



Australian Government
Australian Maritime Safety Authority

Compliance and Enforcement Policy



Version 2
September 2018

Background

The Australian Maritime Safety Authority (AMSA) is the national Commonwealth Government agency responsible for maritime safety, protection of the marine environment, and maritime and aviation search and rescue.

We are governed by the *Australian Maritime Safety Authority Act 1990* and are a Commonwealth corporate entity for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

AMSA's legislation

AMSA implements the following Commonwealth Acts of Parliament:

- *Marine Safety (Domestic Commercial Vessels) National Law Act 2012*
- *Navigation Act 2012*
- *Occupational Health and Safety (Maritime Industry) Act 1993*
- *Protection of the Sea (Civil Liability) Act 1981*
- *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008*
- *Protection of the Sea (Harmful Anti-fouling Systems) Act 2006*
- *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993*
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1981*
- *Protection of the Sea (Powers of Intervention Act) 1981*
- *Shipping Registration Act 1981*.

This list of legislation is current at the time of publication and is referred to as the 'maritime safety legislation' in this document. Please note that, whilst this policy is applicable to ensuring compliance with the *Occupational Health and Safety (Maritime Industry) Act 1993* in general terms, more specific policy and procedures, which have been agreed with the Seacare Authority, apply and are provided elsewhere.

Regulatory Approach and Regulator Performance Framework

In undertaking its statutory role, AMSA is committed to implementing its Statement of Regulatory Approach, Compliance Strategy and the Commonwealth Government's Regulator Performance Framework. In particular, this means ensuring compliance and enforcement approaches are risk based, streamlined and coordinated, and proportionate to the risks being managed.

AMSA acknowledges that an appropriate risk-based approach can assist both the regulator and regulated entities by applying resources where they will have the best regulatory effect. In the maritime safety legislation context, risk based compliance involves:

- undertaking compliance assessment based on relevant information and intelligence analysis
- identifying current and emerging compliance risks
- developing innovative and targeted strategies to effectively address compliance priorities using the full range of tools available to AMSA
- implementing those targeted strategies using a planned approach with clear goals which take account of the nature of the industry and the compliance history of industry participants.

AMSA's Compliance and Enforcement Policy

AMSA's Compliance and Enforcement Policy (the Policy) assists AMSA, regulated entities and other parties that have duties, obligations and responsibilities under maritime safety legislation to understand the suite of tools available to AMSA to ensure legislative requirements are met.

AMSA is committed to finding the balance between helping regulated entities voluntarily comply with the law and the need to deter unlawful behaviour. This Policy addresses that balance.

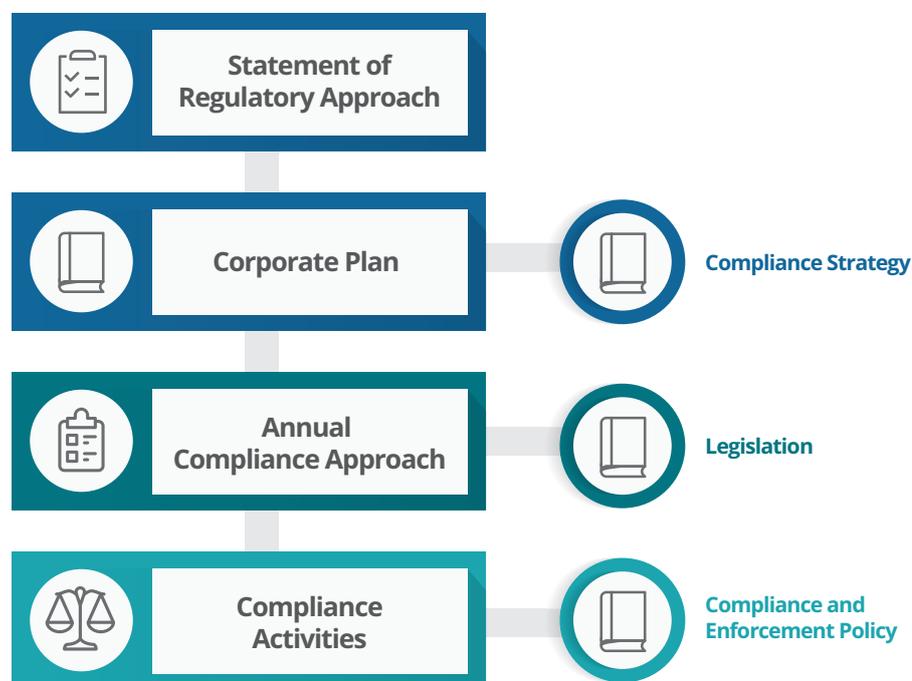
The Policy is an administrative document intended to provide an overview of compliance and enforcement options and information as to when use of each option is appropriate. It does not reduce, extend or modify legislative obligations contained in the maritime safety legislation.

This Policy is expressed in general terms. Maritime operators and other duty holders should not assume that it deals with all operating conditions and environmental circumstances. This will be determined on a case by case basis.

Whilst this Policy assists, it does not control AMSA's compliance and enforcement related decisions. Each decision will take into account all matters relevant to the particular circumstances.

In the event of any inconsistency between this Policy and the legislation under which AMSA exercises a statutory function, power or discretion, the legislation will prevail.

This Policy will be reviewed and amended from time to time to take into account amendments to legislation, feedback from industry as to its usefulness, and changes AMSA considers desirable.



1. Introduction

1.1 Objectives

The objectives of this Policy are to:

- support the objects of the maritime safety legislation
- encourage compliance with the maritime safety legislation through application of a cooperative regulatory approach which builds effective compliance performance capacity
- enable AMSA to identify, prevent and manage contraventions of the maritime safety legislation and the associated risks to safety, the environment and Australia's reputation
- facilitate consistent decision making.

The objects of the *Navigation Act 2012* are:

- promoting the safety of life at sea and safe navigation
- preventing pollution of the marine environment
- ensuring AMSA has the necessary power to carry out inspections of vessels and enforce national and international standards.

The objects of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* are:

- forming a part of a cooperative scheme between the Commonwealth, the States and Territories that provide a single national framework for ensuring the safe operation, design, construction and equipping of domestic commercial vessels
- implementing Australia's international obligations for the safety of domestic commercial vessels
- facilitating the development of a safety culture that prevents or mitigates the effects of marine incidents
- providing a framework for the development and application of consistent national standards relating to the operation, design, construction and equipping of domestic commercial vessels
- enhancing the efficient and orderly operation of domestic commercial vessels
- providing an effective enforcement framework.

1.3 Scope and content

To achieve its compliance and enforcement objectives, AMSA uses a range of flexible and targeted measures.

Compliance measures such as communication and education activities, timely provision of information and guidance, persuasion, cooperative assistance and collaboration are designed to facilitate and encourage regulated entities to voluntarily comply with the law.

Where non-compliance is identified, enforcement tools may need to be used. AMSA employs a range of responsive enforcement tools that escalate in severity as the need arises. These tools include suspension or cancellation of certificates, fines, issue of notices, directions and detentions, imposition of civil penalties, and criminal prosecutions.

AMSA will consider the circumstances of a failure to comply and choose an enforcement tool that is appropriate to those circumstances and in proportion with the risk presented or harm done.

To maintain that proportionate response, most resources will be devoted to preventative compliance measures, with specialist resources assigned to investigate the most serious breaches.

It is neither possible nor necessary to investigate all matters of non-compliance with the maritime safety laws that are uncovered in the course of AMSA's work with duty holders.

This approach sits within the broader Australian Government law enforcement framework. In this regard, the Policy will be applied in conjunction with other relevant documents including:

- Prosecution Policy of the Commonwealth
- Commonwealth Fraud Control Guidelines
- Attorney General's Department – Australian Government Investigations Standards
- Regulator Performance Framework.

1.2 Purpose

The maritime safety legislation places obligations on maritime operators and other parties (including those listed below) to ensure safety of persons and vessels and protection of the marine environment, in the circumstances and to the standards specified in the legislation.

All persons with obligations under the legislation may be subject to compliance monitoring and investigation by AMSA and, where appropriate, subject to compliance and enforcement measures, including prosecution.

This Policy describes how AMSA may use the compliance and enforcement powers that the maritime legislation provides to achieve the objectives of that legislation. It should be noted that the range of options available to AMSA varies from Act to Act, and not all options are available in all matters.

The Policy applies to all those with obligations under the legislation, including:

- maritime operators – vessel owners and those responsible for day to day operation of vessels
- vessel's masters
- seafarers and passengers
- contractors to maritime operators and the employees of these contractors
- persons who design, commission, manufacture, supply, install or erect plant and equipment to be used as, or in connection with, Australian vessels
- persons who consign, pack, load or unload cargo
- coastal pilots and pilotage providers.

In this Policy these persons are referred to as 'duty holders'.

The Policy will be implemented by persons engaged in the administration of the legislation (e.g. decision makers and inspectors).

2. Role and Principles

2.1 The role of AMSA

AMSA's roles in relation to the maritime safety legislation include to:

- administer Australia's general and international shipping registers
- act as the inspectorate for occupational health and safety on Australian ships
- inspect foreign and Australian vessels and operations for compliance with applicable international and domestic standards
- provide and maintain aids to navigation
- respond to cases of marine pollution
- issue certification, including to seafarers
- collect and publish information relating to vessel safety
- provide, or facilitate the provision of, advice, education and training in relation to vessel safety
- monitor, investigate and enforce compliance with the legislation.

These roles will be undertaken by suitably qualified and supervised persons delegated, appointed or authorised by AMSA to act on its behalf. In some cases the legislation specifically identifies those with compliance and enforcement roles as 'inspectors'.

2.2 The role of the inspector

Inspectors may be directly empowered, or be appointed under the maritime safety legislation, or may exercise powers otherwise available to AMSA. They may be staff of AMSA, or be staff of AMSA's compliance partners, including State, Territory or Commonwealth Police, fisheries and parks officers, rangers, and marine safety agencies. This Policy applies to all inspectors as if they were staff of AMSA.

Depending on their role, inspectors are given wide powers of entry and enquiry for monitoring purposes and are also empowered to undertake enforcement actions. In all cases they will be duly qualified and trained to carry out compliance and enforcement functions.

Inspectors must comply with the legislation under which they are empowered/appointed, as well as the internal policies and processes of AMSA when undertaking their functions under the legislation.

The role of inspectors generally includes:

- providing practical, constructive information and advice to duty holders about AMSA's position on legislative requirements
- conducting audits and compliance monitoring inspections to assess compliance with duties and obligations
- compelling duty holders to undertake remedial action to rectify breaches through the use of statutory instruments such as detention, improvement or prohibition notices
- conducting investigations, including those arising from issues identified through audits or compliance inspections.

Depending on the legislation, the inspector may have wide powers to board vessels, detain vessels, require the production of certificates, and to enter places and require assistance.

In other circumstances an inspector may request permission to board and require reasonable assistance to enable the officer to exercise his or her powers.

Inspectors may also seek warrants to allow for boarding, search and removal of articles, documents or equipment or the provision of information.

AMSA's managers and the inspectors will work in close collaboration when deciding what compliance and enforcement actions may be necessary or appropriate in a given set of circumstances.

2.3 Compliance and enforcement principles

In meeting our compliance and enforcement obligations, AMSA is committed to having systems and processes in place to support the following principles:

2.3.1 Accountability

AMSA's inspectors and administrative decision makers must be conscious at all times of their role and their accountability for promoting statutory compliance.

2.3.2 Consistency

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

2.3.3 Transparency

Duty holders must be in no doubt as to the criteria used by AMSA in coming to a decision. Decisions and the reasons for making them must be communicated clearly to relevant regulated entities.

2.3.4 Impartiality

Decisions made by AMSA must be both 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
- public, industry or political criticism, or the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

2.3.5 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 the level and frequency of non-compliance with legislative requirements.

2.3.6 Fairness

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

2.3.7 Cooperation

To limit impact on regulated entities AMSA will work with other agencies that also have a role in the maritime sector. We will, where possible and appropriate, enter Memorandum of Understanding with these agencies so that all parties are clear as to notification, information sharing, joint investigation and reporting requirements.

These agencies may include the Australian Transport Safety Bureau and like State agencies, State and Territory work health and safety and marine safety agencies, State and Territory Police and dangerous goods and electrical safety regulators.

2.4 Monitoring compliance

An inspector may undertake the following activities on behalf of AMSA to monitor compliance with maritime safety legislation:

2.4.1 Audits

An audit involves a review or assessment of all or part of a duty holder's general management, risk management or safety management system. It may also involve field inspections to examine the application of these systems in practice.

Audits may be undertaken as part of a planned audit program, and may also be undertaken in response to circumstances arising at other times.

An audit program may focus on one or more of the following:

- particular system or standards requirements
- particular criteria relating to duty holders
- particular aspects of maritime safety
- particular aspects of maritime operations.

2.4.2 Compliance inspections

In addition to audits, AMSA may conduct compliance inspections. A compliance inspection assesses a duty holder's compliance with his/her obligations and responsibilities under the maritime safety legislation. Compliance inspections may be conducted in a range of circumstances, such as in response to:

- a planned risk assessment, including for port State control purposes
- an occurrence that must be notified
- advice from another government agency
- an observation made or information received by AMSA
- a request from a member of the public or a person in the maritime industry.

A compliance inspection may also be part of AMSA's ongoing activities which target areas for risk management and prevention,

such as when an audit has brought to light specific risk factors or where indicated by incident trends or duty holder specific issues.

2.4.3 Investigations

AMSA conducts two types of investigations—marine incident investigations and compliance investigations.

A marine incident investigation may be undertaken to inform the development of effective standards, safety strategies and advice for owners, operators and seafarers to help avoid similar incidents in the future.

AMSA may use the information gathered from a marine incident investigation to support educational activities, regulatory change or further investigation, all of which are undertaken with the intention of ensuring that appropriate control measures are being implemented to prevent re-occurrence.

Because it is a regulator, AMSA may also use the information to inform its compliance and enforcement activities. Compliance investigations are conducted by AMSA to establish whether a breach of the maritime safety legislation has occurred.

A compliance investigation may be conducted in a range of circumstances, which include responding to notifiable occurrences, audit outcomes, compliance inspection outcomes, identified trend analysis or other intelligence reports.

AMSA does not conduct 'no blame' safety investigations. 'No blame' safety investigations may be conducted by an authority other than AMSA (for example, the Australian Transport Safety Bureau) and in jurisdictions where there is such an authority AMSA will work with them to avoid unnecessary interference and delay for regulated entities

3. Compliance and enforcement options

In accordance with the Regulator Performance Framework, and in order to make the best use of its regulatory resources, AMSA adopts a graduated approach to compliance and enforcement to ensure that actions taken are proportionate to the regulatory risk being managed.

AMSA recognises that both compliance mechanisms and enforcement mechanisms are necessary to provide an effective and flexible regulatory system. Accordingly, AMSA will adopt the approach most likely to promote the objectives of the maritime safety legislation, including by encouraging voluntary compliance.

Under the maritime safety legislation a range of compliance and enforcement options are available. The options may include:

- engagement and education
- guidance and warnings
- identification of deficiencies and vessel detention
- infringement notices
- improvement notices
- prohibition notices
- directions
- undertakings
- suspension or revocation of certification, exemptions or licences
- civil penalties
- prosecution.

These measures do not need to be used sequentially. It is **not** necessary, for example, to give warnings or issue notices before taking prosecution action, if such action is appropriate. AMSA may also choose to use a combination of measures (subject to certain legal restrictions) to facilitate compliance.

Each reported or detected contravention will be subject to an initial assessment to assess the related risk and then to determine how to use AMSA's resources in the most effective manner.

An initial assessment will consider the likelihood that a contravention has occurred, its seriousness and its probable consequences. AMSA will then determine the appropriate response, if any.

The following matters may be taken into account in determining the response:

- the extent of the risk to the health and safety of people and the environment
- the severity of the issue or finding
- the culpability of the duty holder or other relevant person in bringing about the issue or finding, including whether there was a bona fide mistake
- the legislative or administrative mechanisms available in the circumstances
- the motivation of the duty holder
- the compliance history of the duty holder;
- mitigating factors such as self-reporting or timely, voluntary steps taken to address the issue
- the prevalence of the issue in the industry
- available resources
- the need for deterrence.

Each compliance and enforcement activity must be considered in terms of the principles described in this Policy, and in accordance with the relevant legislation, so that the most appropriate option (or options) for the circumstances are applied.

Any decision to take enforcement action must be supported by evidence that is sufficient to substantiate the alleged breach. Such evidence may include field notes, photographs, diagrams, interviews, observations etc.

Many of the options set out below may be subject to external review by a court or tribunal. The right to such review is determined by the relevant maritime safety legislation, and by the general administrative review rights established in Commonwealth law.

To ensure the consistency, transparency, accountability, impartiality and fairness in decision making required by this Policy, all decisions and the reasons for these decisions must be clearly documented.

3.1 Engagement and education

AMSA places strong emphasis on engaging with, educating and assisting those with obligations under the maritime safety legislation to meet their obligations. AMSA chooses to administer the maritime safety legislation by placing emphasis on a proactive approach to encourage voluntary compliance through the provision of general guidance, education and training.

AMSA makes comprehensive use of educational campaigns to provide information and general guidance to regulated entities, to facilitate voluntary compliance with statutory obligations. AMSA takes the firm view that prevention of a breach is always preferable to taking action after a breach has occurred.

AMSA will listen, respond and provide information and opportunities for individuals and groups to ask questions and to discuss issues of concern.

AMSA provides targeted and general publications; it liaises broadly with individuals and businesses about the maritime safety legislation and AMSA's role in its administration.

Communicating its enforcement role is fundamental to the effectiveness of AMSA's education and liaison activities.

These measures help to:

- raise awareness of the benefits of complying with the maritime safety legislation, and the potential consequences of non-compliance;
- remove barriers to compliance (for example, lack of knowledge of requirements or how to comply);
- promote the objects of the maritime safety legislation; and
- overcome factors that might encourage non-compliance.

Provision of such guidance is aimed at helping duty holders to improve their processes and prevent or remedy known or likely minor breaches so as to foster cooperative compliance.

3.2 Circumstances in which guidance or warnings may be appropriate

Provision of specific guidance or a warning may be appropriate in circumstances where there is a lack of awareness about, or misinterpretation of, the law or conditions of certification, licensing or exemption, and the breach or the circumstances surrounding it are minor in nature.

There is no legal obligation for an operator to comply with guidance or a warning, as these are only given to facilitate compliance with AMSA's position on the requirements of the law.

However, where guidance, such as a non-compliance report, or a specific warning with regard to non-compliant behaviour is ignored, AMSA may consider it appropriate to adopt a different compliance option.

Guidance may be given verbally or in writing and is given in good faith, based on the considered view and experience of AMSA. Such guidance might take the form of a Marine Notice, an audit finding or compliance assessment.

Warnings will generally be given in writing. They will outline the unacceptable behaviour and potential future actions if the warning is ignored.

If a decision is made to use guidance or a warning rather than a formal sanction, AMSA must document this decision and the reasons for this decision. The type and level of evidence required to inform this decision may vary according to the particular circumstances but must be sufficient to make clear the reasons for the decision.

3.3 Circumstances in which detention may be appropriate

Detention is the power to order that a vessel not be operated. It is used when, generally as a result of a compliance audit, a vessel is found to have deficiencies which render it unsafe or unseaworthy or its operator has failed to comply with the requirements to hold or maintain statutory certificates. Detention may also be used where a vessel is being investigated for possible contravention of the legislation.

Given the serious commercial consequences that may arise from detention, inspectors may only exercise this compliance option if specifically empowered to do so. Prior to taking this action inspectors will be required to follow specific procedures, which may include where time permits or the circumstances warrant, discussing the potential detention with supervising officers.

3.4 Circumstances under which an infringement notice may be appropriate

The provisions for use of infringement notice schemes vary between the Acts listed in the maritime safety legislation. In general, an authorised person may issue an infringement notice if they believe on reasonable grounds that a person has committed an offence, or a breach for which a penalty notice is allowed, under the maritime safety legislation. An infringement notice may be appropriate where:

- there is a benefit in providing immediacy to the consequences for non-compliance
- there was no attempt to conceal the act or omission from the regulator
- the act or omission is not ongoing or is able to be rectified quickly
- the non-compliance can be immediately assessed
- where the risk and extent of harm arising from the act or omission is less than that which would warrant pursuit of a civil penalty or a criminal prosecution.

We administer the infringement notice scheme by:

- accepting a request to extend the period for payment of an infringement notice by a maximum of 28 days from the original due date—provided that we receive the request for extension in writing within the original payment period
- accepting a request for payment by instalments over a maximum of 6 months from the date of issue of the infringement notice—provided that we receive the request for payment by instalments in writing within the original payment period
- following up once on non-payments
- considering development of a brief of evidence for the Commonwealth Director of Public Prosecutions (CDPP) in every case where payment is not then received.

3.5 Circumstances under which an improvement notice may be appropriate

An improvement notice may be issued when an inspector believes on reasonable grounds that a breach of the legislation is occurring or has occurred and is likely to continue or be repeated.

The improvement notice must state the date by which compliance must be achieved.

The improvement notice is complied with when the deficiencies have been remedied. This work may take a considerable period and a compliance date is required to be specified on the notice. In some cases it will be necessary for an Inspector to confirm that the remedies have been applied, and that they are satisfactory.

An improvement notice may be appropriate when the breach is not minor, having regard to the following:

- the extent of the risk to the health and safety of people and the environment
- the culpability of the duty holder or other relevant person in bringing about the issue or finding, including whether there was a bona fide mistake
- the compliance history of the duty holder
- mitigating factors such as self-reporting or timely, voluntary steps taken to address the issue
- the prevalence of the issue in the industry
- the need for deterrence
- other legislative or administrative mechanisms available in the circumstances.

3.6 Circumstances under which a prohibition notice may be appropriate

A prohibition notice may be issued when the inspector believes on reasonable grounds that there is a risk to health, safety or the environment (legislation dependent).

The prohibition notice requires the immediate cessation of the relevant activity until the matters that give, or will give, rise to the risk(s) are remedied or removed.

The decision to issue a prohibition notice is reached after objectively considering and assessing all the relevant facts and issues, including the consequences of not issuing a notice. Evidence must be available to substantiate an opinion of risk, not that a breach has occurred. Prohibition notices are a tool to achieve compliance with existing legislation. They are not a means of imposing new safety obligations on a person or the maritime industry as a whole.

A prohibition notice is a tool that is used to achieve action in relation to a specific activity to address its associated risks. Non-compliance with a prohibition notice is a serious breach of legislation and will lead to further action.

A prohibition notice ceases to have effect when an inspector gives notice that they are satisfied that adequate action has been taken to remove the risk. There is no compliance date specified.

An inspector may issue both an improvement notice and a prohibition notice in relation to an observed matter. The prohibition achieves cessation of the activity constituting the immediate risk, that is occurring at the specific place and time witnessed by the inspector, and for which evidence has been collected. The improvement notice addresses the systemic failures or deficiencies that allowed a breach to occur and that may have relevance to similar activities conducted at other locations and times.

3.7 Circumstances under which giving a direction may be appropriate

Some of the maritime safety legislation provides for the giving of directions when specific circumstances arise and it is necessary for AMSA or an inspector to specify an action be taken.

The relevant considerations in deciding whether it is desirable to give a direction may include:

- whether measures have been, or are being, taken to address any contravention
- the severity of the suspected contravention
- the likelihood of the person not complying with the Act at a future time
- whether, on one or more occasions, the person:
 - has been charged with or convicted of an offence against the Act
 - has been given a direction
- other means available to address the suspected contravention
- whether it appears the suspected contravention is deliberate
- the desirability of deterring future contraventions.

3.8 Circumstances under which undertakings may be appropriate

AMSA may consider the acceptance of undertakings from duty holders in connection with a contravention or alleged contravention of a small number of the Acts in the maritime safety legislation, and the circumstances and conditions vary from Act to Act.

In general, acceptance of undertakings may be appropriate where:

- the actions proposed to be undertaken address the matters which have given rise to the perceived breach. They must include firm future actions to change behaviour that will prevent a recurrence of the breach
- the actions proposed to be undertaken can be (and have been) described with sufficient clarity and specificity to enable compliance with the undertaking to be established. The description of deliverables must be precise and detailed
- the undertaking will provide an overall positive benefit to the industry and the community generally, rather than just to the alleged offender
- the public interest would be better served by acceptance of an undertaking than proceeding with court action.

A compliance date must be specified and large programs of work may need specific project milestone dates for compliance.

If the duty holder completes the undertaking AMSA cannot take prosecution action for the occurrence of the breach that gave rise to the undertaking.

If the duty holder fails to do what they undertook to do, AMSA may apply to the court to have the undertaking enforced. Alternately, AMSA may rescind acceptance of the undertaking and proceed with other available enforcement action. This decision will depend on the severity of the initial breach and the degree to which the undertaking has been met.

Prior to accepting undertakings AMSA will give due consideration to the nature of the breach (assessing the factors identified in 3 on p.8). Of primary relevance will be assessment of the deterrence factor required.

Careful consideration should also be given to whether a private arrangement between a duty holder and AMSA will meet the principles for accountability, consistency, transparency, impartiality and proportionality detailed in 2.3 above.

3.9 Circumstances in which administrative action on certification may be appropriate

The maritime safety legislation empowers AMSA to:

- vary a certificate, licence, exemption, determination or accreditation ('authorisation')
- vary a condition or restriction that has been imposed by the regulator
- impose a new condition or restriction
- suspend an authorisation
- revoke an authorisation.

Conditions and restrictions may be used to articulate limits to the authorisation. They are not a means of imposing new obligations on an authorised person or the maritime industry as a whole.

Variation of an authorisation, the variation or imposition of conditions or restrictions, or the suspension or revocation of an authorisation, may be appropriate in circumstances where AMSA has formed an opinion that the authorisation holder or the person exercising the authorisation does not have the competence and/or capacity to undertake activities to the extent authorised.

In making a decision whether or not to take such action, AMSA will consider:

- the authorised person's/holder's history of compliance
- whether maritime operations related to the authorisation are conducted to an adequate standard of safety

- whether there is an ongoing threat to the environment
- whether the authorised person is temporarily or permanently unable or unwilling to undertake any relevant remedial action necessary to satisfy the requirements for accreditation
- the suitability of other enforcement options in achieving compliance in the circumstances.

AMSA is required to give the authorised person written notice of an impending decision to take such action, and to provide reasons. The authorised person has the right to make written representations about the intended action within the statutory time frame.

AMSA acknowledges the role that the maritime industry performs and recognises the challenge of balancing the need to provide certainty against the need to protect safety and the environment. The suspension or revocation of an authorisation may have serious consequences including adverse 'flow on' effects for employees, other operators, related operations and so on.

AMSA must therefore advise the authorised person of the intention to impose new or altered conditions or suspend or revoke the authorisation and consider representations before this takes place in accordance with the relevant statutory provisions. However, this requirement does not apply in circumstances in which AMSA is permitted to take immediate action.

3.10 Circumstances in which immediate suspension of authorisation may be appropriate

AMSA has the power to immediately suspend an authorisation, (or part of an authorisation) if AMSA considers that there is, or would be, an immediate and serious risk to safety or the environment unless the authorisation is suspended immediately.

Immediate suspension of an authorisation will generally not be taken unless there is no other effective means of intervention available to prevent such a threat to safety being realised.

3.11 Circumstances in which a prosecution may be appropriate

To determine whether to prepare a prosecution brief of evidence for the Commonwealth Director of Public Prosecution (CDPP) AMSA will take into account all relevant information and apply the following criteria:

- does the breach exhibit a significant degree of criminality
- is the breach sufficiently serious that the Commonwealth and the community expect it to be dealt with by prosecution
- has the breach produced significant real or potential harm
- is it important to deter similar behaviour
- is there any suitable alternative enforcement option available
- will prosecution act as an effective deterrent.

The CDPP will make a decision about whether to proceed with prosecution having considered:

- whether there is sufficient evidence to support a reasonable prospect of conviction; and
- whether imposition of a criminal penalty is in the public interest.

The 'public interest' will be determined by the CDPP after consideration of:

- the seriousness of the alleged offence and whether its nature is of considerable public concern;
- the impact of prosecution related action on general deterrence (i.e. reducing the likelihood that other duty holders will commit similar offences) or specific deterrence (i.e. reducing the likelihood that the duty holder will commit a further breach of maritime safety laws);
- the availability and likely effectiveness of any alternatives to prosecution, such as one of the other regulatory options noted above; and
- whether the operator has repeatedly breached maritime safety laws.

Criminal prosecution may result in the imposition of a fine and/or a period of imprisonment and the recording of a criminal conviction.

3.12 Circumstances in which imposition of a civil penalty may be appropriate

Although civil penalties are set out in a similar way to criminal offences, they do not result in imprisonment or criminal convictions. However, civil penalties are typically of a higher magnitude than those for equivalent criminal offences. This reflects the need for economic deterrence to non-compliance in some circumstances.

Civil penalties:

- lend themselves to the sanctioning of organisations, which do not bear the same stigma as individuals do as a result of criminal prosecutions
- are subject to a lower burden of proof
- can be commenced by AMSA without referral to the CDPP.

AMSA will determine on a case by case basis whether to pursue a breach, which is both a criminal offence and subject to a civil penalty, by civil process, by reference to the Prosecution Policy of the Commonwealth.

Relevant considerations include:

- is there sufficient evidence of the breach to warrant further action
- did the breach cause actual detriment but not involve serious moral culpability
- 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 AMSA's reputation
- is a corporation involved in the breach (as the higher penalties that are applicable to corporations can act as a disincentive to non-compliant behaviour)
- is a lesser compliance option appropriate and available in the circumstances.

3.13 Use of multiple compliance options

Because AMSA will be actively working with regulated entities to promote voluntary compliance, it may be necessary and appropriate to use more than one compliance option to achieve that outcome.

Where non-compliance is suspected AMSA will first address immediate safety issues then work with regulated entities to achieve ongoing compliance.

AMSA will also apply this policy to determine if, in the circumstances, it is necessary or appropriate to address past non-compliance for deterrent purposes.

AMSA will also consider the pattern of behaviour shown by regulated entities over time and will factor repeated compliance or non-compliance into its choice of regulatory option.



