relation to the original breach, as per section.
54. An enforceable undertaking can be a constructive alternative to a civil penalty order. It allows an alleged offender the opportunity to enter voluntarily into a legally binding agreement to perform certain tasks to implement a systematic change to the practices that have led to the contravention of the law and to prevent breaches in the future.
55. A decision to give consent to an undertaking is made by the General Manager, Ship Operations. In making that decision the General Manager, Ship Operations may have regard to the following:
 - Does the action proposed to be undertaken address the matters which have given rise to the (potential) breach and can those actions be described with sufficient clarity to enable compliance to be tested;
 - that an enforceable undertaking will deliver a fundamental change to the behavior that led (or may lead) to a breach;
 - Whether the person has entered an undertaking previously, and if so, was that undertaking successfully completed and are the current circumstances sufficiently similar to warrant refusal;
 - That the undertaking will provide an overall positive benefit to the industry or community generally, rather than just to the alleged offender;
 - That the public interest would be best served by acceptance of the undertaking rather than proceeding with other compliance or enforcement actions.

Circumstances under which an injunction may be appropriate

56. Section 61BY allows AMSA to seek a court order (an injunction) to prohibit a particular form of conduct, or to require particular conduct, if a contravention of a civil penalty would occur (or continue to occur) if the injunction were not in place.
57. The decision to seek an injunction will be made by the General Manager, Ship Operations in circumstances of extreme urgency only.

