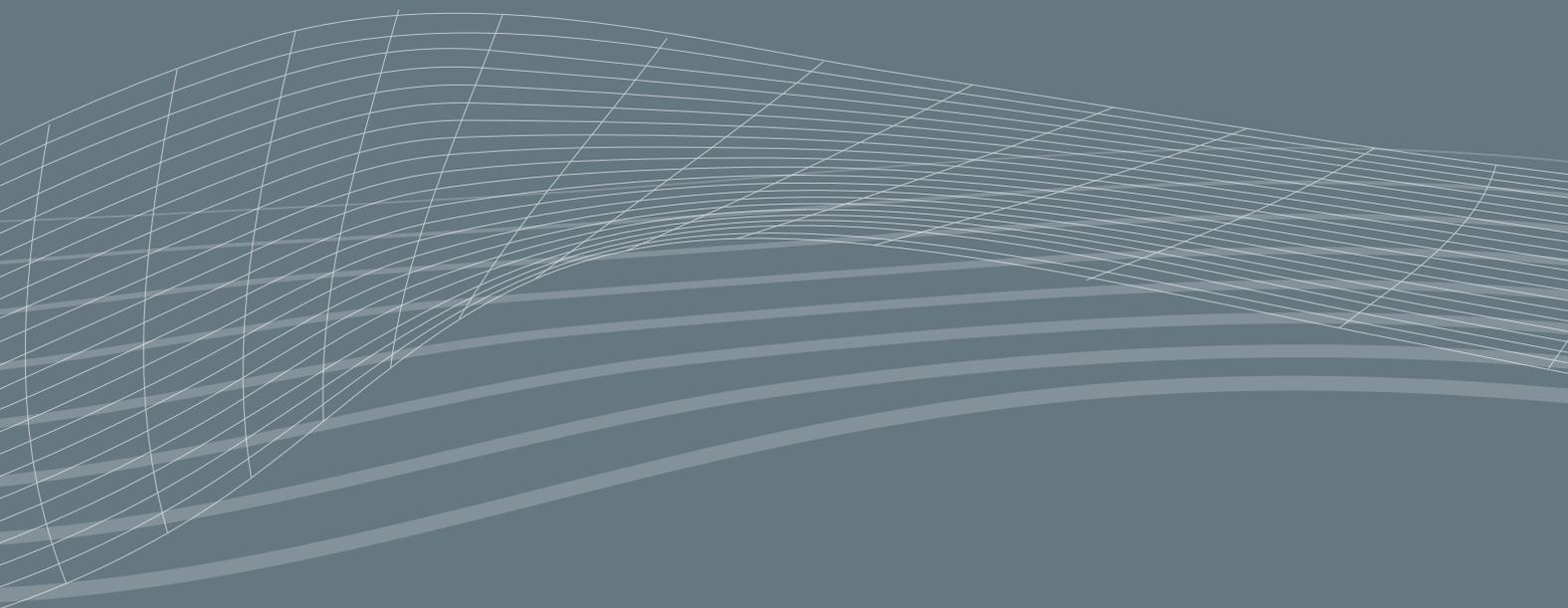




Australian Government  
Australian Maritime Safety Authority

# Compliance and Enforcement Protocol

*Navigation Act 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 *Navigation Act 2012* ("Navigation Act")

## Compliance and enforcement principles

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

### Accountability

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

### Consistency

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

### Transparency

Duty holders must be in no doubt as to the criteria used by AMSA in coming to a decision. A decision and its reasons need to be communicated clearly to the person involved. All decisions must be documented.

### Impartiality

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

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

### Proportionality

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

### Fairness

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

## Overview of the Navigation Act

3. The objectives of the Navigation Act are to promote the safety of life at sea, promote safe navigation, prevent pollution of the marine environment, and to ensure that AMSA has the necessary power to carry out inspections of vessels and enforce national and international standards<sup>1</sup>.
4. The Navigation Act provides for matters relating to seafarers, the safety of regulated Australian vessels and foreign vessels, prevention of pollution, tonnage, the safety of navigation, wrecks and salvage, compliance and enforcement, and other general matters relating to the aforementioned<sup>2</sup>.
5. The Navigation Act gives effect to Australia's international obligations under various conventions, covering matters such as the safety of life at sea; training and certification of seafarers; prevention of collisions at sea; watertight integrity and reserve buoyancy of ships; pollution prevention standards for ships; safety of containers; salvage and determination of gross and net tonnage of ships.
6. The Navigation Act introduces a civil penalty regime, allows for the establishment of an infringement notice scheme and includes a range of other compliance and enforcement tools, as discussed below.
7. Financial penalties and the possibility of imprisonment in the most serious cases are a key part of achieving and maintaining a credible level of deterrence to complement other types of compliance action (such as issuing warnings, detention of the vessels or issuing improvement notices) with the overall objective of increasing voluntary compliance and decreasing the resort to prosecution<sup>3</sup>.
8. Some of the offences provided for in the Navigation Act include:
  - Breaching a condition of a seafarer certificate<sup>4</sup>;
  - Taking a regulated Australian vessel to sea without a maritime labour certificate<sup>5</sup>;
  - Taking a vessel to sea, if it is unseaworthy<sup>6</sup>;
  - Making a false representation about being a licensed pilot or a licensed pilotage provider<sup>7</sup>;
  - Failing to respond to a request for assistance from a vessel in distress<sup>8</sup>;
  - Damaging an AMSA aid to navigation<sup>9</sup>;
  - Removing a wreck without the consent of its legal owner or AMSA<sup>10</sup>;
  - Interfering with an official log book, or making a false entry, or omitting to make an entry<sup>11</sup>; and
  - Obstructing or hindering AMSA in the performance of a function or the exercise of a power<sup>12</sup>.

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<sup>1</sup>s3

<sup>2</sup>s4

<sup>3</sup>Explanatory Memorandum of Navigation Bill 2012, pg 6

<sup>4</sup>s37

<sup>5</sup>s48

<sup>6</sup>s110

<sup>7</sup>s168

<sup>8</sup>s182

<sup>9</sup>S194

<sup>10</sup>s236

<sup>11</sup>s310

<sup>12</sup>s321

## Appointment and role of Inspectors

9. AMSA engages qualified professionals in the role of port marine surveyor (PMS) to assist AMSA in regard to compliance and enforcement matters. PMS have a multifaceted role, part of which will see them acting as delegates of AMSA in regard to performance of statutory functions. At other times PMS will perform the tasks of inspectors, exercising powers specifically provided to inspectors by the Navigation Act.
10. Section 254 of the Navigation Act deals with the appointment of inspectors, and provides that AMSA may appoint officers and employees of agencies of the Commonwealth and the States and Territories as inspectors.
11. An inspector may exercise all of the powers of an inspector under the Navigation Act, or such of those powers as are specified in the inspector's instrument of appointment. In either case, AMSA must be satisfied the inspector is suitably qualified or experienced to exercise each power. Under this regime AMSA intends to create 'classes' of inspectors, each of which will be appointed with different powers, as AMSA considers necessary and appropriate.

## Powers of Inspectors

12. The Navigation Act provides inspectors with a broad mix of powers to facilitate monitoring, enforcement, seizure, direction, and detention, as well as issue of improvement and prohibition notices.
13. Inspectors have the power to board a vessel without consent or warrant to determine if the Act is being complied with<sup>13</sup> and may then exercise monitoring powers.
14. Inspectors also have the power to enter premises by consent or under warrant<sup>14</sup> to exercise enforcement powers.
15. The monitoring powers an inspector may exercise, in specific circumstances, include<sup>15</sup>:
  - search premises and anything on the premises;
  - examine or observe any activity conducted on the premises;
  - inspect, examine, take measurements of or conduct tests on anything on the premises;
  - make any still or moving image or any recording of the premises or anything on the premises;
  - inspect any document on the premises;
  - take extracts from, or make copies of, any such document;
  - take onto the premises such equipment and materials as the inspector requires for the purpose of exercising powers in relation to the premises;
  - request that a person on the premises demonstrate the operation of machinery or equipment on the premises;
  - require the master of the vessel to do one or more of the following: stop or manoeuvre the vessel, adopt a specified course or speed, and/or maintain a specified course or speed;
  - operate or to require a person to operate electronic equipment on the premises to see whether the equipment, or a disk, tape or other storage device that is on the premises and

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<sup>13</sup>S257

<sup>14</sup>s256

<sup>15</sup>s259

can be used with the equipment or is associated with it, contains information (data) that is relevant to determining either whether the Navigation Act is being, or has been complied with, or the correctness of information provided under this Act;

- in relation to data found in the exercise of the power under s259(3), the power to operate or to require a person to operate electronic equipment on the premises to put the data in documentary form and remove the documents so produced from the premises;
  - in relation to data found in the exercise of the power under s259(3), the power to operate or to require a person to operate electronic equipment on the premises to transfer the data to a disk, tape or other storage device that is brought to the premises for the exercise of the power, or is on the premises, and the use of which for that purpose has been agreed in writing by the occupier of the premises, and to remove the disk, tape or other storage device from the premises; and
  - If entry to the premises is under a monitoring warrant, the power to secure a thing for a period not exceeding 24 hours (or longer if a magistrate grants an extension) if the thing is found during the exercise of monitoring powers on the premises, and an inspector believes on reasonable grounds that the thing affords evidence of the commission of an offence against this Act, and it is necessary to secure the thing in order to prevent it from being concealed, lost or destroyed before a warrant to seize the thing is obtained, and it is necessary to secure the thing without an enforcement warrant because the circumstances are serious and urgent.
16. The enforcement powers an inspector may exercise, in specific circumstances, include<sup>16</sup>:
- Where entry to premises is made with the consent of the occupier, search the premises for evidential material;
  - Where entry to premises is under a warrant, search for and seize evidential material specified in the warrant and take samples of evidential material;
  - If the premises are a vessel, require the master to stop or manoeuvre the vessel and adopt or maintain a specified course or speed;
  - Powers in relation to evidential material, including seizure, operation of electronic equipment to put the material in documentary form etc.;
  - When exercising a warrant, use of force where it is necessary and reasonable in the circumstances<sup>17</sup>; and
  - When exercising a warrant, require anyone on the premises to answer questions and produce any books, records or documents that the inspector requests<sup>18</sup>.
17. Inspectors have the power to give directions to a person that the inspector believes is not complying with the Navigation Act<sup>19</sup>, where those directions are required in order to protect the health and safety of people or to protect the environment, or it is desirable in the public interest.
18. Inspectors have the power to issue an improvement notice to a person who, the inspector believes, on reasonable grounds, is contravening the Navigation Act, or to issue prohibition notices where there is an activity that is or may be occurring in relation to a vessel that involves or will involve a serious risk to the health or safety of a person<sup>20</sup>.

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<sup>16</sup>s260

<sup>17</sup>s262

<sup>18</sup>s263

<sup>19</sup>s264

<sup>20</sup>s265 & s267

## Compliance and enforcement options

19. 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 option(s) from the list below which is most likely to promote the objectives of the Navigation Act.
20. Under the Navigation Act the enforcement options are:
- Imposing conditions on, or revoking certificates<sup>21</sup>
  - \*Improvement notices<sup>22</sup>
  - \*Prohibition notices<sup>23</sup>
  - \*Directions<sup>24</sup>
  - Detention of vessel<sup>25</sup>
  - Civil penalties<sup>26</sup>
  - Infringement notices<sup>27</sup>
  - Enforceable voluntary undertakings<sup>28</sup>
  - Prosecution<sup>29</sup>
21. Those options marked with an \* are only available to inspectors. The other options are available to either AMSA delegated officers or through exercise of AMSA's administrative powers.
22. The available 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.

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<sup>21</sup>s33, 46, 102, 134, 157 etc

<sup>22</sup>s265

<sup>23</sup>s267

<sup>24</sup>s246

<sup>25</sup>s248

<sup>26</sup>Numerous, including s291-296

<sup>27</sup>s305

<sup>28</sup>s306

<sup>29</sup>Numerous, including s297-300

## Monitoring compliance

23. AMSA may adopt the following methods for monitoring compliance with the Navigation Act:

### Audits

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

### Compliance inspections

27. A compliance inspection assesses a duty holder's compliance with their obligations and responsibilities under the Navigation Act.
28. Inspections may be done routinely by inspectors or following a report of information that an offence may have been committed. Therefore, a compliance concern could arise as a result of an inspection or be the cause of an inspection.
29. Compliance inspections may also target areas where AMSA has observed incident trends or specific duty-holder issues.
30. Where an inspector conducts an inspection and forms the view that a criminal offence may have been committed, the inspector will take note of all relevant material and provide a report to their Manager, who will then decide whether further investigation is warranted.

### Investigation

31. Where AMSA suspects that a breach of the Navigation Act may have occurred, it can undertake an investigation in accordance with the policy and procedure set out in the AMSA Investigation & Prosecution Manual. The Navigation Act provides broad monitoring and enforcement powers for inspectors as detailed above, which will aid the investigation process.

## Criteria which may guide enforcement decision making

32. The following material covers enforcement options that are available to AMSA, its delegated officers and to inspectors. The power to exercise each option should be established by the officer intending to use it on a case by case basis.

### Circumstances under which taking action in relation to a certificate may be appropriate

33. Revoking, suspending, varying or applying conditions to a certificate alters the ability of the certificate holder to exercise the privileges granted by that certificate, either temporarily or permanently.

34. The Navigation Act provides for variation or revocation by the 'issuing body' (which may be AMSA, a delegated officer within AMSA or a recognised organisation acting on behalf of AMSA<sup>30</sup>) of the following certificates:
- Maritime labour certificate<sup>31</sup>;
  - Safety certificate<sup>32</sup>;
  - Pollution certificate<sup>33</sup>; and
  - Tonnage certificate<sup>34</sup>.
35. Each of the abovementioned sections allows for the variation or revocation to occur if the issuing body is satisfied that the criteria prescribed by the regulations in relation to the certificate are met. As such, this is a statutory test which should be applied in accordance with the legislation.
36. Suspending certificates or applying conditions to certificates is also permitted in some cases (for example following an incident, or upon evidence of misconduct). In these cases the criteria to be applied will be those provided in the Navigation Act in most circumstances.
37. Where AMSA has a discretion in regard to taking action against a certificate that is not guided by the Navigation Act the following matters may be taken into consideration:
- The certificate holder's history of compliance;
  - Whether maritime operations related to the certificate are conducted to an adequate standard of safety and environmental protection;
  - Whether the certificate holder is willing or able to undertake any remedial action necessary to satisfy the criteria for holding the certification;
  - The broader implications of taking action against the certificate; and
  - The suitability of other enforcement options in achieving the necessary compliance.

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

38. An improvement notice may be issued when an inspector believes on reasonable grounds that a person is contravening a provision of the Navigation Act, or has contravened a provision of the Act and is likely to contravene it again<sup>35</sup>.
39. 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; and
  - other legislative or administrative mechanisms available in the circumstances.

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<sup>30</sup>s316

<sup>31</sup>s45 and s46

<sup>32</sup>s101 and s102

<sup>33</sup>s133 and s134

<sup>34</sup>S156 and s157

<sup>35</sup>s265

## Circumstances under which a prohibition notice may be appropriate

40. A prohibition notice may be issued when an inspector believes, on reasonable grounds, that:
  - an activity is occurring in relation to a vessel that involves or will involve a serious risk to the health or safety of a person; or
  - an activity may occur in relation to a vessel that, if it occurs, will involve a serious risk to the health or safety of a person<sup>36</sup>.
41. The decision to issue a prohibition notice is reached after the inspector has objectively considered and assessed all the relevant facts and issues, including the consequences of not issuing a notice.
42. Evidence must be available to substantiate an opinion of a serious risk to the health and safety occurring, or the potential for it to occur. Prohibition notices are a tool to achieve compliance with the Navigation Act, they are not a means of imposing new obligations on a person or the maritime industry as a whole.
43. A prohibition notice is a tool that is used to achieve action, in relation to a specific activity, to address its associated risks. Because prohibition notices may only be issued where there is a serious risk to the health and safety of a person, non-compliance with a notice is a serious breach of the Navigation Act and will be treated as such.

## Circumstances under which giving a direction may be appropriate

44. An inspector may give directions to a person, by written notice, requiring that person, within a specified period, to take such steps as are reasonable in the circumstances for the person to comply with the Act<sup>37</sup> where:
  - there is non-compliance with the Act; and
  - it is necessary to give a direction to protect health and safety of people or to protect the environment; or
  - it is desirable in the public interest to do so.
45. The relevant considerations in deciding whether it is desirable to issue a direction are:
  - whether measures have been, or are being, taken to address the non compliance that the inspector believes is occurring (the suspected non compliance);
  - the likelihood of the person not complying with this Act at a future time;
  - the severity of the suspected non compliance;
  - whether, on one or more occasions, the person:
    - has been charged with or convicted of an offence against this Act; or
    - has been given a direction;
  - other means available to the inspector to address the suspected non compliance;
  - whether, in the inspector's opinion, the suspected non compliance is deliberate; and
  - the desirability of deterring future non compliance with this Act.

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<sup>36</sup>s267

<sup>37</sup>s264

46. AMSA or its delegated officers may also issue directions<sup>38</sup> that:
- a vessel not enter or use any port; and/or
  - that a vessel comply with specified requirements while it is
    - approaching, entering or using any port; or
    - in or leaving any port.
47. The need for issue of such a direction, and the specified requirements, will be determined on a case by case basis having regard to the compliance issue that the direction is intended to address, noting that the delegation to issue such a direction has been granted to General Managers (including the Deputy Chief Executive Officer) only.

### Circumstances under which a detention may be appropriate

48. AMSA or its delegated officers may detain a vessel<sup>39</sup> and may also bring it, or cause it to be brought, to a port, or to another place that it considers appropriate, if:
- It is reasonably suspected that the vessel is unseaworthy or substandard; or
  - It is reasonably suspected that the vessel has been, is or will be involved in a contravention, either in or outside Australia, of the Act; or
  - It is reasonably suspected that a seafarer of the vessel or a person on board the vessel has been, is or will be involved in a contravention, either in or outside Australia, of this Act; or
  - both of the following apply:
    - it is reasonably suspected that the master of the vessel, or a seafarer of the vessel, would contravene this Act if he or she operated the vessel without a particular certificate or certificates, or other documentary evidence;
    - the master of the vessel, or the seafarer, does not produce the certificate or certificates or the other documentary evidence to AMSA when requested to do so; or
  - a provision of the Act provides for AMSA to detain the vessel.
49. AMSA recognised the severity of this enforcement option given the potential for adversely affecting commercial operations. It is recommended that, where practicable, prior to detaining a vessel, appropriate consultation is carried out within AMSA.

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

50. Civil penalty provisions have been included in the Navigation Act to provide an alternative to criminal prosecution for serious offences. However as the majority of enforcement provisions contain both a 'fault based offence' (carrying a criminal penalty of imprisonment, and/or a fine) and a 'civil penalty offence' (carrying a civil fine), where the elements of the breach have been established, the appropriate General Manager will determine which avenue of enforcement to pursue.
51. 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.

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<sup>39</sup>s248

52. The decision of the General Manager to commence a civil penalty proceeding will include consideration of the following:
- is there sufficient evidence of the breach to warrant further action;
  - did the breach cause actual detriment;
  - 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.

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

53. A policy decision has been made that breaches of the Marine Orders will be subject to both civil penalties and criminal penalties (as is the case in the principal legislation). All marine orders have been modified to give effect to this additional enforcement regime.
54. Section 305 Navigation Act states that regulations (i.e. Marine Orders) may provide for a person who is alleged to have contravened a civil penalty provision to pay a penalty as an alternative to civil proceedings. The penalty must not exceed one-fifth of the maximum penalty that a court could impose on the person for contravention of that provision.
55. Accordingly, the infringement notice scheme can be applied to civil penalties (but not criminal offences due to the wording of the s305). The infringement notice scheme is detailed in MO1.
56. It is also AMSA policy that the infringement notice scheme will only be applied to breaches of civil penalties in Marine Orders. This means that there will be no infringement notices issued for breaches of civil penalty provision in the Navigation Act itself.
57. An infringement notice will be appropriate where:
- there is a benefit in providing immediacy to the consequences for non-compliance;
  - the breach is not ongoing or is able to be rectified quickly;
  - the non-compliance can be immediately assessed; and
  - the extent of the harm arising from the breach is less than that which would warrant pursuit of civil penalty or criminal prosecution.
58. The decision whether or not to issue an infringement notice rests with AMSA. However, once an alleged offender has paid an infringement notice penalty, no further action can be taken in relation to that alleged offence.

## Circumstances under which a voluntary enforceable undertaking may be appropriate

59. A General Manager may accept undertakings that a person will<sup>40</sup>:
- take specified action in order to comply with an offence provision or a civil penalty provision of the Act;
  - refrain from taking specified action in order to comply with an offence provision or a civil penalty provision of the Act;
  - take specified action directed toward ensuring that the person does not contravene an offence provision or a civil penalty provision of the Act, or is unlikely to contravene such a provision, in the future.
60. An undertaking may be withdraw or varied by the person at any time, but only with the written consent of the General Manager. The General Manager may also, by written notice, cancel an undertaking<sup>41</sup>.
61. 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 Navigation Act and prevent breaches in the future.
62. Considerations in determining whether to accept an enforceable undertaking include:
- Does the action proposed to be undertaken address the matters which have given rise to the (potential) breach and can those actions be described with sufficient clarity to enable compliance to be tested;
  - that an enforceable undertaking will deliver a fundamental change to the behaviour that led (or may lead) to a breach;
  - Whether the person has entered an undertaking previously, and if so, was that undertaking successfully completed and are the current circumstances sufficiently similar to warrant refusal;
  - That the undertaking will provide an overall positive benefit to the industry or community generally, rather than just to the alleged offender;
  - That the public interest would be best served by acceptance of the undertaking rather than proceeding with other compliance or enforcement actions.

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<sup>40</sup>s306

<sup>41</sup>s306

## Circumstances under which prosecution may be appropriate

63. The Navigation Act provides for a range of offences, and the majority of them contain both a fault-based criminal offence and a civil penalty. Once a suspected offence has been detected, a decision must be made by a General Manager to either proceed on the basis of the civil penalty, or to prosecute.
64. Prosecution will generally only be undertaken for the most serious breaches of the Navigation Act, and where other enforcement options are either inadequate to ensure ongoing compliance or not available due to the nature of the alleged offence.
65. The decision about whether to pursue evidence for a potential criminal prosecution resides with a General Manager. This decision maker may consider a range of issues, including, but not limited to:
- Does the breach exhibit a significant degree of criminality or disregard? This disregard could be for the law, for the environment or for the safety of people. Note that some offences in the Navigation Act are strict liability, for which a criminal intention or fault element is not required.
  - Is the breach sufficiently serious that the Commonwealth and the community would expect it to be dealt with by prosecution?
  - Has the breach resulted in significant or real harm? Under the Navigation Act, this type of harm would usually be to persons (seafarers, passengers), property (vessels, ports, aids to navigation) or the marine environment from the pollution or discharge, for example.
  - Is it important to deter similar behaviour? In this sense a prosecution may play an important educative role.
  - Will the prosecution act as an effective social and industry deterrent?
  - Is there a suitable enforcement alternative to prosecution? A lesser alternative may be appropriate for a first offence or if the offender reported the breach and took corrective action when the breach became known, for example.
66. If a General Manager forms the view that gathering of evidence for a potential criminal prosecution should be pursued an AMSA inspector will undertake additional investigation and will prepare a brief of evidence for the Commonwealth Director of Public Prosecution (CDPP).
67. The CDPP then makes a decision on whether to prosecute a particular offence. The CDPP will base its decision on whether there is sufficient evidence to support a reasonable prospect of conviction in the matter and whether pursuit of the matter is in the public interest.
68. The General Manager may at any time, decide to cease an investigation by AMSA of a potential offence or decide that a prosecution brief will not be provided to the CDPP. This decision could be based on matters such as:
- a lack of evidence;
  - the time since the alleged offence took place;
  - mitigating factors such as self reporting or that damage was not sufficiently serious in nature;
  - jurisdictional considerations;
  - availability of AMSA resources.
69. As a Commonwealth Authority, AMSA implements the *Australian Government Investigation Standards*<sup>42</sup>(AGIS) as the benchmark for best practice in investigation of criminal offences under Commonwealth legislation.

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<sup>42</sup>Provision of AGIS is currently restricted to Australian Government agencies and is not publicly available.



