

MARITIME SAFETY QUEENSLAND ENFORCEMENT GUIDELINES

Overview

Maritime activities contribute significantly to both the economy and lifestyle of Queensland, and therefore it is essential that the environmental and safety risks associated with these activities are effectively managed. In recognition of this, Maritime Safety Queensland (MSQ) seeks to identify and manage the types of risks that are not or cannot be managed by operators and members of the community. In particular, Maritime Safety Queensland manages and influences the operation and use of maritime resources so that they contribute to economic development, ensure environmental sustainability and improve safety, living standards and quality of life.

Maritime Safety Queensland establishes marine safety strategies and marine pollution prevention strategies in line with the legislative requirements of the Transport Operations (Marine Safety) Act 1994 (TOMSA) and the Transport Operations (Marine Pollution) Act 1995 (TOMPA). The strategies, as identified in Maritime Safety Queensland's Strategic Plan, are consistent with the Queensland Government's priorities and also take into account international obligations and arrangements between Queensland and other states and territories and the Commonwealth.

Maritime Safety Queensland appropriately balances regulation of the marine industry and users of waterways with the provision of information and services that enable industry and private operators to effectively manage risks themselves. In addition, Maritime Safety Queensland seeks to promote voluntary compliance with marine safety regulations through the provision of education and the development of strong industry and community relationships¹. While such strategies aim to facilitate voluntary compliance with marine safety standards, Maritime Safety Queensland also acknowledges that it is sometimes in the public interest to take enforcement action.

By clearly defining the types of behaviour that demonstrate compliance with marine safety legislation, these enforcement guidelines aim to ensure industry members and the wider boating community understand their obligations. This in turn will help to prevent the types of unintentional breaches that occur when people are unaware of or do not clearly understand their obligations. These guidelines also assist Maritime Safety Queensland to determine what the most appropriate enforcement action is in any given situation, and in this way they help to ensure that public resources are allocated and utilized in an effective and efficient manner.

¹ For example, MSQ's regional industry forums educate industry members and the broader boating community about national trends affecting maritime safety and pollution and also provide them with an opportunity to voice their opinions/concerns about new initiatives

Introduction

Legislation forms the basis of a regulation framework to assist Maritime Safety Queensland with its task of protecting Queensland's waterways and the people who use them. The two central pieces of legislation that set the regulatory framework are the:

- Transport Operations (Marine Safety) Act 1994 (and Transport Operations (Marine Safety) Regulation 2004) and;
- Transport Operations (Marine Pollution) Act 1995 (and Transport Operations (Marine Pollution) Regulation 2008).

These guidelines explain how Maritime Safety Queensland determines the enforcement action it will take in any given situation and, as far as possible, they provide guidance on what behaviour will result in prosecution or other enforcement action.

Maritime Safety Queensland undertakes investigations to determine whether there have been any contraventions of marine legislation, and the results of these investigations are then used to determine what enforcement action, if any, is appropriate in the circumstances. This process illustrates that investigations are a prerequisite to implementing enforcement measures, and thus in addition to outlining our enforcement measures, these guidelines also clarify the nature and extent of our investigation activities. In summary, the investigation section describes the nature of our proactive and reactive investigation activities, and the processes we follow to ensure that the nature and scope of our investigations are appropriate in the circumstances.

The second part of the document outlines the various enforcement measures available under marine safety legislation. In particular, this section identifies and clarifies the way we determine which enforcement measures, if any, are appropriate in the circumstances, and the processes we employ to ensure that these measures are implemented in a consistent, effective and efficient manner.

Our investigation activities, enforcement measures and procedures for determining when it is appropriate to undertake these activities and measures, have all been developed in accordance with our five compliance enhancement principles². These five principles of proportionality, consistency, transparency, accountability and targeting, are described in detail below.

Proportionality - making our compliance effort commensurate to risk.

For example, our investigation resources are allocated according to the seriousness of the incident reported or detected. Specifically, all marine incidents are assigned a score which reflects the nature of the incident and the severity of the consequences resulting from the incident. These scores are then added to give the marine incident an overall rating which subsequently determines the category of the marine incident and the extent of our

² These principles were originally developed by Workplace Health and Safety Queensland (as detailed in their 2009 Compliance Enhancement Framework). We have adapted these principles in accordance with our compliance framework.

investigation. These investigations then determine the causes of the incident and consequently the type of enforcement action that will be taken.

Consistency - cases involving similar circumstances receive a similar response.

For example, we ensure that regulatory decisions are made according to policy, are justified appropriately and are audited for consistency.

Transparency – helping obligation holders to understand what is expected of them and what they should expect from us.

For example, this document outlines the general compliance framework within which we operate. By outlining the types of behaviour that will result in prosecution and other enforcement action, and by detailing the types of enforcement measures available to us, these guidelines aim to help people understand their obligations.

Accountability – being accountable to the public, in the sense of having policies and standards against which we, as an enforcing authority, can be judged.

Queensland's freedom of information legislation provides that an agency must make copies of its policy documents available for inspection and purchase by members of the public. 'Policy document' is widely defined to cover documents about how an agency proposes to administer statutory powers or administer schemes that may affect the rights or interests of members of the community. A 'policy' includes: enforcement policies, such as enforcement action philosophy and guidelines; policies about heightened levels of enforcement action (known as 'blitzes'); policies about different or altered enforcement responses for a problem class of activities; and policies about proactive compliance programs. These guidelines outline Maritime Safety Queensland's enforcement philosophy and practices, in line with the Freedom of Information Act requirements.

Targeting – the most risk-generating activities and hazards that are least well controlled are the primary focus of our compliance and enforcement activities.

For example, Maritime Safety Queensland's strategic plan 2004-2008³ outlines marine safety and pollution prevention strategies that have been developed in accordance with risk management principles.

The goal of this risk management approach is to match interventions to the nature and extent of the risk faced and the impact of the risk not being addressed. Six risk events have been identified for attention in 2008-2009, and these events have been ranked through review of history, trends and intelligence, and according to the likelihood and consequence of events. Each of these risk events are targeted through the implementation of specific risk treatment plans, which have been incorporated into the outcomes profiles of the Safety and Pollution Implementation programmes for 2008-2009.

³ Maritime Safety Queensland is in the process of developing a new strategic plan to cover the period from 2009-2013

1. Investigation policy

1.1 Introduction

Our investigation activities can be characterised as being of two types – proactive and reactive.

A proactive investigation is scheduled in advance as part of a monitoring/auditing program to monitor compliance with marine safety legislation. By contrast, a reactive investigation is commenced in response to a marine incident or when we receive notification that a contravention of marine legislation has, or may have, occurred.

Following notification of a marine incident, preliminary inquiries are made to help us decide whether an investigation is required. These inquiries may reveal that there is no need for an investigation – for example, the incident may be relatively minor and appropriate remedial actions to prevent reoccurrence may have already been taken.

In accordance with the proportionality principle, investigation resources are allocated according to the seriousness of the incident reported or detected.

1.2 Proactive Investigations

Maritime Safety Queensland undertakes proactive and targeted investigations of commercial and fishing vessels that focus on the extent to which operators have properly implemented a safety management system which ensures the safety of crew, passengers and anybody who may be affected by a ship's operations. Specifically, Maritime Safety Queensland's proactive and targeted investigation policy seeks to:

- Reinforce positive behaviour where an operator's commitment effectively minimises risk;
- Reduce the risks associated with negative behaviour by increasing the scope, depth and frequency of inspections where non-compliance is detected;
- Allow a more efficient use of Maritime Safety Queensland's resources by focusing efforts on ships and operators that are high risk, whether by their nature, history or operation.

Commercial and fishing vessels are assigned a risk index which reflects the relative risks associated with the operation of the vessel, as indicated by an ongoing review of performance and compliance. Risk indices are defined as:

- 1 Lowest risk
- 2 Lower risk
- 3 Base level
- 4 Higher risk
- 5 Highest risk

A vessel is assigned an initial risk index of 3 which is then modified up or down the risk index as indicated by monitoring over time to establish trends in safety compliance. This risk index focuses on the extent to which the owner/operator has properly implemented a systematic safety management system for the safe operation of the vessel. For example:

- Evidence of a proactive culture of compliance would be established when the operator has: initiated risk management strategies; consistently complied with legislation and standards; engaged in nil or minimal non-compliances; initiated a systematic and ordered approach to the ship's operation; and displayed managerial commitment to safety;
- Evidence of a reactive culture of compliance would be established when the operator: relies on the inspection regime to uncover non-conformances; operates on crisis management but has a reasonable willingness to correct non-compliances; and completes corrective actions as required and within stated time frames;
- A negative culture of compliance is evident where the operator: has a negative approach to the uncovering of non-compliance; displays a lack of openness to outside inspection; has a high incidence of non-compliance; fails to correct non-compliances or fails to correct within stated time frames or to the required standard; and is frequently involved in operational incidents.

When an individual risk index is adjusted, a corresponding adjustment is made to the periodic monitoring schedule to reflect the increase or decrease indicated. These adjustments reflect the quality of a ship's safety management system and work to ensure that 'good' operators/owners with sound safety management systems are scrutinized less frequently while 'poor' performers receive greater attention.

The level and frequency of commercial ship monitoring is based on:

- The ship area of operation with class B ships receiving preference over class C, C receiving preference over D, and D receiving preference over E;
- General condition (based on the documented history);
- Age (ships over 15 years may require closer attention);
- Incident reports or complaints received;
- Class 1 and Class 2 commercial ships 6 metres and over in length, with fare paying passengers, are monitored at the rate of at least one inspection per year;
- Class 2 commercial ships 6 metres and over in length, other than ships carrying fare paying passengers, and Class 3 fishing ships are monitored at the rate of at least one inspection every second year.

In any given region, ships that measure less than 6 metres in length are monitored at the rate of 20 percent per annum. However, where a random check of a ship in a fleet identifies a significant level of non-compliance, then further inspections of the fleet will be carried out.

In general, monitoring of a ship on a very frequent basis will only be carried out if the ship condition or operation appears to be unsafe and may endanger the safety of its passengers and crew.

1.2.1 Types of monitoring activities

The types of monitoring activities undertaken by Maritime Safety Queensland's shipping inspectors include:

- Checking a ship's certificates, licenses and documentation (when checking operational manuals on catamarans, inspectors make operators and owners aware of the hazards which may be encountered carrying passengers on foredecks and they also ensure procedures related to this are detailed in the ship's manual);
- Conducting interviews with a representative sample of masters and crew (in particular, the inspectors interview crew to ensure they are familiar with the ship's manuals);
- Conducting challenge testing of masters and crew on emergency response capability, preparedness (with a particular focus on business operations more likely to be exposed to a high turnover of crew) and 'person overboard' procedures;
- Inspecting the condition of a ship (this includes undertaking audits to ensure compliance with material and workmanship construction standards);
- Checking the operational procedures that a ship has in place;
- In-service monitoring of a ship (provided mainly by service agencies with their own boating facilities).

1.2.2 Levels of monitoring activities

The level of monitoring undertaken by a shipping inspector can vary from an inspection of a ship's documentation to a comprehensive inspection of the condition of a ship and the adequacy of its operational procedures. The monitoring activities may also target specific items for inspection or specific issues identified as requiring special attention.

The standards against which a ship and its operations are measured are the regulations for the TOMSA and the supporting performance and prescriptive based standards covering construction, miscellaneous safety equipment, crewing operation and maintenance.

1.2.3 Dealing with non-compliance

Non-compliances found during the proactive monitoring process are dealt with according to the severity of non-compliance. Depending on the seriousness of the breach, shipping inspectors may deal with an individual contravention of either TOMSA or TOMPA by one or a combination of the following:

- educating the offender about their obligations in relation to marine safety and/or marine pollution;

- providing written notification of the conclusion of an investigation process (acknowledgement letters, caution letters and warning letters);
- providing written notification of contraventions and describing the enforcement action that will be taken if non-compliance continues (formal non-compliance letters);
- imposing a fine for a contravention with marine legislation under the State Penalties Enforcement Act 1999 (marine infringement notices);
- cancellation, suspension or amendment of authorities such as registration or licences issued under TOMSA (administrative actions);
- commencing a proceeding by complaint and summons for an offence against marine legislation pursuant to the Justices Act 1886, either summarily or on indictment (prosecutions);
- issuing written directions, declarations and notices (collectively called directions);

Each of these options is explained in detail in the 'Enforcement Policy' section of these guidelines.

1.2.4 Other proactive monitoring activities

In addition to monitoring the operation and condition of vessels, Maritime Safety Queensland also audits accredited people such as designers, builders, surveyors and training providers.

For example, under the BoatSafe scheme, all candidates for a recreational boat licence or personal watercraft licence must complete an approved BoatSafe competency-based training and assessment program, or a Recognition of Prior Learning assessment, with an MSQ approved BoatSafe training provider.

These MSQ approved BoatSafe training organisation and providers are subject to an ongoing audit program. Prior to approving an organisation's application to become a registered BoatSafe training organisation, Maritime Safety Queensland audits the organisation to assess the adequacy of its resources, processes, systems and practices. Once an organisation is registered as a BoatSafe training organisation, they will become subject to regular scheduled compliance audits to ensure ongoing compliance with the BoatSafe scheme. Maritime Safety Queensland may also investigate, at any time, an alleged non-compliance with the terms and conditions of the BoatSafe agreement. The scope and breadth of these complaint triggered audits will depend on the nature of the complaint being investigated.

In addition to auditing recreational boat licence training providers, Maritime Safety Queensland also audits and authorises commercial marine training and assessment providers (known as Registered Training Organisations). When processing registration applications, Maritime Safety Queensland conducts a desktop evaluation of a training organisation's application and a site visit of their campus. Once authorisation is provided, audits are initiated within 12 months to ensure ongoing compliance with the Australian Quality Training Framework (AQTF) and the assessment requirements of the relevant maritime regulations.

1.3 Reactive Investigations

Reactive investigations may be defined as inquiries to establish the facts and circumstances of an event, incident or allegation, in accordance with the law and in the interests of justice. Maritime Safety Queensland reactively investigates marine incidents and events that have occurred, or allegedly occurred, as a result of, or in connection with, the operation of recreational, commercial or fishing vessels.

1.3.1 Marine Incident Management Procedure

Consistent with the compliance principle of proportionality, and in order to allow for the appropriate prioritisation of resources, all marine incidents are categorised according to their severity and urgency. Specifically, each incident is assigned three separate scores that reflect the nature of the incident, the severity of the consequences resulting from the incident and the level of public interest in the incident. These scores are then added to give the marine incident an overall rating which subsequently determines the category of the marine incident and thus the extent of Maritime Safety Queensland's investigation.

1.3.2 Incident type

The incident type score measures the level of risk associated with a particular incident, regardless of the actual consequences that have resulted from the incident. The incident type scores range from 0 to 10, where a score of 0 represents a relatively low risk incident and a score of 10 represents a relatively high risk incident. For example, an explosion on board a passenger vessel is considered to be a high risk incident, and as a result it receives an incident type score of 10. By contrast, the intentional grounding of a recreational vessel is considered to be a low risk incident, and as such it is assigned an incident type score of 1.

1.3.3 Consequence score

The consequence score rates the severity of the consequence of a marine incident from 0 to 10, with 10 being the most serious and 0 being where no adverse consequence resulted from the marine incident. Importantly, even though a marine incident can result in multiple adverse consequences only one consequence score is given to an individual marine incident. In instances where there are multiple consequences of a marine incident, the higher consequence score is selected.

1.3.4 Public interest score

The public interest score refers to either the level of public interest in a marine incident or to incidents where it is in the public's interest that steps are taken by Maritime Safety Queensland to prevent similar future incidents.

1.3.5 Marine incident categories

Once a marine incident has been assigned a score for the type of marine incident, its consequences and the public interest level, the scores are then added to produce an overall incident rating which consequently determines the marine incident category. The marine incident categories and corresponding investigation processes are listed below.

Category One

Category one marine incidents are the most serious and all available resources are directed towards conducting an extremely detailed investigation of such incidents. We commence our investigation activities as soon as we detect, or are advised of, a category one incident.

Category One- fatal

The Queensland Police Service investigates all fatal marine incidents and provides the Coroner with an investigation report. At the same time, Maritime Safety Queensland conducts a separate investigation to explore the circumstances of the marine incident and to consider whether there is a need for legislative/policy changes.

Category One - non-fatal

Category one non-fatal incidents may be investigated by another government agency such as the Queensland Police Service or Workplace Health and Safety, however, Maritime Safety Queensland contributes to these investigations by providing advice and analysing the evidence.

Category Two

Category two incidents are serious, warranting a detailed investigation as soon as practicable.

Category Three

Category three incident investigations are generally conducted to a lesser extent than the Category one and two incident investigations. Maritime Safety Queensland commences category three investigations within one month of receiving advice of an incident. Where appropriate, category three incidents may be referred to another agency for investigation.

Category Four

Category four marine incidents are generally fairly minor and require only a desk top investigation to finalise the case. Category four marine incidents are finalised within six months and commonly require no further action from Maritime Safety Queensland.

Category Five

Category five incidents are incidents that when initially reported may appear to be a marine incident; however, initial investigation may reveal that Maritime Safety Queensland does not have jurisdiction.

1.4 Investigations and enforcement action

Maritime Safety Queensland investigates all incidents as per the categorisation process outlined above. Once an investigation is completed, and in line with the enforcement approach outlined in these guidelines, the agency then determines what enforcement action is most appropriate in the circumstances.

2. Enforcement policy

2.1 Introduction

Enforcement is one of the measures used by Maritime Safety Queensland to achieve the objectives of the law, however, if an alternative to enforcement action will be more effective in achieving the objects of the legislation that is being administered, then that alternative will be considered.

In order to determine whether enforcement action will be taken, Maritime Safety Queensland will investigate all significant breaches of the law and then exercise its discretion in a consistent and logical fashion.

Maritime Safety Queensland has a wide range of enforcement measures available under marine legislation. For instance, an individual contravention of either TOMSA or TOMPA could be addressed by one or a combination of the following:

- encouraging voluntary compliance through education and self-regulation;
- conducting site and ship audits through monitoring programs;
- working with other agencies, such as the Great Barrier Reef Marine Park Authority, the Australian Marine Safety Authority or the Environmental Protection Agency;
- providing written notification of the conclusion of an investigation process (acknowledgement letters, caution letters and warning letters);
- providing written notification of contraventions and describing the enforcement action that will be taken if non-compliance continues (formal non-compliance letters);
- imposing a fine for a contravention with marine legislation under the State Penalties Enforcement Act 1999 (marine infringement notices);
- cancellation, suspension or amendment of authorities such as registration or licences issued under TOMSA (administrative actions);
- commencing a proceeding by complaint and summons for an offence against marine legislation pursuant to the Justices Act 1886, either summarily or on indictment (prosecutions);
- issuing written directions, declarations and notices (collectively called directions);
- applying to the District Court for an enforcement order or interim enforcement order;
- requesting that an offender give a written (enforceable) undertaking that they will not commit, continue to commit, or repeat the act or omission.

2.2 Encouraging voluntary compliance through marketing and education

Maritime Safety Queensland approaches the task of achieving safety outcomes by appropriately balancing regulation of the marine industry and users of the waterways with the provision of information and services that enable, and encourage, industry and private operators to effectively manage risk themselves.

The overall goal of our marketing and education strategy is to change attitudes and behaviour through education and public awareness. Some of our key strategies include:

- Developing and implementing targeted state-wide media campaigns;
- Developing and implementing generic safety campaigns such as Christmas, Easter and annual boating safety campaigns;
- Increasing awareness of Maritime Safety Queensland and boat safety through participation in and sponsorship of boating events, trade shows and expos;
- Educating the public about marine safety through the development and dissemination of recreational handbooks, information sheets, local flyers, press releases and articles about the most common localised issues;
- Developing and delivering information sessions designed to assist ship operators to recognise/discharge their general safety obligation relative to crew induction training and apply lessons learnt for the wider benefit of the maritime industry;
- Distributing packages which support shipboard induction by owners and operators. These packages include a DVD featuring fire and emergency response principles, persons overboard, capsizing prevention and induction procedures;
- One of the roles of the Field Compliance Team (FCT) is to build community partnerships and encourage compliance by education and example, especially in relation to the appropriate and safe use of personal water craft. Marine inspectors in the Field Compliance Team use their discretion to decide whether education or compliance action is appropriate given the circumstances of a particular case. Education action can include distributing brochures, capacity labels, ride smart stickers and other education aides to persons intercepted and/or referring people to the MSQ website for further information and guidance material.

2.3 Safety reports

A safety report is an anonymous summary of a marine event investigation that is disseminated to members of the public for the purpose of increasing awareness of marine safety. These reports consist of a short narrative of the relevant facts, followed by a number of lessons that can be taken from the facts. Where possible, the lessons refer to additional resource material or the relevant rules and regulations, such as a provision of marine legislation or rule of the Collision Regulations

When preparing a narrative, all identifying details, such as the name and registration number of the ship(s) and the name(s) of any person(s) involved, are removed.

These safety reports are posted on the Maritime Safety Queensland website and can be accessed via the following link:

http://www.msg.qld.gov.au/Home/Publications/Safety_reports/

2.4 Prosecution reports

Maritime Safety Queensland also produces prosecution reports which detail the outcomes of criminal proceedings for contraventions of marine legislation where a conviction against a defendant (or an accused) has been recorded. These reports are a short compilation of the facts, which identify the defendant where appropriate and describe the court result.

The objective of both the safety and prosecution reports is to educate the public about the cause of and circumstances surrounding an incident, in order to prevent a similar incident from recurring. For this reason, both the safety and prosecution reports are made publicly available via the Maritime Safety Queensland website.

2.5 Closure letters

Closure letters are usually appropriate in circumstances where a relatively minor contravention has occurred. There are three different kinds of closure letters:

The acknowledgement letter - this is used when the circumstances of the case are accidental, unintended or minor, and the person or persons involved are ordinarily compliant with marine legislation. The acknowledgement letter simply acknowledges the facts and circumstances of the case and advises the persons involved that the investigation is closed and that no further action will be taken at this time.

The caution letter – this is used when the circumstances of the case are more serious or potentially more serious, and where the person or persons involved have fallen short of the standard of conduct required by marine legislation. The caution letter acknowledges the facts and circumstances of the case, identifies the particular provisions of marine legislation that have been transgressed, recommends the action required to the person or persons involved, and states that no further action will be taken at this time.

The warning letter – this is used when the circumstances of the case are very serious (or potentially very serious) and where the person or persons involved have fallen short of the standard of conduct required by marine legislation and may not ordinarily be compliant with marine legislation. Use of the warning letter is restricted to those cases where other compliance action is not otherwise practicable or there are other indicators that warrant the file being given a minor priority.

2.6 Non-compliance letters

Formal non-compliance letters are used when a contravention is considered to have a serious priority, and yet more formal enforcement action is not possible for a number of reasons, including:

- where there is insufficient evidence to support any action, but where a contravention of marine legislation is persistent or is ongoing;

- where there is doubt or confusion about the appropriate standard of conduct required under marine legislation.

In addition, it may be appropriate to issue a formal non-compliance letter:

- to clarify the involvement of the person with the operation of a ship;
- to ascertain intention with respect to a ship;
- to encourage compliant behaviour by setting out the consequences of non-compliance, such as administrative action or prosecution.

2.7 Marine infringement notices

Marine infringement notices are a simple way of dealing with common offences against marine legislation in circumstances that do not warrant a prosecution.

Many of the more straightforward offences under TOMSA, and soon some of the offences under TOMPA, may be dealt with by the issue of a marine infringement notice.

A marine infringement notice is a way of avoiding the cost, complexity and delays of the traditional legal system, whilst imposing a fine for a contravention of marine legislation. They are issued to an alleged offender because a shipping inspector reasonably believes that an offence has been committed. However, the notice does not constitute a proceeding and payment of the fine by the alleged offender does not give rise to a criminal conviction being recorded. If the fine is not paid, it is recoverable as a debt by the State Penalties Enforcement Registry.

A person served with a marine infringement notice has the right to elect a court hearing.

2.7.1 In what circumstances will a marine infringement notice be issued?

There is discretion whether or not to issue a marine infringement notice in the same way as there is discretion whether or not to commence a proceeding. When considering whether or not it is appropriate to issue a marine infringement notice, Maritime Safety Queensland officers consider the principles relating to the exercise of discretion for prosecutions.

In addition to these principles, officers also consider:

- the intention of the legislation to penalise offences that might otherwise go unpunished;
- whether it is an easily-remedied one-off offence;
- whether up to three minor offences are involved.

In such circumstances, the use of a marine infringement notice may be appropriate. In cases of multiple offences arising out of a single event, even though each offence may be relatively minor, the existence of more than three offences tends to indicate that the offences should be dealt with as a prosecution. Further, issuing successive infringement notices for a repeated offence is not appropriate. In such situations prosecution is, again, the most appropriate course of action.

2.7.2 Procedure

The persons authorised to issue marine infringement notices under TOMSA are shipping inspectors. It is envisaged that future amendments to the State Penalties Enforcement Regulation 2000 will empower authorised officers under TOMPA to issue infringement notices under that Act as well.

Shipping inspectors of the Water Police and the Queensland Boating and Fisheries Patrol are empowered to issue marine infringement notices. Shipping inspectors employed by Maritime Safety Queensland, however, are generally not empowered to issue marine infringement notices.

The relevant Shipping Inspector assesses whether a marine infringement notice is appropriate in the circumstances. Specifically, the Inspector considers:

- whether the marine infringement notice can be served on the alleged offender within six calendar months of the date of the alleged offence;
- whether the criteria for issuing a marine infringement notice, outlined above, are satisfied;
- whether the evidence and public interest tests are satisfied.

If all of these criteria are fulfilled, then a marine infringement notice may be issued. If not, a prosecution will be commenced instead, provided the evidence test and the public interest test are satisfied.

A marine infringement notice may be served personally, by registered post or, in some circumstances, on an unattended ship.

2.7.3 Withdrawal of marine infringement notices

The State Penalties Enforcement Act 1999 envisages the possibility of withdrawing a marine infringement notice after service.

A marine infringement notice will be withdrawn if:

- a more serious offence against marine legislation has been identified and therefore a prosecution is more appropriate;
- a mistake of fact was made and the marine infringement notice should not have been issued in the first place;
- some circumstance has changed such that the evidence test or the public interest test can no longer be satisfied.

The State Penalties Enforcement Regulations 2000 enable a marine infringement notice to be withdrawn even if the fine has been paid. Where a decision is made to withdraw a marine infringement notice, Maritime Safety Queensland will send a letter to the recipient of the notice, which advises of the withdrawal pursuant to the State Penalties Enforcement Regulations 2000.

2.8 Administrative actions

Administrative action is action leading to the suspension or cancellation of an individual's licence, registration, approval to establish a buoy mooring or any other authority listed under the TOMSA, in response to an individual's contravention of marine legislation. Administrative action may be initiated in some of the following circumstances:

- for recreational marine driver licence holders, when three marine infringement notices are issued in any one calendar year, pursuant to Maritime Safety Queensland policy;
- for holders of licences to operate commercial and fishing ships, when involved in more than one serious marine incident in the past three years;
- for any licence holder, when allegations of impropriety are made concerning the issue of the licence;
- for any licence holder, when convicted of an offence against section 79 or 80 of the Transport Operations (Road Use Management) Act 1994 (drink driving related offences);
- for a marine pilot's licence, when involved in more than one serious pilotage incident in the past three years;
- for registration of any ship, when it appears that the ship is unseaworthy;
- for any other authority holder, when it appears that one or more of the grounds described in part 6 of the Transport Operations (Marine Safety) Regulation 2004 has been established.

It should be noted that this list is not intended to be exhaustive and there may be other circumstances in which administrative action is justified.

Maritime Safety Queensland will issue a licence holder with a written notice to show cause why their licence or other authority should not be suspended, cancelled or amended (a show cause letter). Once a show cause letter is sent, the offender has 30 days to show why the proposed suspension, cancellation or amendment should not be executed. At the end of the 30 day period, Maritime Safety Queensland will review the response of the licence holder, if a response is received, and make a decision as to whether or not administrative action is required. If no response is received from the licence holder, an administrative decision will be taken immediately.

2.9 Prosecutions

Generally speaking, Maritime Safety Queensland prosecutes marine safety contraventions that are the more serious in terms of consequence, risk and aggravating circumstances. The policy in relation to marine pollution offences is, however, more stringent with every provable discharge offence to be dealt with by prosecution.

The decision to commence a prosecution by complaint and summons rests solely with the complainant, whether the matter is to be dealt with summarily or on indictment. The complainant, who is often an officer external to Maritime Safety Queensland, must be satisfied that there is sufficient evidence to support a prosecution and that the public interest

is satisfied in the circumstances. In order to be satisfied about these matters, the complainant may seek advice from Crown Law.

Maritime Safety Queensland ensures that a matter forwarded for prosecution has sufficient evidence to support a charge and that a proceeding is in the public interest. Maritime Safety Queensland also considers whether Crown Law advice is necessary, and if this is the case, then the agency will obtain that advice.

2.9.1 The model litigant principles

The courts expect the highest standards of probity and fairness from the State in its handling of litigation. On the other hand, the community expects the State to deal properly with taxpayers' money and, in particular, not to spend it without due cause and due process. The balancing of these community and court expectations of fairness and firmness forms the basis of the model litigant principles.

The State and all agencies, including Maritime Safety Queensland, act as model litigants in the conduct of all litigation, by adhering to the model litigant principles of fairness and firmness.

The model litigant principles of fairness state that an agency will:

- act consistently in the handling of claims and litigation;
- deal with claims promptly and not cause unnecessary delays in the handling of claims and litigation;
- endeavour to avoid litigation, wherever possible;
- keep the costs of litigation to a minimum, where it is not possible to avoid litigation altogether;
- pay legitimate claims without litigation (for example the agency can make partial settlements of claims, or interim payments, where liability has been established and it is clear that the State's liability is at least as much as the amount to be paid);
- not seek to take advantage of an impecunious opponent;
- not contest matters which it accepts as correct, in particular by:
 - not requiring a party to prove a matter which the state knows to be true;
 - not relying on purely technical defences where the State will suffer no prejudice by not doing so; and
 - not contesting liability if the State knows that the dispute is really about quantum; and
 - not instituting and pursuing appeals unless the State believes that it has reasonable prospects for success, or the appeal is otherwise justified in the public interest.

In line with community expectations, all agencies, including Maritime Safety Queensland, also adhere to the model litigant principles of firmness which state that an agency will:

- appropriately test all claims;
- contest all spurious or vexatious claims;
- claim legal professional privilege where appropriate;
- claim public interest immunity to protect confidential information, such as Cabinet papers, in appropriate cases;

- seek security for costs where appropriate and pursue costs when it is successful in litigation, which will assist in reducing the potential for vexatious proceedings to be instituted against it;
- rely on available statutes of limitation, which have been enacted to protect a defendant from unfair prejudice; and
- act properly to protect the state's interests.

Maritime Safety Queensland adopts these principles, as far as they are relevant, in relation to its conduct of prosecutions and appeals against administrative action.

2.9.2 Exercising prosecutorial discretion

MSQ exercises prosecutorial discretion when its officers make decisions that affect criminal proceedings, particularly those concerning evidence and the public interest.

In assisting a complainant in the exercise of prosecutorial discretion, Maritime Safety Queensland officers adopt the overriding principle that a prosecution must not be instituted for improper purposes.

A decision whether or not to prosecute will not be influenced by:

- any discrimination against any person based on ethnicity, nationality, race, religion, gender or political affiliations;
- any personal feelings or bias towards any person;
- any possible political advantage or disadvantage to the government or any group;
- the possible affects of the decision to prosecute on the unit officer's personal or professional circumstances.

These matters underpin and prevail over all considerations of sufficient evidence and public interest.

2.9.3 Evidence test

The basic prerequisite of any prosecution is that the available evidence appears to establish a prima facie case. The discretion to prosecute only arises once a complainant is satisfied that a prima facie case exists. This is a well established principle of law that has been enunciated in the Prosecutions Guidelines of the Queensland Office of the Director of Public Prosecutions, which says:

'The criteria which are to be applied in deciding whether to prosecute fall into two categories. First, is the evidence sufficient to justify proceedings? Second, does the public interest require a prosecution? The prosecutor must be satisfied as to the first question before moving on to the second.'

The prosecution policy and guidelines of the Director of Public Prosecutions in New South Wales further qualifies the evidence test as follows:

'Given the existence of a prima facie case it must be understood that a prosecution should not proceed if there is no reasonable prospect of a conviction being secured....This decision requires an evaluation of how strong a case is likely to be

when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by the alleged offender, and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction.'

Maritime Safety Queensland ensures that every matter that is to be prosecuted satisfies this expanded evidence test. At the very least, there must be reliable, probative evidence to support every element of the intended charge or charges, and there must be a reasonable prospect of a conviction in all of the circumstances.

In assessing whether the evidence test has been satisfied, Maritime Safety Queensland considers the following matters:

- the admissibility of evidence;
- reliability of evidence, including identification evidence;
- the possible defences that could be raised, and whether they can be negated;
- the extent of any conflicts in evidence between witnesses;
- the competency of witnesses;
- whether the witnesses can be compelled to appear;
- any other factors that could affect the credibility of witnesses;
- the availability of witnesses;
- whether witnesses will be hostile, adverse or cooperative.

If there are any issues concerning the sufficiency of evidence, the admissibility of evidence or the availability of a defence, then Crown Law advice is obtained before a prosecution is commenced.

2.9.4 Public interest test

Sufficient evidence and the likelihood of securing a conviction are not the only factors that are considered when exercising prosecutorial discretion. Before commencing a prosecution, Maritime Safety Queensland must also be satisfied that a prosecution is in the public interest.

In terms of the public interest test, the following factors are amongst those which Maritime Safety Queensland considers before prosecution is commenced. More than one factor may be applicable to a particular file:

- the seriousness or triviality of the offences, or whether the offences are of a technical nature only;
- whether marine safety or the marine environment has been affected by the offence;
- any mitigating or aggravating circumstances;

- the personal characteristics of the person such as age, experience, health or other special characteristic;
- the degree of culpability of the person;
- the availability and effectiveness of alternatives to prosecution;
- the prevalence of the offence and the need for deterrence;
- the time elapsed since the offence occurred;
- whether there is any counter-productive feature associated with a prosecution;
- whether the offence is of public concern;
- the cost and length of a prosecution compared to the seriousness of the offence;
- any precedent which may be set by commencing or not commencing a prosecution;
- whether the consequences of a conviction would be unduly harsh or oppressive;
- whether other proceedings have been commenced arising out of the same circumstances;
- the sentencing principles set out in the Penalties and Sentences Act 1992;
- any other fact or circumstance that would indicate for or against a prosecution being commenced.

2.9.5 Selecting the appropriate defendant

Once a decision has been made to prosecute, it is imperative that the most appropriate defendant is selected. Generally, the person who was principally responsible for the offence is the appropriate defendant. That is, the person who:

- actually committed the act or made the omission that constitutes the offence;
- did or omitted to do any act for the purpose of enabling or aiding someone else to commit the offence;
- aided someone else to commit the offence;
- counselled or procured someone else to commit the offence.

Where the offence is one of strict liability, such as a discharge offence under TOMPA, the role of the person involved with the offence is considered.

Prosecution is used as part of Maritime Safety Queensland's strategy for achieving its objectives, however, if prosecution is unlikely to lead to deterrence, other measures may be considered. Each case is individually assessed to determine whether prosecution is the most appropriate regulatory response.

For offences under TOMSA and TOMPA, criminal liability is only imposed upon a person in relation to the role that the person played in the circumstances.

This is particularly significant for owners of ships. For example, an owner is responsible under marine legislation for the general safety obligations under TOMSA and for discharge offences under TOMPA. Whilst some owners of ships may have no direct involvement in a particular offence, it is their responsibility, as owners of ships, to ensure that their ships are operated safely, that the condition of their ships is safe, and that oil, garbage and sewage are not discharged from the ships. Owners of ships can be proper defendants to charges in circumstances where they have materially failed to discharge their obligations under marine legislation, even where they have no direct involvement in the commission of the offence.

Similarly, masters and crew of ships cannot use as a defence that they were acting under orders, although such matters may be taken into consideration during sentencing.

2.9.6 Withdrawal of charges

In some circumstances, it may be necessary for Maritime Safety Queensland to consider:

- withdrawing a charge;
- offering no evidence in respect of a charge, particularly when either the evidence test or the public interest test is no longer being satisfied.

When considering whether to withdraw a charge, or to offer no evidence in respect of a particular charge, Maritime Safety Queensland will ensure that:

- It makes such a decision in a timely manner; and
- Communicates that decision to the defendant and the court as soon as practicable.

2.10 Shipping inspector⁴ directions

Shipping inspector directions are useful compliance tools that allow shipping inspectors to manage:

- unsafe ships;
- movements and operations of unsafe ships;
- boardings and inspections of ships;
- unseaworthy ships, including their removal from the water; and
- contraventions of the licensing and registration requirements of the TOMSA.

The following section details the purpose and nature of written directions, declarations and notices (collectively called directions) as set out in sections 171, 172, 172AA and 172A of the TOMSA.

⁴ Shipping inspectors include officers employed by: Maritime Safety Queensland (MSQ), the Queensland Police Service (QPS) and the Queensland Boating and Fisheries Patrol (QBFP).

2.10.1 Section 171 – Direction if shipping inspector reasonable believes a ship is not safe or cannot be operated safely

Section 171 provides that a shipping inspector can require an owner or master (or a person who appears to be the master) to take an unsafe ship, or a ship that cannot be operated safely, to an anchorage, berth or mooring, to enable the ship to be further inspected and, if necessary, surveyed. Alternatively, the owner or master can be directed to keep the ship at its current anchorage, berth, mooring or place on land, for a period of time stated in the direction. A direction under this section may be given to the owner or master of any commercial, fishing or recreational ship, whether registrable or not.

Where a shipping inspector reasonably believes that life may be endangered because a ship that is being, or is intended to be, operated is not safe or is unable to be operated safely, they may issue a direction under this section.

It is important to note that the definition of 'operation' under this section is not necessarily confined to the navigation of the ship on a voyage. 'Operation' includes the commercial deployment of the ship, the technical safety and adequacy of the ship, and the choice, supervision, care and discipline of the master and crew on board the ship.

A shipping inspector may determine that a ship is not safe or cannot be operated safely when:

- critical equipment is missing or does not function;
- the condition of the hull and machinery is such that the ship is not safe;
- the ship is not appropriately crewed or equipped for its intended voyage; or
- some other factor leads the shipping inspector to believe that life may be endangered due to the condition of the ship and the intended voyage.

These directions aim to preserve life and prevent harm to the marine environment by restricting or preventing the operation of an unsafe ship or a ship that, because of its condition, cannot be operated safely. Specifically, a section 171 direction enables an inspector to prevent an unsafe ship from being placed in the water and to order that an unsafe ship be removed from the water, so that it can be properly inspected.

If a person is required to hold a licence of a particular class to operate the ship and the directed person does not hold the necessary licence, the directed person must comply with the direction by causing a person who holds the licence to take the ship to the anchorage, berth or mooring, as stated in the direction.

The maximum penalty for not complying with a direction issued under this section is 200 penalty points (currently \$15,000 for an individual and up to 5 times that amount for a corporation).

Ordinarily, a shipping inspector will utilise a direction under section 171 of the TOMSA where the condition of the ship is not hopeless; if the ship is manifestly unseaworthy and there is little or no possibility of survey or repair, then a declaration and direction under section 172AA of the TOMSA would be more appropriate.

2.10.2 Section 172 – Shipping inspector may direct that a ship be surveyed and order repairs

The directions issued under section 172 follow on from the section 171 requirement for a ship to be surveyed⁵. Under section 172, a shipping inspector may board a ship, inspect it and, if the inspector considers necessary, give a direction to the owner or master that the ship be surveyed as specified by the inspector.

In particular, if a shipping inspector is satisfied that life may be endangered because of the state of a ship, they may, by written direction, order the owner or master –

- Not to operate the ship until specified works are carried out to the ship or the ship is provided with specified equipment; or
- To operate the ship only under specified conditions that the shipping inspector considers appropriate for its safe operation.

A shipping inspector will usually only issue a direction under this section when they are sure there is a problem, but they are not entirely certain of its scope or whether other problems may exist. It is also used where a ship is intended to continue in commercial operations, but not before the full extent of the ship's problems are exposed, and the appropriate repair work performed. Where the condition of a ship or its equipment is truly hopeless, the shipping inspector will compile a report or statement that demonstrates the ship's unseaworthiness.

Under the TOMSA shipping inspectors are empowered to board ships, but they are not empowered to enter private property in order to obtain access to a ship. In some cases, a shipping inspector may need to obtain a warrant⁶ before accessing a ship through private property. Shipping inspectors also have the power to seize evidence if they believe that the object is evidence of the commission of an offence against the TOMSA.

When a shipping inspector issues a direction under this section, they will specify a date by which the ship must be surveyed. A report or certificate of compliance prepared by a marine surveyor will then be sighted by the inspector to ensure that there has been compliance with the direction.

The maximum penalty for not complying with a direction issued under this section is 500 penalty units (currently \$37,500) or one year's imprisonment. However, if a contravention of subsection (4) causes the death of, or grievous bodily harm to, a person, the owner or master commits an indictable offence and is liable to a maximum penalty of 5000 penalty units or two year's imprisonment.

2.10.3 Section 172AA – shipping inspector may declare a ship is unseaworthy and must not be operated

Under section 172AA, if a shipping inspector reasonably believes that a ship is unseaworthy, they may, by written direction:

⁵ However, this section applies regardless of whether or not a direction has been issued under section 171.

⁶ *Transport Operations (Marine Safety) Act 1994*, sections 162, 163 and 164.

- Declare that the ship is unseaworthy and must not be operated, other than in a way approved by the shipping inspector;
- Require the owner or master to remove the ship from Queensland waters within a period stated in the direction and in a way approved by the shipping inspector.

A section 172AA direction enables shipping inspectors to deal with unseaworthy vessels which have the potential to cause major environmental harm or serious marine incidents.

A direction issued under this section can be used:

- to prevent unseaworthy ships from going to sea;
- to require delinquent owners of ships to remove unseaworthy ships from the water;
- as a basis for an application for an enforcement order; and
- ultimately, as a basis for Maritime Safety Queensland to remove a ship from the water and to deal with it appropriately.

A particular ship is seaworthy if it is fit and safe in all respects to meet the ordinary perils of the voyage on which it is proceeding or about to proceed. In particular, a ship is deemed to be seaworthy when it is:

- properly constructed;
- properly maintained;
- properly equipped;
- properly crewed or manned, including manned by experienced and appropriately licensed crew;
- properly supplied and its cargo and accommodation spaces are fit and safe.

Any reasonable lack of fitness of the ship in any one of these respects for the intended voyage, could render the ship unseaworthy and so warrant a direction under section 172AA of the TOMSA.

Once a ship has been declared unseaworthy, the ship should not be operated until the ship has been rendered seaworthy, unless the operation is positively required in order to render the ship seaworthy.

A maximum penalty of 200 penalty units (currently \$15000) applies for non-compliance with a direction issued under this section. A person given a direction to remove a ship from Queensland waters will only be exempt from complying if they have a 'reasonable excuse'. If the identity of the owner or master of the ship is not known, the ship may be treated as abandoned property under section 175A of the TOMSA, and consequently sold by public auction or destroyed.

2.10.4 Section 172A – other directions

The intent of this provision is to appropriately deal with unregistered ships, contraventions of registration conditions, and unlicensed masters and crew members when ships are intercepted by shipping inspectors whilst on a voyage at sea.

Specifically, a direction may be issued by a shipping inspector under section 172A:

- where a person is operating a ship that is not registered; or
- a person is operating a ship as its master, or acting as a crew member of the ship, and the person is not appropriately licensed.

In such circumstances the shipping inspector may, by written notice, require the master of the ship:

- to take the ship to a reasonable anchorage, berth or mooring stated in the notice within the reasonable time stated in the notice; and
- to not operate the ship for any purpose other than taking it to the stated destination.

A shipping inspector may also issue a direction, under this section, where a ship is registered, but is operating in waters beyond the waters in which the ship is authorised to operate under its registration⁷.

In this case the inspector may, by written notice, require the master of the ship:

- to take the ship to waters in which it is authorised to operate under its registration (operating waters) within the reasonable time stated in the notice; and
- to not operate the ship for any purpose other than taking it to the operating waters.

A master will only be exempt from complying with a direction issued under this section if they have a reasonable excuse. The maximum penalty for failing to comply with a section 172A direction is 200 penalty units.

A direction issued under this section does not preclude other compliance action, for example, a criminal proceeding, the issue of a marine infringement notice, or administrative action. Similarly, compliance with a direction does not necessarily excuse the owner or master from any other offences that may have been committed in the circumstances, in particular, the general safety obligation against section 43 (2) (b) (i) of the TOMSA, the registration requirement under section 57 of the TOMSA and the licensing requirement under section 61 of the TOMSA. However, section 172A (5) provides that complying with the direction does not of itself constitute a contravention of section 57 of the TOMSA.

It is important to note that a direction under section 172A may only be given to the master of the ship.

⁷ This circumstance will only occur for commercial ships and fishing ships; recreational ships ordinarily do not have conditions on their registration

2.10.5 To whom can a direction be given?

If there is evidence that more than one person is the owner, or more than one person is purporting to exercise the powers of owner, then the shipping inspector will give directions to all such persons. If evidence is later provided that a particular person is not an owner of the ship, the direction may then be withdrawn.

In some circumstances it may be appropriate for the shipping inspector to issue a direction to both the ship's owner and the master in their different capacities. For instance, the master of the ship may be directed under section 171 of the TOMSA to keep the ship at its current location, for a period of time. However, the person so directed may not be the master the next day; and so to avoid issuing a direction to each new master, it may be preferable to give the same direction to the ship's owner as well.

2.10.6 When will a direction be lifted?

The issue of a certificate of compliance by an accredited marine surveyor does not of itself discharge or set aside a direction by a shipping inspector. A direction will only be lifted once the shipping inspector who issued the original direction, or another inspector who has been briefed on the facts of the case, has completed a follow-up inspection of the ship. If the follow-up inspection reveals that the ship's condition has been sufficiently improved, then the shipping inspector will issue the master/owner with a notice advising that the original direction is no longer in force.

2.11 Enforcement orders and interim enforcement orders

The chief executive, general manager or a harbour master, may apply to the District Court for an enforcement order to be issued when a person has failed to comply with any of the following –

- A direction or requirement given to the person by the general manager, a harbour master or a shipping inspector;
- An enforceable undertaking (described below) given by the person to the general manager.

The District Court may make an enforcement order, regardless of whether or not there has been a prosecution for the offence, if they are satisfied that:

- A notice offence has been committed or, unless an enforcement order is made, will be committed;
- An undertaking has been contravened or, unless an enforcement order is made, will be contravened

In situations where the District Court has not yet decided a proceeding, the Court may make an interim enforcement order on its own initiative or on application by a Maritime Safety Queensland prosecutor.

An enforcement order or interim enforcement order is issued by the District Court and may direct a person to do one or more of the following:

- To stop an activity that constitutes, or will constitute, a notice offence or a contravention of an enforceable undertaking;
- Not to start an activity that will constitute a notice offence or a contravention of an enforceable undertaking ;
- To do anything required to stop committing a notice offence or a contravention of an enforceable undertaking, including, for example, requiring the repair, demolition or removal of a ship or a part of a ship.

The District Court's power to make an enforcement order (or interim enforcement order) to stop, or not to start, an activity may be exercised whether or not –

- It appears to the court that the person against whom the order is made intends to engage, or to continue to engage, in the activity; or
- The person has previously engaged in an activity of the kind; or
- It appears to the court a marine incident may happen if the person engages, or continues to engage, in the activity

In addition, the District Court's power to make an enforcement order or interim enforcement order to do anything may be exercised whether or not –

- It appears to the court that the person against whom the order is made intends to fail, or to continue to fail, to do the thing; or
- The person has previously failed to do a thing of the kind; or
- It appears to the court a marine incident may happen if the person fails, or continues to fail, to do the thing.

When the District Court issues an enforcement order they may also:

- direct the respondent to give a security bond to the State for a stated period for a matter mentioned in the order; or
- make another order the court considers appropriate.

Enforcement orders (and interim enforcement orders) seek to secure compliance with marine safety legislation by providing for the legal enforcement of shipping inspector's directions and enforceable undertakings. In this way, enforcement orders and interim enforcement orders offer an alternative to prosecution and the delays and costs associated with this.

Where a respondent contravenes an enforcement order (or interim enforcement order) during the period for which the security bond was given, the District Court may order, on application by a Maritime Safety Queensland prosecutor, the forfeiture to the State of all or part of the security bond.

The maximum penalty for failing to comply with an enforcement order or interim enforcement order is 500 penalty points (currently \$37,500) or one year's imprisonment.

2.11.1 In what circumstances will an enforcement order (or interim enforcement order) be issued?

Enforcement orders and interim enforcement orders will generally be utilised in situations where:

- A contravention is ongoing;
- No other enforcement technique will prevent the ongoing contravention;
- The contravention is very serious and could have a major impact on marine safety or the marine environment in Queensland; and
- The contravention is sufficiently serious to justify the costs and inconvenience associated with obtaining the order.

2.12 Enforceable undertakings

Where the General Manager of Maritime Safety Queensland believes, on reasonable grounds, that a person has or will contravene the TOMSA, they may request that the said person give a written undertaking that they will not commit, continue to commit or repeat the act or omission. A written undertaking may cover any activity or omission for which the chief executive, general manager or harbour master has a function or power under the TOMSA.

These agreements provide an opportunity for Maritime Safety Queensland to work cooperatively with industry members, in order to facilitate positive outcomes and encourage future voluntary compliance. In many cases they also protect Queensland's marine and coastal environment from potentially irreparable harm, by preventing breaches before they occur.

When a person signs a written undertaking, they can only vary or cancel the agreement with the general manager's consent. The general manager may vary or cancel an undertaking, without the signee's consent, only if they reasonably believe:

- Before the undertaking was accepted, the person contravened the TOMSA in a way unknown to the general manager and, had the general manager known about the contravention, he or she would not have accepted the undertaking; or
- The undertaking is no longer necessary.

The District Court may issue an enforcement order to secure compliance with an undertaking, where the court is satisfied that there has been, or there will be, non-compliance unless such an order is made.

Failure to comply with an undertaking can result in a maximum penalty of 500 penalty units (currently \$37,500) or one year's imprisonment.

Conclusion

These guidelines are not intended to cover every situation comprehensively and are not intended to have legal status. They are not legally binding on Maritime Safety Queensland and do not confine, restrain or limit the discretion of Maritime Safety Queensland to take any action. They provide general guidance on how enforcement and investigation is being approached throughout Maritime Safety Queensland. More specific guidance can be obtained by reference to guidelines addressing specific pieces of legislation.

References

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