

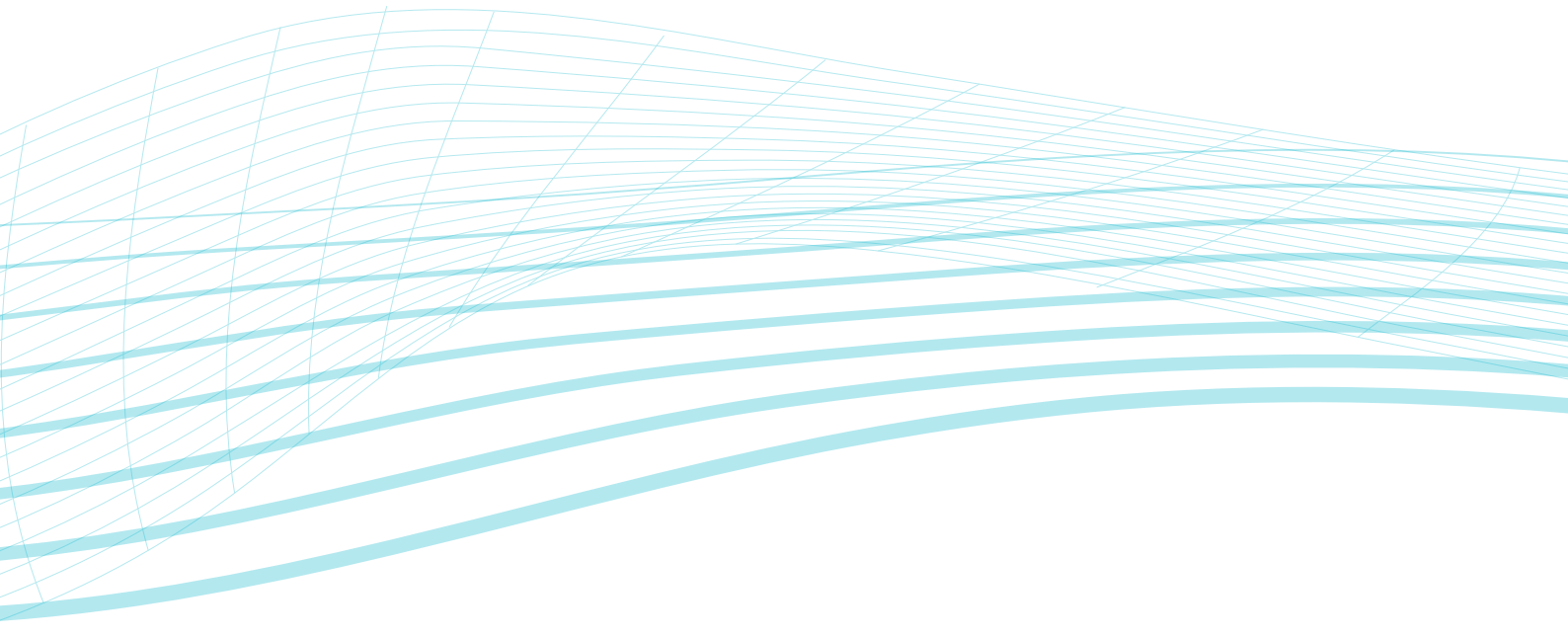


Australian Government

Australian Maritime Safety Authority

**Seafarers Safety, Rehabilitation
and Compensation Authority**

Seacare Compliance and Enforcement Policy



Acknowledgements

This publication has been revised to reflect the principles outlined in the *National Occupational Health and Safety (OHS) Compliance and Enforcement Policy*¹.

Disclaimer

This publication is intended to provide a summary and general overview of the Seafarers Rehabilitation and Compensation Authority's and the Australian Maritime Safety Authority's approach to workplace health and safety regulation. It is not intended to be a comprehensive outline of the *Occupational Health and Safety (Maritime Industry) Act 1993* and is not a substitute for independent professional advice.

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¹The *National OHS Compliance and Enforcement Policy* was endorsed by each Heads of Workplace Safety Authorities jurisdiction in Australia, including Seacare in December 2008.

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Enforcement Policy Overview

Purpose and scope of policy

This policy is based on the *National Occupational Health and Safety (OHS) Compliance and Enforcement Policy* (the National Policy). The National Policy is a principles-based document agreed to by all heads of Australian workplace authorities to work towards a consistent, national approach to the enforcement of OHS laws. The National Policy is interim in nature, pending the development and jurisdictional implementation of model national OHS laws.

The purpose of this policy is to explain the Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority) and the Australian Maritime Safety Authority's (AMSA) approach to workplace health and safety regulation under the *Occupational Health and Safety (Maritime Industry) Act 1993* (the OHS(MI) Act). In particular, the policy explains the principles which govern the enforcement activities of AMSA and its Inspectors.

Enforcement activities are part of a range of regulatory strategies undertaken by the Seacare Authority and AMSA to improve occupational health and safety outcomes. Activities that do not involve enforcement, but are designed to achieve compliance, collaboration and better practice, are referred to as compliance measures.

The compliance and enforcement strategy, investigations and enforcement measures are described in this Policy. This Policy applies to actions and decisions taken by inspectors and AMSA under the OHS(MI) Act.

Who should read this policy?

Anyone who holds a duty relating to occupational health and safety (OHS) under the OHS(MI) Act should read this policy. Duty holders under the OHS(MI) Act are:

- ▶ Operators of prescribed ships or units;
- ▶ Employees of operators of prescribed ships or units;
- ▶ Manufacturers, importers and suppliers of plant and substances;
- ▶ Persons erecting, installing, repairing or maintaining plant on a prescribed ship or unit;
- ▶ Persons constructing, modifying or repairing a structure on a prescribed ship or unit;
- ▶ Persons engaged in loading or unloading a prescribed ship or unit; and
- ▶ Inspectors appointed under the OHS(MI) Act.

OHS Regulation in the Seacare Jurisdiction

The Australian Government is committed to achieving continuous improvement in OHS in the Seacare jurisdiction and supporting the achievement of national targets established in the *National OHS Strategy 2002-2012*².

²<http://www.safeworkaustralia.gov.au/NR/rdonlyres/E8D707CF-9E69-4C61-A063-F04519170EF7/0/NationalOHSStrategy200212.pdf>

The Seacare Authority and AMSA both have legislative responsibility to ensure that the obligations imposed under the OHS(MI) Act and Regulations on operators, employees and others are complied with. The Seacare Authority and AMSA's approach to regulation emphasises prevention, and includes the provision of guidance and advice to promote best practice.

The objects of the OHS(MI) Act are:

- ▶ to secure the health, safety and welfare at work of maritime industry employees;
- ▶ to protect persons at or near workplaces from risks to health and safety arising out of activities of maritime industry employees at work;
- ▶ to ensure that expert advice is available on occupational health and safety matters affecting maritime industry operators, maritime industry employees and maritime industry contractors;
- ▶ to promote an occupational environment for maritime industry employees that is adapted to their health and safety needs; and
- ▶ to foster a cooperative consultative relationship between maritime industry operators and maritime industry employees on health, safety and welfare of maritime industry employees at work.

Consistent with these objects, the OHS(MI) Act places a general duty relating to OHS on operators, employees, manufacturers, importers, and suppliers of plant and substances, and persons erecting, installing, repairing and maintaining plant in a workplace. Those persons who are in a position to influence health and safety in the workplace need to understand and comply with the duties set out in the OHS(MI) Act and associated Regulations.

The Seacare Authority and AMSA's regulatory approach consists of a range of actions from encouraging best practice through the issue of guidance and advice to taking enforcement action.

Regardless of the level of compliance demonstrated by a duty holder, enforcement activity of the types outlined in this policy may be undertaken against employers and other duty holders who are found to be in breach of their legislative obligations and duties. The OHS(MI) Act provides for a range of criminal actions and penalties.

Aims and key principles of OHS regulation

In accordance with the National Policy, the Seacare Authority and AMSA implement compliance and enforcement strategies in order to:

- ▶ ensure duty holders have access to information about OHS laws and how to comply;
- ▶ ensure duty holders comply with OHS laws or if they fail to comply ensure they are held to account;
- ▶ ensure duty holders eliminate or properly control risks;
- ▶ take action to deal immediately with serious risks;
- ▶ promote and achieve sustained compliance with the law; and
- ▶ deter non-compliance and prevent workplace injury³.

³National OHS Compliance and Enforcement Policy at page 4.

The key principles of regulation underpinning the Seacare Authority and AMSA's compliance and enforcement activities are:

- ▶ **Consistent** – endeavouring to ensure that similar circumstances lead to similar enforcement outcomes, thus providing greater protection and certainty.
- ▶ **Constructive** – providing support, advice and guidance to help people comply with OHS laws.
- ▶ **Transparent** – demonstrating impartiality, balance and integrity.
- ▶ **Accountable** – willingness to explain enforcement decision making and uphold avenues of complaint or appeal.
- ▶ **Proportionate** – compliance and enforcement responses are proportionate to the seriousness of the non-compliance⁴.

Seacare Authority and AMSA's compliance and enforcement strategy

AMSA and the Seacare Authority have adopted this strategy to use as an effective mix of positive motivators and deterrents to achieve compliance with the law and improved health and safety. This strategy seeks to encourage duty holders to comply while ensuring that there are fair and swift consequences for those who do not.

The compliance and enforcement strategies range from information, advice, persuasion, cooperation, inspection, verification and compulsion through to deterrence activities. The primary emphasis is on assisting industry to comply with OHS obligations through the provision of programs that build industry capability to properly manage workplace risks.

The compliance and enforcement strategies range from encouraging better practice through the provision of guidance and advice through to enforcement actions which are consistent with the National Policy. The Seacare Authority and AMSA have a risk based and responsive approach to compliance and enforcement⁵.

Risk based compliance and enforcement

Compliance and enforcement actions are targeted to areas of greatest risk to health and safety and where they are likely to have the greatest impact on improving working environments.

Responsive compliance and enforcement

To ensure that the Seacare Authority and AMSA's regulatory response is effective at leading to sustained compliance at the workplace, compliance and enforcement measures are responsive to the particular circumstances of the duty holder or workplace that is the subject of attention.

Responsive regulation uses the most effective and appropriate enforcement measures to achieve compliance.

⁵National OHS Compliance and Enforcement Policy at page 4.

Responsive sanctioning complements responsive compliance and enforcement. The principles governing such sanctioning aim to:

- ▶ change the behaviour of the duty holder;
- ▶ eliminate any financial incentive of non-compliance;
- ▶ be proportionate to the nature of the offence and the harm caused;
- ▶ reduce the harm caused by regulatory non-compliance, where appropriate;
- ▶ deter future non-compliance; and
- ▶ be responsive and consider what is appropriate for the particular duty holder⁶.

Regulatory model

By understanding employers and assessing risks, Seacare and AMSA are able to undertake a planned program of activities aimed at fostering open working relationships and encouraging cooperative compliance, leading to reductions in injury rates, costs and regulatory burdens.

The key steps are:

Understanding the employers' businesses

To assist in effective targeting of assurance activities, Seacare and AMSA regularly review data trends and assess industry performance. AMSA, as the inspectorate, attends industry groups, stakeholder forums and conducts audits.

Assessing the risks

AMSA assess the compliance risks by applying a risk matrix. This assessment is informed by up-to-date information, including intelligence and research, knowledge of employers' systems and culture, emerging hazards, industry type and employers' workers' compensation claims history.

Planning strategies

AMSA uses a range of regulatory strategies to address the varying levels of identified risk. The strategies balance education, prevention and enforcement, and include:

- ▶ compliance assistance, which involves AMSA working cooperatively with employers and employees in the jurisdiction to:
 - provide information and better practice advice on compliance with laws;
 - promote prevention as the primary means of reducing human and financial costs of work-related injury and disease;
 - promote the development of better practice OHS and rehabilitation management systems; and
 - assist organisations in the adoption of a regular cycle of performance auditing to underpin continuous improvement such as ISM auditing.

⁶National OHS Compliance and Enforcement Policy at page 4

⁷National OHS Compliance and Enforcement Policy at page 5 outlines the principles that Australian workplace authorities should have regard too in determining the appropriate compliance and enforcement strategy.

- ▶ development and administration of safety policies aimed at improving the regulatory model to ensure that it provides strong accountability, reflects risks and is outcome-based; and
- ▶ enforcing laws that protect the health and safety of employees and others through an active regulatory assurance program such as participation in industry groups, OHS auditing on ships and attending health and safety forums.

The Compliance and Enforcement Strategy

What criteria are applied when enforcing the OHS(MI) Act?

Most enforcement activity is undertaken by Inspectors who adopt a flexible and responsive approach in accordance with the OHS(MI) Act. In considering a response to an alleged contravention of the OHS(MI) Act or Regulations, Inspectors will have regard to the principles outlined in this Policy.

Decisions about appropriate enforcement measures occur at various stages of an investigation. Not all of the principles outlined below may be relevant: for example, where there is an immediate threat to the health and safety of a person, a prohibition notice may be issued without regard to all of the principles.

In deciding whether, and to what extent, enforcement action is warranted, AMSA's DCEO and Inspectors apply objective policy considerations to foster consistency and proportionality. These considerations are outlined in the National Policy⁷ and supplemented below, taking into account the particular legislative and administrative framework within which AMSA operates.

Adverse effect

This involves a consideration of the facts, whether it was foreseeable that harm could be caused and the practicability of avoiding the actual or potential harm.

A systematic failure by an employer to appropriately address a known or foreseeable risk is likely to be viewed more seriously than a risk to which an employee was exposed because of a combination of inadvertence on the part of an employee and a momentary lapse of supervision.

It is also relevant to consider:

- ▶ the extent of the risk;
- ▶ the seriousness of the breach; and
- ▶ the actual or potential consequences.

The gravity of the consequences of an incident does not itself dictate the seriousness however; the occurrence of death or serious injury may manifest the degree of the seriousness of the safety breach.

The objective seriousness of the risk, breach and actual or potential consequences, without more, may call for the most serious enforcement action to meet reasonable community expectations, encourage future compliance with the OHS(MI) Act and deter non-compliance.

Culpability

Culpability involves a consideration of how far below acceptable standards the conduct has fallen. It may be relevant to consider whether the duty holder had a licence or permission to undertake particular activities. It might also be relevant to consider industry codes of practice. AMSA may rely on expert evidence in making an assessment of the culpability of each duty holder.

Compliance history and attitude

This involves consideration of any previous findings of non-compliance made against a duty holder and may involve an analysis of relevant incident data. Regard may also be had to the duty holder's cooperation during the investigation.

Likelihood of any breach being repeated

This involves consideration of a duty holder's approach to managing OHS, the steps taken to prevent risk of injury and any alleged failure to comply with a statutory notice issued by an Inspector.

Impact of enforcement on encouragement or deterrence

The objects and provisions of the OHS(MI) Act make it clear that general deterrence and specific deterrence are relevant considerations. Employers are required to take all reasonable steps to ensure safety in the workplace and should adopt an approach to safety which is proactive and not merely reactive. In many cases it will be necessary to have regard to the need to encourage a sufficient level of diligence by duty holders in the future. This is particularly so where an employer conducts a large enterprise which involves inherent risks to safety.

Any mitigating or aggravating circumstances

It is a significant aggravating factor if the risk of injury was foreseeable even if the precise cause or circumstances of exposure to the risk were not foreseeable. The situation may be further aggravated if the risk of injury is not only foreseeable but actually foreseen and an adequate response is not taken by the duty holder. The neglect of simple, well-known precautions to deal with an evident and great risk of injury, take a matter towards the worst case category.

AMSA will also consider any mitigating circumstances including the extent of effort a duty holder has expended in controlling risks.

Whether the risk to health and safety is imminent or immediate

If that is the case, the situation will be assessed by an Inspector to determine whether, in the first instance, it is appropriate to issue a prohibition or improvement notice.

Remedies that may be achieved through a particular course of enforcement action

It is relevant to consider the remedies that may be achieved and a combination of enforcement and compliance strategies may be utilised by AMSA and Inspectors.

Enforcement measures

AMSA Inspectors have a range of enforcement options and can determine whether education, compliance assistance, enforcement action or a combination of these will be applied in a given situation.

If a duty holder is found to be in breach of duties and obligations owed under the OHS(MI) Act or Regulations, a range of enforcement options are envisaged by the OHS(MI) Act. A combination of compliance and enforcement measures may be applied that are appropriate to the circumstances.

1. Investigation
2. Statutory Enforcement Options
 - Improvement notice
 - Prohibition notice
3. Criminal Prosecution

Investigations

Compliance strategies may need to escalate if they do not achieve the desired outcome, or are otherwise not appropriate given the circumstances. One mechanism for monitoring compliance with the OHS(MI) Act is through conducting an investigation. Once an investigation is commenced, a range of enforcement options become available.

There are three types of investigations – reactive, responsive and strategic.

1. **Reactive investigations** are commenced in relation to specific incidents requiring immediate regulatory examination such as a serious injury or death in the workplace.
2. **Responsive investigations** are initiated as a result of emerging trends of non-compliance with particular provisions of the OHS(MI) Act or Regulations by an employer or a number of employers. For instance, a responsive investigation may be initiated as a result of a series of dangerous occurrences in a particular workplace.
3. **Strategic investigations** focus on broader emerging trends and issues determined through a formal periodic compliance planning process. These investigations typically form part of a collaborative response to an emerging regulatory risk across the jurisdiction. This can also include the regular OHS audits that are conducted annually on Australian Ships that come under the OHS legislation.

What triggers an investigation?

AMSA exercises discretion in deciding whether most incidents, cases of ill health, or complaints should be investigated.⁸ Section 87 of the OHS(MI) Act states that an investigation may, at any time, be conducted:

- (a) to ascertain whether the requirements of, or any requirements properly made under, this Act or the regulations are being complied with; or
- (b) concerning a contravention or possible contravention of this Act or the regulations; or
- (c) concerning an accident or dangerous occurrence that has happened in the performing of work.

⁸Section 87 of the Act

The Inspectorate (AMSA) may direct an inspector to conduct an investigation:

- (a) to ascertain whether the requirements of, or any requirements properly made under, this Act or the regulations are being complied with; or
 - (b) concerning a contravention or possible contravention of this Act or the regulations; or
 - (c) concerning an accident or dangerous occurrence that has happened in the performing of work;
- and the inspector must, unless the Inspectorate revokes the direction, conduct an investigation accordingly.

An involved union may ask an inspector or the Inspectorate to conduct an investigation at a workplace at which an employee, who is a member of the union, performs work for an operator; or

To maintain a proportionate response, most resources available for investigation of incidents are devoted to the more serious circumstances. It is neither possible nor necessary to investigate all issues of non-compliance notified or identified in the jurisdiction.

AMSA will carry out an investigation of a notifiable work-related death, unless there are appropriate reasons for not doing so.

The OHS(MI) Act imposes duties on a number of persons and these duties may co-exist and overlap. In circumstances where the activities of a person or an employer are outside of AMSA's jurisdiction, AMSA works closely with the relevant State or Territory workplace health and safety authority and other regulatory agencies. AMSA currently has Memoranda of Understanding with these regulatory agencies which set out the guidelines for cooperation

In deciding whether to commence an investigation, AMSA will take into account a number of factors, including:

- ▶ the severity and scale of potential or actual harm;
- ▶ the seriousness of any potential breach of the law;
- ▶ the duty holder's compliance history, including such matters as prior convictions and notices issued;
- ▶ the enforcement priorities;
- ▶ the practicality of achieving results;
- ▶ the wider relevance of the event, including matters of significant community concern or emerging issues.

During the course of an investigation, a duty holder will be advised of the issue of possible non-compliance that is the subject of the investigation and the relevant provisions of the OHS(MI) Act or Regulations being considered. Duty holders and relevant witnesses will be asked to provide evidence to an Inspector.

Statutory enforcement options

Following the commencement of an investigation, the OHS(MI) Act provides for a range of statutory enforcement measures. Statutory enforcement options can be exercised at various stages of an investigation.

Improvement Notice

An Improvement Notice is a statutory notice⁹ issued by an Inspector requiring a person to undertake certain action. The Notice has effect as soon as it is given to the person, and the Notice includes a time limit for completion. An Inspector issues an Improvement Notice based on the opinion that a person is breaching a provision of the OHS(MI) Act or Regulations, or has breached a provision of the OHS(MI) Act or Regulations and it is likely that the breach will be repeated. An Improvement Notice is used in situations which, while requiring improvement, do not warrant the additional restrictions of a Prohibition Notice. An Inspector may, by written notice, extend the term of an Improvement Notice. The OHS(MI) Act provides for penalties for failure to comply with a notice.

Prohibition Notice

An Inspector may issue a Prohibition Notice¹⁰ that prohibits an activity that the Inspector believes involves, or will involve, an immediate threat to the health and safety of any person. A Prohibition Notice has a more serious impact on the person to whom it is issued than an Improvement Notice, because the activity cannot be started again until the Inspector is satisfied that adequate action has been taken to remove the threat. For this reason, an Inspector must be satisfied that the threat to health and safety is immediate. The OHS(MI) Act also provides for penalties in relation to non-compliance with Prohibition Notices.

Escalation of enforcement strategies

Where an investigation reveals evidence of non-compliance, enforcement strategies may graduate from a notice issued by an Inspector through to investigation reports or a criminal prosecution being commenced.

An Inspector or Deputy CEO may make recommendations in regard to the commencement of more serious enforcement strategies.

In assessing the need for escalation of compliance and enforcement strategies, AMSA will have regard to the following priority areas:

- ▶ Failure to comply with an Improvement or Prohibition Notice
- ▶ Where an alleged breach of the OHS(MI) Act or Regulations has resulted in a fatality, serious personal injury, or injuries to a number of people
- ▶ Where an Inspector alleges an operator or person has wilfully repeated the same offence

⁹Section 98 of the OHS(MI) Act.

¹⁰Section 93 of the OHS(MI) Act.

- ▶ Where either an Inspector or health and safety representative alleges a Provisional Improvement Notice has not been complied with
- ▶ Where there are offences in relation to Inspectors (e.g. assault or obstruction, provision of false information provided) alleged
- ▶ Where there is an allegation of discrimination against an employee for any action in relation to occupational health and safety
- ▶ Where a person has interfered with safety equipment.
- ▶ Work related fatalities and serious injuries or where there is a risk of such consequences.

All AMSA Inspectors are appointed under the OHS(MI) Act and have extensive powers, including to issue statutory notices, and to compel the provision of information and evidence.

Criminal Prosecutions

Criminal prosecution is available for specific breaches of the OHS(MI) Act that cause death or serious bodily harm, or expose a person to a substantial risk of death or serious bodily harm, through negligence or recklessness¹¹.

Prosecution is also available for certain breaches of Part 4 of the OHS(MI) Act (powers of Inspectors) and of the Regulations.

Prosecution is a discretionary action, with the laying of charges to be determined by the Commonwealth Director of Public Prosecutions (CDPP) having regard to the Prosecution Policy of the Commonwealth. Not every breach of the OHS(MI) Act is automatically prosecuted.

The CDPP has the authority to determine whether or not a prosecution will proceed.¹² The Office of the CDPP administers the process of any prosecution with assistance from AMSA.

AMSA's DCEO and Office of Legal Counsel will review all matters where a referral to the CDPP may be warranted. If AMSA's DCEO considers that other enforcement options may not be sufficient, the matter may be referred to the CDPP. If the DCEO consider that prosecution action is warranted, a brief of evidence will be supplied to the CDPP.

When and why will a decision to prosecute be made?

The decision of whether to bring a criminal prosecution for a breach of OHS laws is significant as the effect on those impacted by the decision (the defendant, worker or family of a deceased worker for instance) will be considerable.

The Australian Directors of Public Prosecutions (DPP) have agreed upon a common set of principles to be used in determining whether or not a prosecution should be commenced or, if commenced, should be permitted to proceed. Although in some jurisdictions these criteria are expressed in different language, they do not differ in substance¹³.

¹¹Section 11(2) and (3) and Chapter 2 of the *Criminal Code Act 1995* sets out the general principles of criminal responsibility, including the fault elements of negligence and recklessness.

¹²*Prosecution Policy of the Commonwealth* available at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/>

¹³See "Prosecutorial Guidelines" agreed by the Australian Directors of Public Prosecutions, as first articulated in 30 June 1993 and *Prosecution Policy of the Commonwealth* available at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/>

In determining whether or not to prosecute, the following criteria which are common to all jurisdictions in the DPP guidelines need to be met. They are as follows:

- ▶ The existence of a prima facie case, that is, whether the evidence is sufficient to justify the institution of proceedings.
- ▶ There needs to be a reasonable prospect of conviction, that is, an evaluation of how strong is the case likely to be when presented in court. This takes into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court or tribunal that will determine the matter, the admissibility of any confession or other evidence and any lines of defence available to the defendant.
- ▶ The public interest which may include (but is not limited to) the following considerations:
 - ▶ the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature;
 - ▶ any mitigating or aggravating circumstances;
 - ▶ the characteristics of the duty holder – any special infirmities, prior compliance history and background;
 - ▶ the age of the alleged offence;
 - ▶ the degree of culpability of the alleged offender;
 - ▶ whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute;
 - ▶ the availability and efficacy of any alternatives to prosecution;
 - ▶ the prevalence of the alleged offence and the need for deterrence, both specific and general; and
 - ▶ whether the alleged offence is of considerable public concern.

Within what timeframe must a prosecution be brought?

Time limits for criminal prosecution of an individual for a breach of the OHS(MI) Act is governed by s15B of the *Crime Act 1914* (Cth)..

- ▶ A prosecution of an individual for an offence against any law of the Commonwealth may be commenced:
 - (a) if the maximum penalty which may be imposed for the offence in respect of an individual is, or includes, a term of imprisonment of more than 6 months - in the case of a first conviction – at any time;
 - (b) in any other case – at any time within one year after the commission of the offence.
- ▶ A prosecution of a body corporate for an offence against any law of the Commonwealth may be commenced:
 - (a) if the maximum penalty which may be imposed for the offence in respect of a body corporate is, or includes, a fine of more than 150 penalty units - in the case of a first conviction – at any time;
 - (b) in any other case – at any time within one year after the commission of the offence.

How will a decision be communicated?

A duty holder may be advised of AMSA's decision to refer a brief of evidence to the CDPP for consideration at any time during the course of, or following completion of an investigation.

The outcome of successful proceedings will be published to maximise the deterrent value and educate duty holders. Publication of cases draws attention to the consequences of poor occupational health and safety and the need for real and sustainable improvement in workplace health and safety.

Enforcement action against employees

In deciding whether to pursue enforcement action against an employee, AMSA takes into account the role, involvement and circumstances of each duty holder in applying the principles contained in this Policy.¹⁴ For example, the employee's duty is complementary to an employer's duty to provide appropriate training, information, instruction and supervision to enable the employee to fulfil their general duty of care.

When determining whether an employee has failed to take reasonable care of their own or other persons' safety, AMSA will pay particular regard to:

- ▶ An employee must, at all times while at work, take all reasonable steps to comply with the rest of this section. An employee who fails to take those steps contravenes this section.
- ▶ An employee must ensure that he or she does not create a risk, or increase an existing risk (whether by doing something or failing to do something), to his or her own health or safety or to the health or safety of other persons (whether employees or not) at or near the place where he or she is at work.
- ▶ An employee must cooperate with the operator, or with any other person, to the extent necessary to enable the operator or other person to fulfil a duty or obligation imposed on the operator or other person by or under this Act.
- ▶ the employee must use equipment, and must use it in accordance with any instructions given by the operator consistent with its safe and proper use.
- ▶ The choice or manner of use of equipment may be agreed on between the operator and any relevant involved union or agreed on by a health and safety committee.

Should AMSA decide that a criminal prosecution against an employee may be warranted, it would refer the matter to the CDPP. AMSA would consider referring a matter against an employee to the CDPP where:

- ▶ an alleged breach causes death or serious bodily harm; and
- ▶ the employee was either: negligent as to whether the breach would cause death or serious bodily harm or; reckless as to whether the breach would cause death or serious bodily harm.

¹⁴An employee's duty of care is provided for in section 27 of the OHS(MI) Act.

Appeal rights

The OHS(MI) Act provides for certain classes of persons affected by a decision made by an Inspector to lodge an appeal with Fair Work Australia (FWA).¹⁵

Which decisions may be appealed?

Rights of appeal against an Inspector's decision are detailed in section 100 of the OHS(MI) Act. The following decisions made by an Inspector may be appealed. The decision:

- ▶ to take possession of plant, substances or things;
- ▶ to issue a 'Do Not Disturb' notice, either verbally or in writing to direct that a workplace, plant, substance or thing not be disturbed;
- ▶ to confirm, vary or cancel a provisional improvement notice (PIN) issued by a health and safety representative (HSR);
- ▶ to issue an improvement notice or prohibition notice; or
- ▶ that an employer who is issued with a prohibition notice has not taken adequate action to remove the threat to health and safety identified by the prohibition notice.
- ▶ that an employer who has been issued with a prohibition notice has taken adequate action to remove the threat to health and safety identified by the prohibition notice.

Who may appeal a decision?

- ▶ An operator affected by the decision;
- ▶ A person in command to whom an improvement notice or a PIN has been issued;
- ▶ The HSR for a designated work group in which is included an employee affected by the decision;
- ▶ An involved union in relation to a designated work group or in relation to an employee who is affected by the decision;
- ▶ The owner of any plant, substance or thing to which a decision relates; or
- ▶ A person who has been issued with a PIN.¹⁶

How to appeal a decision?

For information on how to lodge an appeal, including the required time period within which to do so, see the FWA rules at: www.fwa.gov.au/

The FWA may affirm or revoke the Inspector's decision. It may also vary the Inspector's decision and substitute its own decision. To do this, the FWA will conduct a hearing into the matter, taking into account relevant evidence.

¹⁵Fair Work Australia (FWA) is the national workplace relations tribunal.

¹⁶ A provisional improvement notice may be issued under Section 58 of the OHS(MI) Act.

What happens to a notice or decision once an appeal has been lodged?

Once an appeal is lodged with the FWA, the decision of the Inspector, including a decision to issue a notice, remains in effect unless the FWA makes an interim order to the contrary.

The operation of an improvement notice however, is suspended until the appeal has been determined by the FWA or it makes an interim ruling to the contrary.

Reference material

Information on Seacare Authority and AMSA publications and compliance assistance material may be accessed via the Seacare Internet Website at www.seacare.gov.au or the AMSA Internet website at www.amsa.gov.au.

