



COMPLIANCE AND ENFORCEMENT

POLICY

Approved for Publication

1. Purpose

The purpose of this policy document is:

- to provide an overview of the legislative framework within which the National Offshore Petroleum Safety Authority (NOPSA) operates and sets out how NOPSA's 'Compliance and Enforcement Strategy' is applied to its regulatory activities;
- to set a range of options available to Occupational Health and Safety (OHS) inspectors and to NOPSA in gaining compliance with the relevant legislation;
- to set strategies and supporting processes for both promotion of compliance and enforcement;
- to ensure compliance and enforcement strategies and processes identify and mitigate against risks and non-compliance issues, and take appropriate action when incidents occur to ensure no recurrence;
- to outline NOPSA's approach to ensuring health and safety outcomes across the offshore petroleum industry improve;
- to ensure NOPSA uses its powers in a way that is, and is seen to be, firm, fair and consistent;
- to enhance transparency of the compliance and enforcement process;
- to improve efficiency and consistency of compliance and enforcement decision making; and
- to provide assurance to NOPSA management, operators and stakeholders that decisions to take compliance and enforcement action are fair, proportionate to the circumstances, and consistent with the legislation.

All compliance and enforcement activities undertaken by NOPSA will adhere to the framework that is described in this document.

2. Scope

This document sets out NOPSA's compliance and enforcement management for all non-compliances where powers have been conferred under:

- the Commonwealth *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGSA); and
- the State and Territory PSLA 1982 and associated regulations.

This policy:

- provides OHS inspectors and NOPSA with a framework for making consistent compliance and enforcement decisions;
- helps Team Leaders monitor the fairness and consistency of OHS inspectors' compliance and enforcement decisions; and
- assists newly appointed OHS inspectors in making compliance and enforcement decisions.

This policy will also assist stakeholders in their understanding of the principles that OHS inspectors and NOPSA follow when deciding on a particular course of action. This Compliance and Enforcement framework is a risk-based programme of compliance assessment activities that provides NOPSA with a cost-effective approach to monitoring compliance, enabling it to target available resources to the highest priority regulatory risks and to respond proactively to changing and emerging risks.

This policy should be read in conjunction with the [Enforcement Management Model Standard Operating Procedure](#) and the [Prosecution Policy of the Commonwealth](#), which provide decision making criteria for compliance, enforcement and prosecution action.

The compliance and enforcement framework does not cover operator deregistration. This is a separate process that is not considered to be enforcement action in the context of this policy.

Definitions and abbreviations used in this document can be found in NOPSA's Glossary of terms for Regulatory Operations – *Glossary – Regulatory Operations* (N-09000-GL0326).

NB: This document is not a legal document and should not be relied on as such. It is provided for the purposes of information and does not limit the discretion of NOPSA to take any action it sees fit under the OPGGSA and associated legislation. It reflects the current policies of NOPSA, which may change from time to time, with all changes being notified publicly. Please contact your solicitor for legal advice.

3. Relevant Legislation

The following Commonwealth legislation guides NOPSA's compliance and enforcement activities:

Offshore Petroleum and Greenhouse Gas Storage Act 2006 (OPGGSA), Schedule 3 [Clause 75, 76, 77, 78, 81, 89]; and

Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009 [Regulation 3.33 and Schedule 3.1].

Similar provisions apply in coastal waters where certain States and the Northern Territory has enacted legislation that mirrors Commonwealth legislation. Unless otherwise specified, references to regulatory requirements in the material provided below are in relation to Commonwealth legislation.

4. Background

A primary objective of NOPSA is to improve safety outcomes across the offshore petroleum industry. While the duty of ensuring a facility is safe and without risk to the health of any person at or near the facility rests with the operator, NOPSA has a responsibility to provide assurance to the Australian community, and particularly to stakeholders, that operators are meeting mandated requirements and comply with the relevant legislation. NOPSA employs various types of activities to increase compliance. This includes the promotion of compliance and enforcement.

NB: NOPSA encourages cooperative compliance and promotes operators to move beyond minimum compliance towards continuous improvement and effective health and safety management including participation of all workforce members.

5. Principles of Compliance and Enforcement

NOPSA uses its powers in a transparent, efficient and consistent manner, and according to the principles of procedural fairness. NOPSA's compliance and enforcement activities align with the organisation's primary objective of improving safety outcomes across the offshore petroleum industry.

NOPSA achieves this by:

- educating the offshore petroleum industry about their regulatory obligations through fostering a spirit of cooperative compliance with the legislation;
- assessing risks posed by non-compliance; and
- addressing risks posed by non-compliance, in a fair and consistent manner, and in proportion to the offence or non-compliance committed.

NB: The reasons for compliance or enforcement action must be provided and, if appropriate, options for achieving compliance. The evidence upon which compliance or enforcement action is taken should be shared with the responsible party(s) if appropriate.

NOPSA ensures operators and other responsible parties meet legislative requirements by being:

- (a) Outcome focused;
- (b) Proportional and responsive;
- (c) Informed;
- (d) Transparent and consultative;
- (e) Consistent;
- (f) Targeted;
- (g) Aligned with the principles of 'Due Process' and 'Natural Justice'; and
- (h) Subject to Probity.

(a) Outcome Focused

Enforcement action will primarily target the achievement of a clear safety outcome. Some enforcement action may also be directed towards securing regulatory compliance for other reasons (e.g. reporting of accidents, which is required in order that NOPSA can investigate).

NB: In all enforcement actions, the ultimate intent is to meet the objectives of the relevant legislation.

(b) Proportional and Responsive

Once non-compliance is found, the decision to act is made quickly and the response implemented immediately. The [Enforcement Management Model](#) ensures enforcement action is proportionate to the risk posed by non-compliance by considering:

- the risks to health and safety inherent in any incident or offence that may have been committed;
- the gravity of any incident or offence that may have been committed; and
- previous enforcement and the compliance history of the operator.

A proportionate response minimises:

- the amount of regulatory intervention needed to effectively mitigate the risks; and
- the costs of regulatory action to NOPSA (enforcement costs) and to the operator (business costs).

(c) Informed

NOPSA's enforcement action will be informed by:

- assessment;
- planned inspections and audits;

- investigations of accidents and dangerous occurrences;
- investigations of complaints;
- operator compliance history and previous enforcement actions;
- national programmes; and
- industry trends.

(d) Transparency

Transparency is important in maintaining stakeholder confidence and helping operators to understand what is expected of them. Compliance and enforcement measures are to maintain transparency so that operators understand what compliance and enforcement action is likely to be taken. This means that the OHS inspector should lead the responsible party, and relevant stakeholders, through compliance and enforcement decision-making where appropriate.

(e) Consistent

Consistency in enforcement decision making is promoted by:

- embedding quality assurance practices in the enforcement decision making process such as subjecting the decision to peer review (comparing the decision with similar decisions, and ensuring that established processes have been followed);
- the use of an enforcement management tool that reduces the scope for subjectivity;
- agreement and development of a standard process for compliance and enforcement action;
- there is a review process for significant enforcement decisions prior to their finalisation;
- a set of [enforcement measures](#) provided by the legislation (with the choice of which to deploy, guided by the [Enforcement Management Model](#)); and
- consistent training for all OHS inspectors.

(f) Targeted

Where non-compliant activity is identified, relevant responsible parties will be considered for enforcement action. Regulatory effort will be directed primarily towards:

- operators undertaking activities that generate high levels of risk;
- operators with hazards that are not well managed; and
- repeat offenders.

(g) Aligned with the principles of Due Process and Natural Justice

Enforcement action must be carried out within the powers and processes of the applicable legislation, using principles of [due process](#) and [natural justice](#) (also referred to as procedural fairness). This means that enforcement action must:

- be based on logical proof or evidentiary material;
- provide an opportunity for the operator to respond to the OHS issue or incident (including [appeals](#)); and
- be taken without bias.

(h) Subject to Probity

The concept of probity implies diligence and integrity in the way enforcement action is taken, and how OHS inspectors and NOPSA conduct themselves. It includes:

- independence of inspectors from outside influence; and
- checks and reviews of decision making.

6. Compliance and Enforcement Tools

The [Enforcement Management Model](#) is a tool which provides guidance on determining what compliance or enforcement action needs to be taken, NOPSA takes compliance and enforcement action when it identifies the need for potential improvements in operators' health and safety management systems or detects non-compliance with obligations imposed by the OPGGSA and associated regulations.

The tools available to NOPSA in taking compliance and enforcement action include:

- [Promotion of Compliance](#); and
- [Enforcement action](#).

The compliance and enforcement tools include a range of graduated actions that allow OHS inspectors to determine an [initial enforcement expectation](#) in each case and escalate if required, based on modifying factors.

All allegations of non-compliance are checked to determine whether a contravention of the legislation has occurred. NOPSA has the discretion to investigate an allegation. NOPSA may opt to terminate an investigation once commenced if, for example, the identity of the alleged offender cannot be ascertained or there is insufficient evidence to establish any non-compliance.

7. Improvement Notices

7.1 General

The OPGGSA 1996 allows an OHS inspector to issue an improvement notice if the OHS inspector believes on reasonable grounds that a person is contravening, or has contravened, a provision of Schedule 3 or the regulations.

Improvement notices should not generally be issued at a facility immediately upon the initial identification of the need for an improvement notice. Delaying issue of the notice until the OHS inspector returns to the NOPSA office facilitates the due process inherent in the EMM (possibility of peer review / management review / research of relevant factors, etc.) and to allow the considered drafting of the improvement notice bearing in mind the potential for further enforcement (prosecution) action in the event of non-compliance with the improvement notice.

When considering an improvement notice, the OHS inspector needs to gather sufficient evidence to form a reasonable belief. However, the OHS inspector should also be mindful that any subsequent prosecution for failure to comply with an improvement notice will in most instances require evidence to support the fact that the improvement notice was not only valid in the context of the non-compliance identified, but validly issued by the OHS inspector. Inspectors should give consideration to the level of supporting evidence necessary, under the specific circumstances, to support their opinion that improvement is required. Photographs of plant/equipment, on which an improvement notice is issued, can often be useful evidence.

In addition, an improvement notice relating to, for example, a maintenance management system may be supported by taking copies or extracts of relevant documentation and/or records associated with the management system (e.g. overdue maintenance records).

In most cases it will not be appropriate to issue an improvement notice to an individual for a breach of Clause 15 of the Schedule (Duties of persons in relation to OHS), as this clause does not lend itself to improvement over time. In these instances the OHS inspector should consider issuing either a written warning or initiating prosecution action.

7.2 Single issue per notice

An improvement notice should only specify a single clause of [Schedule 3 to the OPGGSA](#) or a single regulation, as specifying multiple provisions of the legislation within the improvement notice may compromise the validity of the notice.

7.3 Stipulation of Action to be taken

Clause 78 (6) of Schedule 3 to the OPGGSA allows for, but does not require the OHS inspector to specify in the improvement notice, the action to be taken by the responsible person. It is NOPSA policy that;

- (a) action necessary to achieve improvement should normally be stipulated and,
- (b) such stipulation should normally be focused on systemic improvement and,
- (c) such stipulation should include a caveat that allows the operator discretion to achieve the necessary compliance with the Clause or Regulation “by any other means”.

7.4 Time period

The time period stipulated in the notice must be sufficient for the improvement to be reasonably achievable by the responsible person. It is the responsibility of the OHS inspector to decide upon and set the period of the notice, however where practicable they should do so in consultation with the responsible person.

The OHS inspector may have an estimated time period in mind as to how long it will take the responsible person to complete the improvement. If the responsible person suggests a time frame not vastly dissimilar from what the OHS inspector deems is reasonable, that time frame may be agreed upon and set by the OHS inspector in the notice. If the responsible person suggests a time frame which is vastly different from what the OHS inspector believes is reasonable, the responsible person should be asked to justify that time frame. If the responsible person can not provide reasonable justification for the suggested time frame, the OHS inspector should set the time frame based on what they believe is reasonable.

Note that in some circumstances, it may be appropriate to allow the responsible person to consider what amount of time they may need to complete the improvement before the improvement notice is issued by the OHS inspector. For example, for a complex improvement with many facets it may be appropriate to give the responsible person a period of time to plan the improvement before consulting with the responsible person and deciding on an improvement time frame.

It is preferable to allow time at the start of the process to plan and decide on an appropriate improvement time frame rather than managing poor planning at a later stage through the granting of extensions. Note that the responsible party also has the right to appeal a notice on either content or time frame aspects.

7.5 Extensions to Improvement Notices

The legislation allows an OHS inspector to extend the period specified in an improvement notice [Clause 78(7)]. However, it is NOPSA policy that an extension to the period of time allowed for the improvement to be completed should not normally be granted. In exceptional circumstances that could not reasonably have been foreseen by a diligent operator, an extension may be granted which, whilst taking account of the exceptional circumstances, should ordinarily be for a period not more than half of the initial period specified in the improvement notice. For example, if a period of 6 weeks is specified in the original improvement notice, any extension should generally be no more than 3 weeks.

It should be noted that it is NOPSA policy for OHS inspectors to discuss an improvement notice with the responsible person, including the period of the notice, prior to issue. This means that the responsible person will generally have input into the agreement of a suitable time frame to complete the improvement and therefore there should rarely be any need for extensions.

Notwithstanding the above, if an OHS inspector believes on reasonable grounds that it is appropriate to do so, the OHS inspector may, in writing and before the end of the period, extend the period specified in the notice. This means that an OHS inspector can only grant an extension if they receive a request for an extension before the end of the notice period in a time frame which allows the OHS inspector to adequately consider the request and to respond in writing. Requests for extensions submitted in the last few days of the period of the improvement notice should not generally be considered.

Extensions to the period of improvement notices should not be granted unless the responsible person can show that they have made all reasonable attempts to comply with the Improvement Notice within the specified time frame and the delays are due to reasons outside of their control. For example, if the improvement notice relates to hardware/equipment improvements and the responsible person can demonstrate that they have lodged orders for the hardware/equipment and it is the supplier who has caused the delays.

Furthermore, no more than one extension should be granted.

7.6 Non-compliance with an Improvement Notice

On non-compliance with an improvement notice, it is NOPSA policy to pursue prosecution against the defaulting party, wherever possible. In the first instance, prosecution action should be considered in relation to the failure to comply with the notice rather than the material non-compliance which was the subject of the improvement notice.

8. Prohibition Notices

The OPGGSA 2006 allows an OHS inspector to issue a prohibition notice if the OHS inspector is satisfied on reasonable grounds that it is necessary for the operator of a facility to remove an immediate threat to the health or safety of any person.

NB: When considering prohibition notices, the OHS inspector should ensure that independent items are not all included on the same notice, despite the fact there might be a common failing of the items. For example if three separate equipment items are unsafe due to lack of maintenance and could be repaired by conducting maintenance, then a separate prohibition notice should be issued for each item rather than a single notice covering all items.

9. Prosecution

The OPGGSA 2006 allows for prosecution to be instituted following a non-compliance of the applicable legislation. Depending on the circumstances, prosecution may be instituted by either:

- [NOPSA](#); or
- an [OHS inspector](#).

However, due to potential liability issues, prosecutions are generally instituted by NOPSA.

A Health and Safety Representative or a workforce representative may also request that NOPSA institute prosecution in certain circumstances.

NOPSA will consider prosecution in circumstances where there is a serious or ongoing alleged non-compliance with the applicable legislation. A decision to prosecute is based on an assessment of the nature of the non-compliance and the responsible party's performance.

The EMM should be applied formally by OHS inspectors, prior to taking prosecution action, to arrive at an enforcement decision.

10. Appeals

Several appeal mechanisms are possible. The right to appeal notices is detailed in notes included on the back of notices issued by inspectors. Depending on the circumstances issues may be:

1. considered by the reviewing authority (Fair Work Australia); and/or
2. externally reviewed (in some cases) under the Administrative Appeals Tribunal Act 1967.

All decisions made by NOPSA may be subject to review by the Federal Court.

The [appeals guideline](#) should be consulted to determine the appropriate appeal process.

11. Working with other agencies

Enforcement is carried out within the context of wider Government policy and other statutory requirements. NOPSA employees should, at all times, be mindful of:

- interagency relationships (including the CDPP, AFP and DAs); and
- media co-operation and communication.

NOPSA will notify other agencies and authorities as provided for in the relevant [Memoranda of Understanding](#) or Service Level Agreement.

12. Working with other stakeholders

In addition to the government agencies described above, NOPSA may also come into contact with other interested parties including:

- State and Territory Police;
- Coroners;
- Health and safety / workforce representatives;
- Injured persons; and
- Families or representatives of injured or deceased persons.

NOPSA aims to maintain appropriate levels of transparency with regard to any and all stakeholders and other interested parties in relation to proceeding with investigations and enforcement action.

NB: OHS Inspectors should always refer requests from external stakeholders to the appropriate NOPSA Team Leader.

13. Review

Enforcement actions taken are to be reviewed against procedures and expected outcomes by the NOPSA Senior Management Team on a continual basis. This should be seen as an opportunity for recognising best practice, as well as areas for improvement that lead to internal corrective actions and/or internal procedural revision.

14. Circumstances for formal application of EMM

An OHS inspector will generally not formally apply the EMM for health and safety issues identified as a result of a planned inspection or audit where it is likely that these issues would simply form a recommendation within a report. However, where the OHS inspector believes an identified health or safety issue may warrant the issue of a notice, the EMM will generally be formally applied, if practicable.

Team Leaders may also require formal application of the EMM in certain cases, e.g.:

- fatal or major accident investigations;
- when improvement notices are proposed to be served by a newly appointed OHS inspector;
- as a sample of an OHS inspector's work as part of performance assessment; or
- as required for the purposes of training and competence assessment.

Information about the key decisions from the EMM, (detailed in the enforcement assessment record form), should be recorded and included in the prosecution report, or attached to a copy of the enforcement notice (kept by NOPSA), or kept with the investigation papers, as appropriate.

Team Leaders should evaluate assessments and decisions made by OHS inspectors when the model has been applied formally and recorded on the enforcement assessment record form. This includes cases in which prosecution action is to be recommended to the CEO, when approving enforcement notices prior to service, or when reviewing investigation reports made by OHS inspectors.

The Team Leader should discuss the circumstances of the decisions of the OHS inspector, and assess their decision against the EMM criteria. The Team Leader should state whether they agree with the OHS inspector's assessment and proposed action. Any variance or a decision to refer the proposed action for further management review (with reasons for taking different action), must also be recorded.

Where prosecution is being considered, the enforcement assessment record form may record whether the proposed course of action is in accordance with the NOPSA Prosecution Procedure or the Commonwealth Director of Public Prosecution's guidance.