



Australian Government
Australian Maritime Safety Authority

Compliance and Enforcement Protocol

Protection of the Sea (POTS) Acts



Purpose

1. The Purpose of this Protocol is to provide guidance on the application of the AMSA Compliance and Enforcement policy as it relates to the powers contained within the suite of the Protection of the Sea (POTS) Acts. These Acts are:
 - Protection of the Sea (Prevention of Pollution from Ships) Act 1983*
 - Protection of the Sea (Harmful Anti fouling Systems) Act 2006*
 - Protection of the Sea (Powers of Intervention) Act 1981*
 - 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 (Oil Pollution Compensation Funds) Act 1993*
2. Ensuring compliance with the POTS Acts is vital in preventing and responding to pollution from ships by oil or other substances into the marine environment and for meeting Australia's obligations under international conventions.

Compliance and enforcement principles

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

Accountability

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

Consistency

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

Transparency

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

Impartiality

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

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

Proportionality

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

Fairness

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

Overview of the Protection of the Sea Acts

Protection of the Sea (Prevention of Pollution from Ships) Act 1983

4. This Act implements the International Convention for the Prevention of Pollution from Ships 1973 and the 1978 Protocol relating to that Convention (often together referred to as MARPOL 73/78). Annexes I to VI of MARPOL are given effect by the Act¹.
5. The Act includes a large number of offence provisions for which a person or the owner, master or charterer of a ship may be liable for. Some of these include:
 - discharge of oil or oily mixtures from a ship into the sea²;
 - discharge from an Australian ship of oil residues into the sea³;
 - breach of the duty to report an incident involving oil or oily mixture⁴;
 - discharge of a liquid substance, or a mixture containing a liquid substance from a ship into the sea⁵;
 - offences relating to cargo record books⁶;
 - discharge by jettisoning of harmful substances into the sea⁷;
 - breach of the duty to report certain incidents involving harmful substances⁸;
 - discharge of untreated sewage from a ship into the sea in the Antarctic Area⁹;
 - offences relating to garbage record books¹⁰;
 - using fuel oil with a sulphur content of more than the prescribed limit¹¹;
 - taking of a ship into an emission control area¹²; and
 - using fuel that does not meet fuel oil quality requirements¹³.

¹Note that the provisions of MARPOL 73/78 requiring ships to have certain construction configuration and that ships carry certain equipment, are given effect in the Navigation Act 2012.

²Section 9.

³Section 10.

⁴See section 11, particularly subsections 11(3), (6), (7) and (8).

⁵Section 21

⁶See sections 23(4) (5), 24 and 25(2) (3).

⁷Section 26AB.

⁸Section 26B.

⁹Section 26BC.

¹⁰See sections 26FA and 26FB.

¹¹Section 26FEG.

¹²Section 26FEH.

¹³Section 26FEN(1).

6. Inspectors are given a wide range of powers under section 27 of the Act (summarised below under 'Powers of Inspectors'). Inspectors appointed under the *Navigation Act 2012* are also inspectors for this Act.
7. The Act applies both within and outside Australia and extends to the EEZ¹⁴. It applies to Australian flagged ships, where ever they may be; and to foreign flagged ships in Australian ports, in the Australian territorial sea and in some cases, in the EEZ.
8. Under the Act, inspectors have the role of checking whether ships comply with MARPOL through the port State control regime. Foreign ships may be detained by AMSA if there are clear grounds for believing that a pollution breach has occurred¹⁵.

Prosecution [for pollution breaches] is the main enforcement option under this Act.

Protection of the Sea (Harmful Anti fouling Systems) Act 2006

9. This Act gives effect to the *International Convention on the Control of Harmful Anti fouling Systems on Ships 2001*, also known as the Anti fouling Convention.
10. It is an offence for a harmful anti fouling compound to be applied to a ship¹⁶; and for non complying ships to enter or remain in a shipping facility¹⁷.
11. The Act provides for the issue of an anti fouling certificate for a ship with a gross tonnage of 400 or more¹⁸; and for endorsement of an anti fouling certificate and cancellation of an anti fouling certificate¹⁹.
12. The Act includes offences for failing to carry an anti fouling certificate²⁰; failing to carry an anti fouling declaration²¹; and for a master and owner breaching their obligation to give notice of something happening to a ship that affects or might affect its compliance with the anti fouling requirements²².
13. Inspectors appointed under the *Navigation Act 2012* are also inspectors for the purposes of this Act. Other inspectors can be appointed under the Act by AMSA²³. Inspectors can exercise a wide range of powers under section 17 of the Act, for the purpose of ascertaining whether the Act and the regulations are being complied with; whether the Convention is being complied with; or whether a foreign Convention law²⁴ is being complied with in respect of the ship.

¹³Section 26FEN(1).

¹⁴Section 6.

¹⁵Section 27A.

¹⁶See sections 8(1) (2).

¹⁷See sections 9(1) (8).

¹⁸Section 10(1).

¹⁹Sections 10(2) and 12.

²⁰See sections 13(1) and 13(2).

²¹See sections 15(1) and 15(2).

²²See section 14(1).

²³Section 16(2).

²⁴Section 3: *Foreign convention law* means a law of a foreign country that gives effect (wholly or partly) to the *International Convention on the Control of Harmful Anti fouling Systems on Ships*.

14. AMSA has the administrative power under section 18(1) to detain a ship in an Australian shipping facility if AMSA has reasonable grounds for believing that an offence has been committed in respect of the ship. The circumstances in which the ship must be released are set out at section 18(2). Under section 18(4), it is an offence of the master and owner if the ship leaves the shipping facility while it is under detention.
15. A criminal prosecution for an offence against this Act is the main enforcement option and may be brought at any time²⁵, however there are some limits of prosecutions of offences involving foreign ships²⁶.

Protection of the Sea (Powers of Intervention) Act 1981

16. The *Protection of the Sea (Powers of Intervention) Act 1981* provides AMSA with a range of responsibilities and powers to take measures and issue directions to prevent or respond to pollution of the sea by oil or other substances.
17. The Act implements the *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* and also applies the *Protocol Relating to the Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973*.
18. The *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* allows coastal States that are parties to the Convention to take measures on the high seas necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil.
19. In addition the Act provides powers for AMSA to act in regard to pollution by oil or other substances within Australian waters²⁷.
20. The Act applies both within and outside Australia.
21. The Act includes offences for contravention of a direction under the Act. Not following a direction or directions given under the Act could therefore give rise to a criminal prosecution.
22. There is no time limit for a prosecution of an offence under this Act to be brought.
23. Inspectors do not hold powers under this Act. The powers belong to the Minister and to AMSA.

Protection of the Sea (Civil Liability) Act 1981

24. The *International Convention on Civil Liability for Oil Pollution Damage*, also known by the shorter name, the *Civil Liability Convention (CLC)* is implemented by this Act. The Act provides powers to AMSA to make claims against a ship that spills oil or threatens to do so. Australian ships and foreign flagged ships that come into Australian ports are required to hold insurance for oil spills.
25. Owners of oil tankers are liable for the expenses of any pollution damage that is caused by oil or other toxic or noxious substances that has or have escaped or been discharged. There are some exceptions to the liability. The owner also has the right to limit their liability.

²⁵Section 21(1).

²⁶Section 21(2).

²⁷Section 10

²⁸Section 6

²⁹See sections 19(1) and 18(4).

³⁰Section 20.

26. Australian oil tankers and foreign flagged oil tankers coming into Australian ports must carry proof of the insurance, as required by the CLC³¹.
27. Ships, other than oil tankers, with a gross tonnage of 400 or more that are carrying oil as bunkers are required to carry a relevant insurance certificate when coming into an Australian port³². This requirement is a domestic measure of Australia and is not actually included in the CLC.
28. AMSA is given the ability under the Act to recover the expenses it has incurred in cleaning up oil spills that were in contravention of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* or in taking preventative measures where an oil spill was threatened³³.
29. There are a number of offences in the Act³⁴ which can be prosecuted.
30. Inspectors do not have powers or roles under this Act.

Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008

31. This Act gives effect to the *International Convention on Civil Liability for Bunker Oil Pollution Damage 2001*. The Act sets out requirements for appropriate insurance certificates depending on the ship (e.g., Australian, Commonwealth, State or Territory, or foreign) and for the issue of insurance certificates³⁵. It is an offence under section 16 for ships not to carry an insurance certificate when entering or leaving ports in Australia. Under section 17(1), ships registered in Australia must carry an insurance certificate when in operation. Not to do so is an offence of the registered owner or master.
32. An *enforcement officer* under the Act includes an inspector appointed under the *Navigation Act 2012* or a person in the class of persons prescribed by the regulations³⁶.
33. An enforcement officer may require the master or other person in charge of a ship to produce to the officer an appropriate insurance certificate that is in force³⁷ and detain a ship if they have reasonable grounds for believing the ship does not have an appropriate insurance certificate in force³⁸. Failing to comply with the requirement of an enforcement officer is an offence³⁹, as is a ship leaving a port whilst under detention⁴⁰.

³¹See Part III of the Act, particularly sections 14 and 15..

³²See Part IIIA of the Act, particularly sections 19B and 19C.

³³Section 22A.

³⁴For example, see sections 15(1) (3) and 19C(1), (2) and (4)

³⁵Sections 18 19.

³⁶An enforcement officer can also include an officer of Customs within the meaning of the *Customs Act 1901*, under the definition in section 3.

³⁷Section 20(1).

³⁸Section 21(1).

³⁹Section 20(2).

⁴⁰Section 21(3).

Protection of the Sea (Oil Pollution Compensation Funds) Act 1993

34. This Act implements the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971*, also referred to as the Fund Convention⁴¹. The Act provides for the calculation of an annual levy that oil companies must pay to the Oil Pollution Compensation Fund established under the Fund Convention⁴².
35. The Act provides compliance options for the enforcement of the levy against Australian oil companies, if they do not pay⁴³.
36. Persons who have suffered damage or incurred expenses in cleaning up oil spills have the right to compensation and can sue to enforce their claims⁴⁴.
37. Inspectors do not have powers or roles under this Act.

Appointment and role of Inspectors

38. As noted in the summary above some POTS legislation provides directly for the appointment of inspectors. In these instances AMSA formally appoints inspectors as required, noting that Navigation Act inspectors are automatically approved. In all cases, inspectors will be appropriately trained.

Powers of Inspectors

39. Within the suite of POTS Acts, only the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Protection of the Sea (Harmful Anti fouling Systems) Act 2006* include specific powers for inspectors. Some of the key powers are summarised below per Act. Importantly, in all cases an inspector should be aware of scope of these powers and must be careful not to exceed the power available to them.

Powers under the Protection of the Sea (Prevention of Pollution from Ships) Act 1983

40. Under section 27 of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*, for the purpose of ascertaining:
 - whether a provision of the Act in relation to an Australian ship has been complied with;
 - whether there has been a discharge from a ship in contravention of the Act; and

⁴¹The original Convention has been amended by a number of Protocols since 1971 and the Act makes reference to each in section 3.

⁴²The *Oil Pollution Compensation Fund Act 1993* is the Act that established the fund in Australia. The fund is supported by three other Acts in the Protection of the Sea suite of legislation that give effect to the levies imposed on Australian oil companies for the fund. These Acts are the *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund Customs) Act 1993*; the *Protection of the Sea (Oil Pollution Compensation Fund Excise) Act 1993*; and *Protection of the Sea (Oil Pollution Compensation Fund General) Act 1993*.

Under these three Acts, the oil companies are required to keep records, produce reports and pay the levies imposed. AMSA is given the power to enforce these provisions.

⁴³For example, a late penalty payment and recovery. See sections 39 and 41 for the Fund contributions; and sections 46M and 46P for the Supplementary Fund contributions.

⁴⁴See sections 32 and 46F.

- whether an applicable provision of the MARPOL Convention has been complied with in respect of a foreign ship; or whether a provision of a law of a country other than Australia giving effect to the MARPOL Convention, that is applicable in relation to a foreign ship has been complied with;

an inspector may:

- go on board the ship with assistants and equipment as the inspector considers necessary;
 - require the master of the ship to take such steps as the inspector directs to facilitate the boarding;
 - inspect and test any machinery or equipment of the ship;
 - require the master of the ship to take such steps as the inspector directs to facilitate the inspection or testing of any machinery or equipment of the ship;
 - open or require the master of the ship to cause to be opened any hold, bunker, tank, compartment or receptacle in or on board the ship and inspect the contents of any hold, bunker, tank, compartment or receptacle in or on board the ship;
 - require the master of the ship to produce a record book required by the Act to be carried in the ship or any other books, documents or records relating to the ship or its cargo that are carried in the ship;
 - make copies, or take extracts from, any such books, documents or records;
 - require the master of the ship to certify that a true copy of an entry in a record book required by the Act to be carried in the ship made by the inspector is a true copy of such an entry;
 - require the master of the ship to produce any substances on board the ship or under the ship's control;
 - examine and take samples of any substances on board the ship or under the ship's control; and
 - require a person to answer a question.
41. It is important to note there are limits on powers of inspection of a foreign ship navigating in the exclusive economic zone (EEZ)⁴⁵.

Powers under the Protection of the Sea (Harmful Anti fouling Systems) Act 2006

42. Under section 17 of the *Protection of the Sea (Harmful Anti fouling Systems) Act 2006*, inspectors have wide powers similar to those above under section 27 of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.
43. An inspector may exercise the powers under section 17 in relation to a ship in an Australian shipping facility for the purpose of ascertaining:
- whether the Act and regulations are being complied with in respect of the ship;
 - whether the Anti fouling Convention is being complied with in respect of the ship; or
 - whether a foreign Convention law is being complied with in respect of the ship.

⁴⁵Section 27(1A).

An inspector may:

- go on board the ship with such assistants and equipment as the inspector considers necessary;
- require the master of the ship to take steps as the inspector directs to facilitate the boarding;
- examine and take samples of any substances on board the ship or any designated external surface of the ship;
- inspect any part of the ship or its machinery or equipment;
- open or require the master of the ship to cause to be opened any hold compartment or receptacle in or on board the ship and inspect the contents of any hold, compartment or receptacle;
- require the master of the ship to produce any certificate, declaration, endorsement or record that is required by the Act or the regulations to be carried on the ship; or any other documents records or books relating to the ship or its cargo;
- make copies or take extracts from any documents or books;
- require the master of the ship to certify that a true copy or extract made by the inspector is a true copy of the original;
- take photographs, including video recordings, of the ship or of equipment or anything else in or on board the ship; and
- require a person to answer questions.

Monitoring compliance

44. AMSA may adopt the following methods for monitoring compliance with the POTS legislation:

Audits

45. 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 POTS legislation; however AMSA may develop an audit program as part of its general functions.
46. 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.
47. Outcomes of audits will be made known to duty holders to inform ongoing improvement programs.

Compliance inspections

48. A compliance inspection assesses a duty holder's compliance with their obligations and responsibilities under the relevant legislation.
49. 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.

50. Compliance inspections may also target areas where AMSA has observed incident trends or specific duty holder issues.
51. Where an inspector is conducting an inspection and forms the view that a criminal offence may have been committed, the inspector will take note of all relevant material and provide a report to their Manager, who will then decide whether further investigation is warranted⁴⁶.

Compliance and enforcement options

52. The POTS Acts include a range of criminal offences, most of which are strict liability offences. Strict liability means there is no fault or intention element to prove.
53. Some offences under the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* have an element of recklessness or negligence⁴⁷, which are therefore not strict liability. Because breaches of the POTS Acts are always criminal offences, the only applicable enforcement option for such offences is prosecution.
54. For each offence within the POTS Acts, there are elements that need to be proven, by provision of admissible evidence, if prosecution is to proceed. The onus, or burden, of proving those elements beyond reasonable doubt is on the prosecution, not on the defendant. The *AMSA Investigation and Prosecution Manual and ITS95 Guidelines for AMSA Surveyors investigations of offences under the Protection of the Sea (Prevention of Pollution from Ships) Act 1983* elaborate further on the elements that generally need to be established for a POTS offence⁴⁸.
55. A criminal prosecution, if pursued, may result in a fine being imposed and/or a period of imprisonment and the recording of a criminal conviction.
56. Given that inspectors are also carrying out a port State control function when inspecting foreign ships, in cases where there is non-compliance with mandatory convention requirements, as established in the relevant POTS Act, ships may also be detained until the deficiency is rectified.
57. Certification required under the POTS Acts may also be withdrawn from Australian flagged ships in circumstances of non-compliance with those certificates. A decision to act in this manner would be taken by the relevant Manager, informed by evidence collected by inspectors.

⁴⁶*AMSA Investigation and Prosecution Manual*, Chapter Two: Investigations, 'Surveyors as Investigators'.

⁴⁷For example, see sections 17(1), 21(1), 26BC(1), 26D(1), 26F(1) and 26FEG(1). These offence provisions include elements such as to engage in conduct and the person being reckless or negligent. There are strict liability versions of these offences, however the strict liability offences have a much lower penalty.

⁴⁸These elements are generally identification of the ship involved; identification of the person (e.g. owner, master or charterer) or corporation that has committed the offence; the reckless or negligent conduct (if required it will not be required if the offence is strict liability); the discharge, spill etc; the sea that is, where did the offence or discharge occur; the pollutant or substance involved; or failure to record or report.

Criteria which may guide enforcement decision making

Detention of a vessel

58. Detention of a vessel may be appropriate in circumstances where there is evidence that a pollution offence has occurred. In such cases the decision to detain is dependent upon:
- evidence that the pollution offence is likely to have been committed;
 - location of the ship and its intending sailing schedule; and
 - involvement of the ship's Protection and Indemnity insurer.
59. The decision to detain will be made by an AMSA General Manager and will be actioned by an authorised inspector.
60. The ship will be released from detention following:
- Determination that the suspected offence did not involve the ship; or
 - provision of security by the owner of the ship; and
 - collection of such evidence as might be available from the ship itself.

Pursuit of a prosecution for breach of an offence provision

61. The decision about whether to pursue evidence for potential a 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 most offences in the POTS Acts 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 POTS Acts, this type of harm would usually be to 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.
62. If the 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).

63. The CDPP then make the decision on whether to prosecute a particular offence. The CDPP will base their decision on whether there is sufficient evidence to support a reasonable prospect of conviction in the matter and whether the matter is in the public interest.
64. The General Manager may at any time, decide to cease an investigation by AMSA of a potential offence or that a prosecution brief will not be provided to the CDPP. This decision could be based on matters such as:
 - a lack of evidence;
 - the time since the alleged offence took place;
 - mitigating factors such as self reporting or that damage was minor in nature;
 - jurisdictional considerations;
 - availability of AMSA resources.
65. As a Commonwealth Authority, AMSA implements the *Australian Government Investigation Standards*⁴⁹ (AGIS) as the benchmark for best practice in investigation of criminal offences under Commonwealth legislation.

⁴⁹Provision of AGIS is currently restricted to Australian Government agencies and is not publicly available.

