



Australian Government

Australian Maritime Safety Authority

# Compliance and Enforcement Protocol

***Marine Safety (Domestic Commercial Vessel)  
National Law 2012***





## 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 *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* ("National Law").

## Compliance and enforcement principles

2. In meeting our compliance and enforcement obligations under the National Law, AMSA, in our capacity as National Regulator, is committed to having systems and processes in place to support the following principles:

### Accountability

National Law marine safety inspectors ("MSI") 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 or its delegate'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 or its delegates in coming to a decision. A decision and its reasons need to be communicated clearly to the person involved.

### Impartiality

Decisions made by AMSA or its delegates 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 the decision maker 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 or its delegates will be proportionate to the identified risk to safety or the marine environment, the seriousness of any perceived breach and 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 National Law

3. The objectives of the National Law<sup>1</sup> are to:

- (a) Form a cooperative scheme between the Commonwealth, the States and the Northern Territory that provides a single consistent national framework and standard for ensuring the safe, efficient and orderly operation, design, construction and equipping of domestic vessels.
- (b) Implement Australia's obligations in relation to the safety of domestic commercial vessels, facilitating the development of a safety culture that will prevent, or mitigate the effects of marine incidents.
- (c) Provide an effective enforcement framework to ensure compliance to the National Law.

## Appointment and role of MSI

4. The National Regulator – AMSA, may appoint in writing an officer or employee of an agency of the Commonwealth, a State or Territory to be a Marine Safety Inspector (MSI)<sup>2</sup>.
5. The National Regulator may delegate the power to appoint an MSI to the CEO, Head or equivalent position of a State agency. However this delegation is subject to the directions and conditions provided for in the instrument of delegation, and the form of MSI appointment<sup>3</sup>.
6. The National Regulator proposes not to delegate the power to sub-delegate the power to appoint a MSI. The practical consequence of this is that the CEO, head or equivalent will need to appoint the MSI directly themselves.
7. The definition of MSI includes a member of the Australian Federal Police or a member of the police force, however described, of the State or Territory. As a consequence, these persons automatically become MSI with associated powers and functions<sup>4</sup>.

## Powers of Inspectors

8. The powers and functions of MSIs provided for in the National Law are a broad mix of monitoring, enforcement, seizure, direction, detention, improvement, prohibition and infringement notice powers.
9. In circumstances where the premises are a domestic commercial vessel the MSI may board or enter without consent or warrant<sup>5</sup>. A MSI may also enter premises which are not a residence to gain access to a domestic commercial vessel without consent or warrant<sup>6</sup>. In all other circumstances entry requires a consent or warrant<sup>7</sup>.

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<sup>1</sup>National Law section 3 of Schedule 1

<sup>2</sup>National Law section 91 of Schedule 1

<sup>3</sup>National Law section 11 of Schedule 1

<sup>4</sup>National Law section 6 of Schedule 1

<sup>5</sup>National Law section 97 of Schedule 1

<sup>6</sup>National Law section 96 of Schedule 1

<sup>7</sup>National Law section 103 of Schedule 1

10. The monitoring powers an MSI may exercise include<sup>8</sup> the power to:
- Search, inspect, examine, copy, make still, moving images or recordings;
  - Take equipment onto premises or vessel;
  - Take measurements and conduct tests;
  - Require a demonstration of equipment;
  - Require a person to give name and address details;
  - Operate equipment;
  - When on or leaving premises - Operate electronic equipment and make copies;
  - Require a vessel to stop, manoeuvre, or taken to a specified place;
  - Require a person to give name and address details;
  - Take samples, secure a thing for a maximum of 72 hours, or seize things found during the exercise of monitoring powers on a vessel, provided the MSI believes on reasonable grounds that the thing is evidential material and power needs to be exercised without warrant, either because of serious and urgent circumstances or because it is not practicable to obtain a warrant, in order to prevent concealment, loss or destruction of the evidential material<sup>9</sup>.
11. The enforcement powers exercisable by MSIs with consent or warrant, if the MSI has reasonable grounds to suspect that there may be evidential material on any premises, include<sup>10</sup>:
- All powers available under the monitoring powers noted above at paragraph 10, but with the purpose of gathering evidentiary material;
  - If under warrant, the power to seize evidentiary material of the kind specified in the warrant;
  - The power to require persons to answer questions and produce documents, unless the person has a reasonable excuse<sup>11</sup>.
12. In executing a warrant an MSI may use such force that is necessary and reasonable in the circumstances<sup>12</sup>.
13. On reasonable grounds an MSI may give a direction requiring a person within a time specified to take such steps as are reasonable in the circumstances to comply with the National Law or are necessary to protect the health and safety of people or the environment or in the public interest<sup>13</sup>.

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<sup>8</sup>National Law sections 98, 99 & 104 of Schedule 1

<sup>9</sup>National Law section 100 of Schedule 1

<sup>10</sup>National Law section 105 of Schedule 1

<sup>11</sup>National Law section 106 of Schedule 1

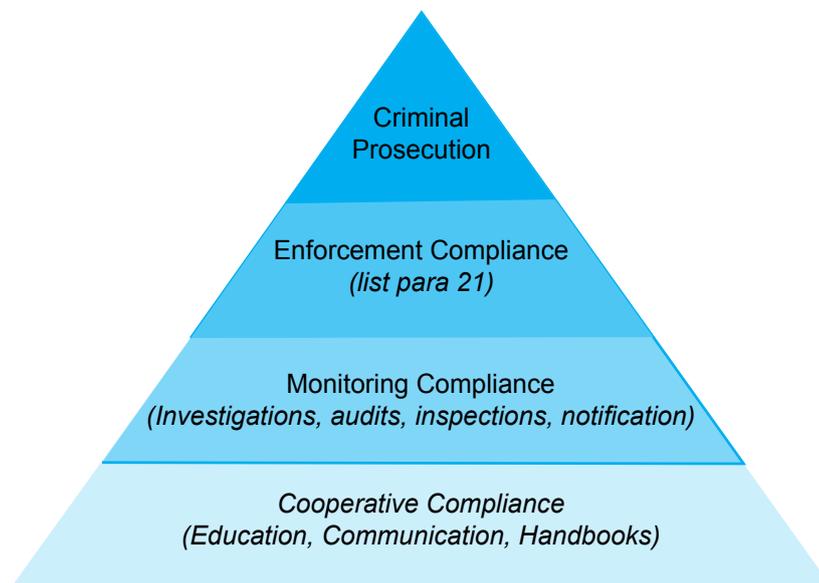
<sup>12</sup>National Law section 107 of Schedule 1

<sup>13</sup>National Law section 109 of Schedule 1

14. An MSI may issue an improvement notice if on reasonable grounds the MSI believes that a person has or is likely to contravene the National Law. The notice will specify what action is, or is not to be undertaken during a specified period and the measures for compliance with the National Law<sup>14</sup>.
15. An MSI may issue a prohibition notice if on reasonable grounds the MSI believes that an activity is occurring, or may occur that involves or will involve a risk to the health or safety of a person or the environment<sup>15</sup>.
16. An MSI may detain a domestic commercial vessel and bring it to port if the MSI reasonably suspects that the vessel is, will be or has been involved in a contravention of the National Law<sup>16</sup>.
17. An MSI may give a person an infringement notice, if the MSA believes on reasonable grounds that a person has committed an offence of a strict liability offence prescribed in the regulations. The amount of the penalty prescribed in the infringement notice will be one fifth of the maximum penalty that a court could impose on the person for breach of that offence<sup>17</sup>.

## Compliance and enforcement options

18. In order to make the best use of its regulatory resources AMSA adopts a graduated approach to compliance and enforcement, recognising that both compliance mechanisms and enforcement mechanisms are necessary to provide an effective and flexible regulatory system. In doing so, AMSA will adopt the approach which is most likely to promote the objectives of the National Law.



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<sup>14</sup>National Law section 110 of Schedule 1

<sup>15</sup>National Law section 111 of Schedule 1

<sup>16</sup>National Law section 101 of Schedule 1

<sup>17</sup>National Law section 138 of Schedule 1

## Monitoring compliance

19. An MSI may undertake the following activities on behalf of AMSA to monitor compliance with the National Law including:
- Audit;
  - Compliance inspection; and
  - Investigation.
20. Monitoring compliance is facilitated by the exercise of the MSI monitoring powers in the National Law<sup>18</sup>.

## Enforcing compliance

21. Under the National Law a range of options (in addition to administrative processes like the provision of advice, education or warnings) are available. The options available in the National Law include:
- Infringement notices<sup>19</sup>;
  - Improvement notices<sup>20</sup>;
  - Prohibition notices<sup>21</sup>;
  - Directions<sup>22</sup>;
  - Detention of vessel<sup>23</sup>;
  - Enforceable voluntary undertakings<sup>24</sup>;
  - Suspension or revocation of certificates<sup>25</sup>;
  - Prosecution; and
  - Civil penalties<sup>26</sup>.
22. These measures do not need to be used sequentially. It is not necessary, for example, to give advice 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<sup>27</sup>.

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<sup>18</sup>National Law sections 98, 99 & 104 of Schedule 1

<sup>19</sup>National Law section 138 of Schedule 1

<sup>20</sup>National Law section 110 of Schedule 1

<sup>21</sup>National Law section 111 of Schedule 1

<sup>22</sup>National Law section 109 of Schedule 1

<sup>23</sup>National Law section 101 of Schedule 1

<sup>24</sup>National Law section 159(4) of Schedule 1 reg making power

<sup>25</sup>National Law sections 41, 42, 51, 52, 63, & 64 of Schedule 1

<sup>26</sup>National Law section 162 of Schedule 1 regulation making power

<sup>27</sup>AMSA Compliance and Enforcement Policy Manual page 8

## Criteria which may guide enforcement decision making

23. Each reported or detected contravention will be subject to an initial assessment to determine the most effective option to achieve the objects of the National law.
24. The initial assessment will consider the likelihood that a contravention has occurred, its seriousness and its probable consequences. The appropriate response, if any will then be implemented.
25. 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 the circumstances, including whether there was a bona fide mistake;
  - the legislative or administrative mechanisms available in the circumstances;
  - the compliance history of the duty holder;
  - mitigating factors such as self-reporting or voluntary steps taken to address the issue;
  - the prevalence of the issue in the industry; and
  - the need for deterrence.
26. Each compliance and enforcement activity must be considered in terms of the principles described in the AMSA compliance and enforcement policy and in accordance with the objects of the National Law, so that the most appropriate option (or options) for the circumstances are applied.
27. 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.
28. 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 National Law, and by the general administrative review rights established in Commonwealth legislation.
29. To ensure the consistency, transparency, accountability, impartiality and fairness in decision-making required by AMSA's compliance and enforcement policy, all decisions and the reasons for these decisions must be clearly documented.

## A guide to enforcement decisions exercised by an MSI

30. The following circumstances utilise enforcement tools that will generally not require referral to the National Regulator before the MSI exercises the discretion.
31. These enforcement tools require an MSI to believe on 'reasonable grounds' that there is a breach of the National Law or there is some detriment to the health and safety of persons or the environment.
32. 'Reasonable grounds' requires that the decision to exercise the discretion to implement the enforcement tool is from an objective viewpoint, one that is just and appropriate in the circumstances.

### Circumstances under which an infringement notice may be appropriate

33. An infringement notice may be issued if an MSI has reasonable grounds to believe that a person has committed an offence of the kind prescribed by the regulations (including a civil penalty offence).
34. These offences are 'strict liability' offences and require only that the act or omission occurred and the MSI does not need to consider whether there was any intent, knowledge or recklessness by the alleged offender that led to or caused the alleged breach.
35. 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; and
  - where the extent of harm arising from the act or omission can be immediately assessed.
36. It is at the discretion of the MSI whether to issue, or recommend the issue of an infringement notice, or prosecute the offence. However once an alleged offender has paid an infringement notice penalty, no further action can be taken in relation to the alleged offence.

### Circumstances under which an improvement notice may be appropriate

37. An improvement notice may be issued when an MSI believes on reasonable grounds that a breach of the legislation is occurring or has occurred and is likely to continue or be repeated.
38. The improvement notice must state the date by which compliance must be achieved. Improvement notices may be appropriate in circumstances where a breach is not minor in nature, having consideration to the factors outlined in para 25.
39. The improvement notice is complied with when the systemic deficiencies have been remedied. This work may take a considerable period and a compliance date is required to be specified on the notice.

### Circumstances under which a prohibition notice may be appropriate

40. A prohibition notice may be issued when the MSI believes on reasonable grounds that there is an immediate risk to safety or the environment.
41. 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.
42. 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.
43. Evidence must be available to substantiate an opinion of immediate threat to safety, not only that a breach has occurred. Prohibition notices are a tool to achieve compliance with existing legislation. They are not a means of imposing new obligations on a person or the maritime industry as a whole.
44. A prohibition notice is a tool that is used to achieve short term localised action, in relation to a specific activity at a specific locality, to address its associated risks.
45. Because prohibition notices may only be issued where there is an immediate threat to safety or to the environment, non-compliance with a prohibition notice is a serious breach of safety legislation and will lead to prosecution.

### Circumstances under which a direction may be appropriate

46. If an MSI on reasonable grounds believes that a giving of a direction, requiring a person to take such steps within a specified time is necessary to prevent a contravention of the National Law, or is in the best interest of the public, or required to protect the health or safety of people or the environment the MSI may do so. For example an MSI may give a direction for a person not to operate an unsafe vessel.
47. The direction must be given in writing, clearly identifying the steps to be taken and the time frame within which the steps are to occur.
48. The MSI may also arrange for the direction to be implemented, if a person fails to comply with a direction, and the time for compliance has expired. In these circumstances clear records and evidence needs to be gathered and referred to the National Regulator to commence action to recover any costs incurred by the National Regulator in implementing the direction.

### Circumstances under which a detention may be appropriate

49. If an MSI reasonably suspects that a vessel is, will be, or has been involved in a contravention of the National Law, whether in or outside Australia, the MSI may detain the vessel and cause it to be brought to port or a place the MSI considers appropriate.
50. This enforcement option has the potential to cause adverse effects on commercial operations and, therefore, the livelihoods of persons. These adverse effects must be carefully considered before exercising the discretion.

## Circumstances under which an emergency suspension of a certificate may be appropriate

51. The emergency suspension of a certificate temporarily removes the ability of the certificate holder to exercise the privileges granted by that certificate.
52. The emergency suspension of a certificate power may only be exercised where the MSI is satisfied that the suspension is necessary to protect the safety of human life or the navigation of vessels, or in an emergency involving a threat to the environment.
53. The period of suspension is for a specified or prescribed period, but may be revoke earlier or if a condition specified by the National Regulator is fulfilled.

## A guide to enforcement decisions to be referred to the National Regulator

54. The following enforcement options are exercisable by the National Regulator and outside the scope of powers of an MSI. The effective implementation of these options requires that the MSI take all necessary steps to gather evidence in respect to the alleged offence in accordance with the National Regulator policy. (AMSA Investigation and Procedures Manual and the procedure for the collection and storage of evidence by AMSA investigators may apply).

## Circumstances under which an enforceable undertaking may be appropriate

55. An enforceable undertaking is a constructive alternative to prosecution. 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 National Law, and prevent breaches of the National Law in the future.
56. An essential consideration is that an enforceable undertaking must deliver a fundamental change to the behaviour that led to the breach and provide an overall positive benefit to the industry sector generally, or the community, rather than just considering the alleged offenders failure to comply with the National Law.
57. A decision to enter into an enforceable undertaking agreement as the most effective enforcement tool with an alleged offender is a policy consideration, and not within the discretion of the MSI.

## Circumstances under which a suspension or revocation of a certificate may be appropriate

58. Suspending or revoking a certificate removes the ability of the certificate holder to exercise the privileges granted by that certificate, either temporarily or permanently.
59. The period of suspension is for a specified or prescribed period, but may be revoke earlier or if a condition specified by the National Regulator is fulfilled.
60. The actioning of a suspension should be in response to an immediate threat that is rectifiable. If the circumstances that led to the suspension prevail, or cannot be rectified the appropriate action is to revoke the certificate.
61. The National Regulator in suspending or revoking a certificate must first give a show cause notice to the certificate holder affording the certificate holder procedural fairness, including the opportunity to state the grounds as to why the revocation should not occur.

## Circumstances under which prosecution may be appropriate

62. The Commonwealth Director of Public Prosecutions (CDPP) is responsible for the conduct of prosecutions for offences against the laws of the Commonwealth and for the conduct of criminal confiscation action in relation to such offences.
63. Prosecution will be undertaken for the most serious breaches of the National Law, and where other enforcement options are either inadequate to ensure ongoing compliance with the National Law or not available due to the nature of the alleged offence<sup>28</sup>.
64. The National Law anticipates a two tier prosecution regime.
  - Strict liability offences that have been subject to an infringement notice where the alleged offender has fail to pay – may be prosecuted in house by the National Regulator under an agreed Memorandum of understanding (“MOU”) with the CDPP similar to other agency MOU’s that have been entered into with the CDPP; and
  - Serious offences to be prosecuted by the CDDP requiring the preparation of a brief by the National Regulator.

## Strict liability offences that have been subject to an infringement notice

65. If a Commonwealth infringement notice is unpaid, the only options available to the Commonwealth are to withdraw the notice or prosecute the offender. However, this prosecution is not for the infringement notice penalty amount, but for the maximum penalty allowed under the offence provision, equal to (5) five times the infringement notice amount.
66. Infringement notices can only be issued against offences of strict liability. Successful prosecution of strict liability offence only requires the prosecution to prove the physical elements of the alleged offence, such as whether a domestic commercial vessel was operated without a certificate of operation and no valid exemptions applied.

## Serious offences to be prosecuted by the CDDP requiring the preparation of a brief

67. Following an investigation of a potential serious offence, the enforcement decision for National Regulator is primarily whether to brief the Commonwealth Director of Public Prosecutions (CDPP) about the potential offence and the evidence. The CDPP will then make the independent decision on whether to prosecute the matter, based on whether the prospects of success are good and whether the matter is in the public interest. This is in accordance with the Commonwealth Prosecution Policy.
68. Guidance on putting together a brief of evidence for the CDPP and prosecutions can be found in the AMSA Investigations and Prosecutions Manual.
69. The decision of whether to submit a prosecution brief to the CDPP belongs to the General Manager Domestic Vessels Division. This decision may include consideration of a whole range of issues similar to those the CDPP may consider, 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;

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<sup>28</sup>Commonwealth Director of Public prosecutions website: [www.cdpp.gov.au](http://www.cdpp.gov.au)

- Has the breach resulted in significant or real harm;
  - Is it important to deter similar behaviour? In this sense a prosecution may play an important educative role; and
  - Will the prosecution act as an effective social and industry deterrent.
70. The CDPP will 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.
71. It is AMSA policy that the Office of Legal Counsel (OLC) be consulted on the content of all briefs to the CDPP before the briefs are submitted to the CDPP.

#### Decision to cease an investigation or not to prepare prosecution brief

72. The General Manager Domestic Vessels Division may at any time, decide to cease an investigation by the National Regulator of a potential offence or that a prosecution brief will not be provided to the CDPP.

This decision could be on matters such as:

- a lack of evidence;
- the age or health of the alleged offender or a key witness; or
- mitigating factors such as self-reporting.

This is also a very serious decision, and regard should be had to the principles above and the guidance materials available to AMSA staff.

#### Circumstances under which a civil penalty may be appropriate

73. The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (“the guide”) states that it is important that civil penalties be used in appropriate and justifiable contexts. They are otherwise open to criticism for being too soft (in not carrying a criminal penalty) or for being too harsh (in not carrying the safeguards of criminal procedure such as a requirement for proof to be beyond reasonable doubt).
74. The appropriate financial penalty under a civil penalty provision will often be higher than the appropriate maximum fine for a criminal offence. This is because there is no criminal sanction and corresponding stigma attached to a civil penalty offence, it is purely a monetary penalty.
75. Civil penalties are most likely to be appropriate and effective in the following circumstances:
- **Criminal punishment not merited** – The contravention does not involve a serious moral culpability, or an offence involving harm to a person, serious danger to public safety, or knowing or reckless dishonesty by a person;
  - **Penalty sufficient to justify court proceedings** – A contravention should only be punishable by a civil penalty if the size of the maximum penalty will justify the expense and time required to take the matter to court; or
  - **Corporate wrong doing** – Civil penalties have traditionally been directed against corporate wrong doing where imprisonment is not available (because the offender is a corporate entity). In these circumstances, the higher financial disincentive that civil penalties provide for is most likely to be useful and effective.





