

National Compliance and Enforcement Policy

2017



Australian Government
Australian Fisheries Management Authority

AFMA
FISHERIES

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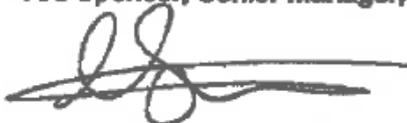
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2017 National Compliance and Enforcement Policy

Authorisation

2017 National Compliance and Enforcement Policy

Document

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AFMA Commission

Date *Following the circulation of the draft National Compliance and Enforcement Policy, a number of comments had been received from Commissioners. These had been incorporated and the Commission ENDORSED the final policy document*
Endorsed at the 28-29 June 2017 Commission meeting

Introduction

Purpose of this Policy

The AFMA National Compliance Operations and Enforcement Policy (the Policy) establishes the framework on which AFMA's National (Domestic) Compliance and Enforcement Program is based, it provides:

- a guide to AFMA on its compliance and enforcement role
- a broad explanation of AFMA's compliance and enforcement role under the legislation it administers
- an explanation of AFMA's risk based approach
- an explanation of how AFMA determines the appropriate action to take in a particular risk event
- an outline of the enforcement actions available under the legislation AFMA administers
- a clear framework for maintaining the integrity of fisheries management arrangements, provided through accountability, consultation and cooperation for the community and AFMA
- a foundation for consistent, integrated and coordinated enforcement action across Commonwealth fisheries.

Aims and Objectives

The principal aim of the National Compliance and Enforcement Policy is to:

Effectively deter illegal fishing in Commonwealth fisheries and the Australian Fishing Zone

In order to achieve this aim AFMA has the following objectives:

- Conduct and enable compliance programs that target identified risks.
- Develop and implement programs which are consistent with the mission of Australian Fisheries National Compliance Strategy, *Torres Strait Fisheries Act 1984*, *Fisheries Management Act 1991*, *Maritime Powers Act 2013* and the *Fisheries Management Regulations 1992*.

Corporate Governance

The Policy recognises AFMA's shared responsibilities between the AFMA Commission and AFMA's Chief Executive Officer (CEO).

- The AFMA Commission endorses the Policy.
- The CEO is responsible for the endorsement of the risk assessment methodology, risk assessment results and the National Compliance Operations and Enforcement Program (and its implementation).

The program is based on a risk minimisation strategy, which is outlined in two key documents:

- AFMA's Risk Assessment methodology
- the National Compliance and Enforcement Program.

These documents are key enablers to effectively deter illegal fishing in Commonwealth fisheries and the Australian Fishing Zone. As part of the program the Operational Management

Committee (OMC), provides overall strategic direction; whilst having regard to the results of the risk assessment, which determines those risks requiring treatment.

Policy Framework

The Policy sits within the broader Australian Government law enforcement policy context and should be read in conjunction with other relevant documents, including:

- Prosecution Policy of the Commonwealth ([CDPP Prosecution Policy](#))
- Commonwealth Fraud Control Guidelines ([Commonwealth Fraud Control Guidelines 2011](#))
- Australian Government Investigations Standards ([Australian Government Investigation Standards](#))
- Australian National Audit Office – Administering Regulation: Achieving the Right Balance Better Practice Guide June 2014 ([ANAO - Administering Regulation](#))
- Australian Fisheries National Compliance Strategy 2016-2020 ([Australian Fisheries National Compliance Strategy 2016-2020](#))

The Australian Fisheries National Compliance Strategy

AFMA is committed to the Australian Fisheries National Compliance Strategy and has designed its program so as to complement its aims and principles.

The overarching mission of the Australian Fisheries National Compliance Strategy 2016-20 is to achieve an 'optimal level of compliance'. An optimal level of compliance:

'... is that which holds the level of non-compliance at an acceptable level, which can be maintained at a reasonable cost, while not compromising the integrity of management and resource sustainability'

This is underpinned by the following strategic objectives:

- working in partnerships and building relationships
- risk based compliance approaches, including mitigating the risk of organised crime
- fair, reasonable and cost effective compliance approaches with a focus on outcomes
- safety and professional development of fisheries officers.

Definitions

In order to clearly understand the purpose of the Policy it is important that distinctions between the terms compliance, voluntary compliance, deterrence and enforcement are well understood. These terms are often used interchangeably, but in reality there is a clear distinction between them.

It is also important to note that voluntary compliance in particular is not primarily a function of AFMA's compliance and enforcement program and is not a specific part of the Policy, although measures to improve voluntary compliance are among the many tools used by fisheries officers and other parts of AFMA to improve compliance.

Compliance

Compliance generally refers to the level of conformity with the law. Compliance can be defined as a function of voluntary compliance and deterrence:

Compliance = (f) Voluntary Compliance + (f) Deterrence

Voluntary Compliance

Voluntary compliance is the idea that compliance is achieved as a result of the community (or individuals) choosing to willingly or voluntarily comply with rules, regulations or even general philosophies.

Voluntary compliance occurs generally as a result of a number of factors:

- an understanding of the reasons for a rule or regulations (e.g. why it is there)
- the belief that those reasons are sound
- the belief that by complying, the community (or individual) receives a benefit.

It is important to understand that voluntary compliance is not compliance due to an understanding and/or fear of the consequences of not complying; that is deterrence. In essence voluntary compliance is the act of complying regardless of (or without) any possible repercussions.

Deterrence

Deterrence is generally defined as ‘the act or process of discouraging actions or preventing occurrences by instilling fear or doubt or anxiety’. In the AFMA compliance enforcement context deterrence is a combination of:

- the likelihood of ‘getting caught’
- the likely repercussions/sanctions.

Deterrence includes programs which not only increase the likelihood of getting caught and the severity of repercussions but also includes education programs about the likelihood of getting caught and the penalties involved for those who are caught.

Enforcement

Enforcement embodies those activities that compel adherence to legal requirements. In essence enforcement is one type of deterrence. Enforcement activities typically include:

- inspection and monitoring
- investigation of offences
- prosecutions
- fines, suspensions and forfeitures.



Plate 1: AFMA Officer inspecting an unload in Ulladulla New South Wales (2016)

AFMA's Approach

'Regulators have a responsibility to provide assurance to the Australian community that regulated entities are meeting mandated requirements. A systematic, risk-based program of compliance assessment activities provides a regulator with a cost-effective approach to monitoring compliance, enabling it to target available resources at the highest priority regulatory risks and to respond proactively to changing and emerging risks.'

AFMA has recognised that a 'best practice', cost effective method of compliance and enforcement is an approach which aims to encourage the fishing community to stay away from the tip of the enforcement pyramid, or conscious non-compliance, and operate at the base of the pyramid, or the area of voluntary compliance (Figure 1).

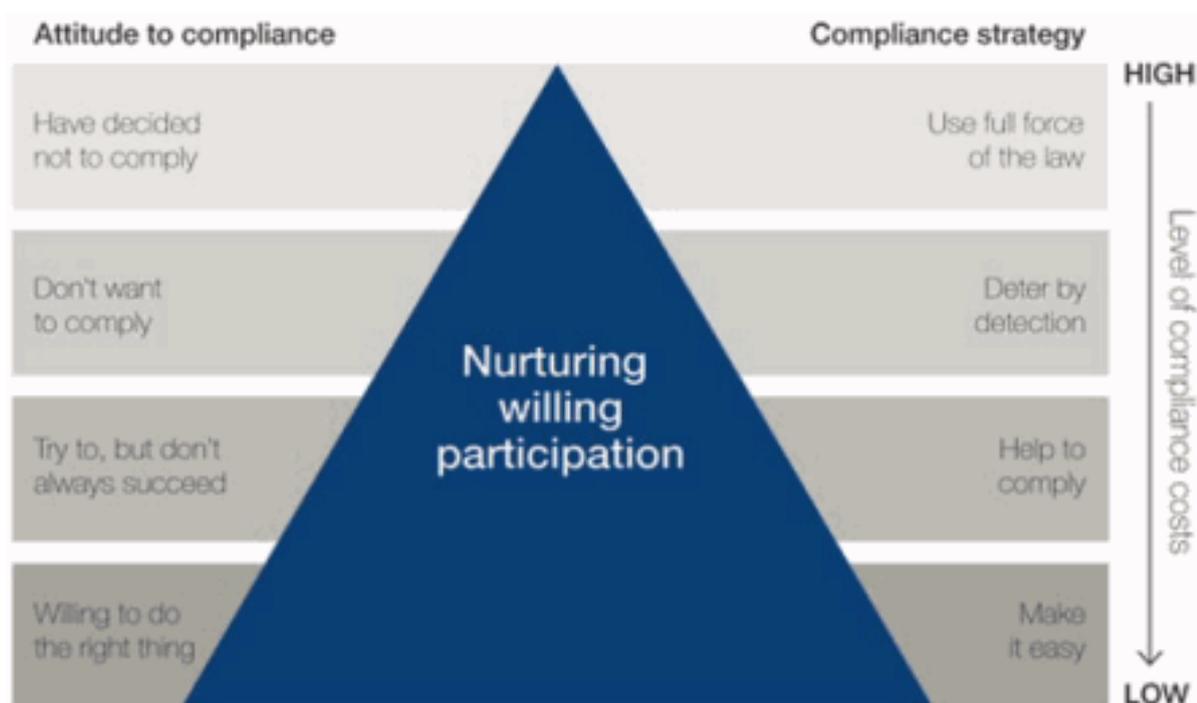


Figure 1: Compliance Model Pyramid¹

In order to achieve this 'shift' AFMA aims to implement mechanisms which:

- make it easy for those who want to comply with fisheries regulations (i.e. promote voluntary compliance)
- make it difficult for those who do not want to comply (i.e. deter, detect and enforce).

¹ Adapted from 'Compliance program 2010-2011' – Australian Taxation Office

In its compliance and enforcement role AFMA's program is principally concerned with the upper (or deterrence) end of the pyramid. With effective enforcement and monitoring programs which deter, detect and enforce (when combined with other 'non-enforcement'-based programs) AFMA can promote a culture of willing compliance within the fishing community.

Table 1: Compliance Service Delivery Model (Table 1) depicts a method of bringing together a risk-based approach, proportionate responses and collaboration in a way that ensures regulated parties are certain of their position and get the level of support and attention necessary to maximise compliance outcomes.

Table 1: Compliance Service Delivery Model

Service Delivery Categories	Willing to do the right thing	Try to do the right thing but do not always succeed	Do not want to comply	Have decided not to comply
Behaviours	Voluntarily comply and informed	Attempting to comply and uninformed	Propensity to offence (opportunistic)	Criminal intent and illegal activity
Intervention Information	<ul style="list-style-type: none"> Enabling legislation Brochures, publications and signage that accurately convey legal and technical requirements Organisational information that directly supports decision making 	<ul style="list-style-type: none"> Areas specific communication plans Brochures and signage that highlights areas of specific concern Compliance collection planning Organisational information that directly supports decision making 	<ul style="list-style-type: none"> Brochures, publications and signage that highlight consequences of non-compliance Compliance collection planning Compliance tactical intelligence reporting Organisational information that directly supports decision making 	<ul style="list-style-type: none"> Compliance collection planning Compliance tactical intelligence reporting Internal information that directly supports decision making Compliance operational and strategic intelligence reporting
Intervention Stakeholder Agreements/Co-Management	<ul style="list-style-type: none"> Compliance rate discussion and agreement of comprehensive measures Inspection focus 	<ul style="list-style-type: none"> Compliance rate with focus on improvement advice Formal agreement with general standards 	<ul style="list-style-type: none"> Compliance rate with focus on direction of required activity Formal agreement with performance standards defined 	<ul style="list-style-type: none"> Enforcement activity with clear understanding that voluntary, assisted and directed states have been breached
Intervention Action	<p>Plan and respond</p> <ul style="list-style-type: none"> Engage with stakeholders in all sectors – National and International 'Trusted' status assigned 	<p>Intelligence and Risk Entities</p> <ul style="list-style-type: none"> Compliance tactical intelligence reporting Identification of risk <p>Plan and respond</p> <ul style="list-style-type: none"> Engage through education and intervention with 'no' and 'low' risk <p>Enforcement</p>	<p>Intelligence and Risk Entities</p> <ul style="list-style-type: none"> Identification of risk Target of 'medium' risk <p>Plan and respond</p> <ul style="list-style-type: none"> Compliance tactical intelligence report responses Develop enforcement plans that are principally 	<p>Intelligence and risk entities</p> <ul style="list-style-type: none"> Identification of risk Target 'high' risk <p>Plan and respond</p> <ul style="list-style-type: none"> Compliance tactical, operational and strategic intelligence report responses Develop enforcement plans that are principally

Service Delivery Categories	Willing to do the right thing	Try to do the right thing but do not always succeed	Do not want to comply	Have decided not to comply
		<ul style="list-style-type: none"> Identified breaches of law will be 'warning focused' 	<p>patrol and inspection focused</p> <ul style="list-style-type: none"> Inter-agency collaboration <p>Enforcement</p> <ul style="list-style-type: none"> Identified breaches of law will be 'infringement' and 'summary proceedings' focused 	<p>risk based and targeted as part of investigation focus</p> <ul style="list-style-type: none"> Inter-agency collaboration <p>Enforcement</p> <ul style="list-style-type: none"> Identified breaches of law will be 'prosecution' focused
<p>Intervention</p> <p>Assessment</p> <p>And</p> <p>Measurement</p>	<ul style="list-style-type: none"> Define clearly relevant compliance measures and rates across sector dimensions Compliance rate monitoring and reporting (agreed Voluntary measures) Effectiveness of education programs <p>Review and design compliance best practice</p>	<ul style="list-style-type: none"> Compliance rate monitoring and reporting (agreed assisted measures) Effectiveness of education programs <p>Review and design compliance best practice</p>	<ul style="list-style-type: none"> Compliance rate monitoring and reporting (agreed directed measures) Effectiveness as deterrent. <p>Review and design compliance best practice</p>	<ul style="list-style-type: none"> Compliance rate monitoring and reporting (agreed enforcement measures) Effectiveness as deterrent <p>Review and design compliance best practice</p>

AFMA's Compliance and Enforcement Model

AFMA's compliance model has been developed based on the model adopted by the Australian Taxation Office (ATO)². The ATO model provides a structured process that appreciates an individual's motives to comply or not comply. The ATO model advocates a deeper understanding of motivation, circumstances and characteristics so that assistance and enforcement actions can be tailored to promote better compliance. In an AFMA context, the model can be used in a way which recognises that fishers are not a homogenous group and that an individual's circumstances can change over time. Importantly the model provides insights into factors that influence different compliance behaviours and assists AFMA in deciding the interventions that are necessary.

Through the development and maintenance of strategic alliances and partnerships with industry, other key stakeholders and other agencies, AFMA aims to ensure that the management and compliance arrangements it uses are appropriate to the needs of the fisheries and that the risks are adequately identified. Through the application of targeted operations and actions involving the mobilisation of a motivated, highly trained and professional workforce, AFMA aims to ensure that risks are adequately addressed.

The ultimate aim is to influence as many operators as possible to move down the 'enforcement pyramid' (Figure 5, page 29) into the 'willing to do the right thing' zone. Analysing compliance behaviour in this way assists AFMA to address the actual causes of non-compliance rather than the symptoms. With correctly targeted responses and interventions (including a mix of alerts, audits, penalties, advice, guidance, education and procedural change) AFMA can influence fishers' behaviour in a positive way.

The Risk Based Approach

Why a risk based approach?

In 2009 the Australian National Audit Office (ANAO) released its performance audit report on the Management of Domestic Fishing Compliance³. Amongst the specific recommendations, the ANAO stated:

'.....the new [centralised compliance] approach also requires an overall compliance strategy that fully integrates: compliance risk assessments (at fishery and boat/operator level); intelligence gathering and analysis; targeted compliance activities (including inspections); and a timely and appropriate enforcement response to non-compliance.'

The ANAO reinforced this idea in its February 2013 performance audit⁴:

² Compliance program 2009-2010 – Australian Taxation Office

³ ANAO Audit 2008-2009 – Management of Domestic Fishing Compliance

⁴ ANAO Audit 2012-2013 – Administration of the Domestic Fishing Compliance Program

A structured approach to risk management enables a regulator to identify, analyse and monitor regulatory risks, and to prioritise and plan compliance activities to mitigate these risks.'

A risk-based compliance approach enables AFMA's resources to be targeted to the areas where they are most needed and will prove most effective. It involves a series of steps to identify and assess non-compliance risks and then apply appropriate enforcement action to mitigate these risks.

Risk-based compliance has a range of benefits⁵, including:

- Improved compliance outcomes - AFMA can tailor or target compliance measures to effectively deal with the most significant non-compliance risks.
- Efficiency gains - the targeting of compliance measures to the most significant risks ensures resources are concentrated in the areas where they are most likely to improve compliance outcomes.
- Reduced industry compliance costs - Compliance activities imposing burdens and costs on the fishing industry are only carried out where needed, thereby minimising costs. This means that businesses will only be inspected, audited or have to provide data where it is justified.
- Greater industry support for compliance programs/measures - Risk management processes are widely understood by the fishing industry and the community as a whole.

How are the risks assessed?

AFMA conducts risk assessments in accordance with the international standard for risk management (ISO 31000:2009). The assessments are conducted across the major Commonwealth domestic fisheries⁶.

The risk analysis covers the following major Commonwealth fisheries/sectors:

- Southern Bluefin Tuna Fishery (SBT)
- Eastern Tuna and Billfish Fishery (ETBF)
- Western Tuna and Billfish Fishery (WTBF)
- Small Pelagic Fishery (SPF)
- Southern and Eastern Scafish and Shark Fishery (SESSF) including:
 - Commonwealth Trawl Sector (CTS)
 - Great Australian Bight Trawl Sector (GABTS)
 - Gillnet Hook and Trap Sector (GHAT)
- Bass Strait Central Zone Scallop Fishery (BSCZSF)
- Northern Prawn Fishery (NPF)
- Torres Strait Fishery (TSF).

The risk analysis process assesses and ranks risks of non-compliance with management arrangements to identify where non-compliant activity across Commonwealth fisheries may be occurring. The final risk ratings are determined by assessing the average risk rating provided by stakeholder groups, AFMA's intelligence holdings and the history of detected offences.

⁵ Risk-Based Compliance www.betterregulation.nsw.gov.au

⁶ It should be noted that whilst the remaining fisheries managed by AFMA do not generally warrant formal assessment, routine monitoring and inspection programs are conducted on all fisheries. Further, where prioritised risks overlap into these 'non-assessed' fisheries, risk treatments may also be applied in those fisheries

Inherent and residual risk ratings are assessed and these rankings are then used by AFMA to assist in determining the priority risks. The methodology utilised for risk analysis is detailed in AFMA's National Compliance Risk Assessment Methodology document(s).

How are the risks prioritised?

It will be the responsibility of the OMC to prioritise the identified risks. In particular, the OMC will review the outcomes of the risk assessment and, having regard to the results of the assessment, will:

- make an additional qualitative judgement on the level of each risk
- recommend to the CEO which risk or risks will be the focus of the compliance and enforcement (treatment) program(s).

The Compliance Risk Treatment Cycle

A risk treatment based approach is traditionally a seven step process or cycle (refer figure 2) consisting of:

- Step (1)** Identify - the risk assessment process where risks are identified, evaluated and prioritised. The OMC will nominate risks to be treated by Compliance Risk Management Teams (CRMTs) in accordance with the compliance risk treatment cycle. A CRMT is to be established for each nominated risk.
- Step (2)** Assess/measure – quantify a base line for the prioritised risk (e.g. number of offences, number of detected incidents etc.) using a measure which can be repeated⁷.
- Step (3)** Set a performance target or goal – define what it is you intend to achieve (e.g. number of incidents detected to be reduced by 50%).
- Step (4)** Select a strategy (or strategies) – identify a method or methods to be applied to the risk (e.g. surveillance, education programs, operations etc.) which can reduce the risk, including determining the extent or depth.
- Step (5)** Implement the strategy - undertake the selected strategy.
- Step (6)** Assess/Measure – using a baseline figure (where possible) evaluate the effectiveness of the strategy by monitoring the risk level.
- Step (7)** Evaluate – assess the effectiveness of the strategy chosen and adjust or change as appropriate⁸.

⁷ It may not always be possible to measure the risk; this does not mean action should not be taken to address the prioritised risk. It may be possible to use indirect indicators.

⁸ Adjustments or changes should only be made once regard has been given to resources available and cost benefit



Figure 2: Compliance Risk Cycle

The General Deterrence/Presence Role

In addition to the risk treatment model it is essential that AFMA retains a general presence/deterrence model. By maintaining a ‘general’ presence at fishing ports and ‘at sea’ AFMA discourages members of the fishing community who do not wish to comply from attempting to flout the rules and regulations.

Further, AFMA’s presence reassures those who are complying that non-compliant activity is likely to be detected. AFMA fisheries officers can also assist those wishing to comply (but not knowing how) by providing advice and/or instruction on operators responsibilities.

Presence, visibility and the opportunity for fishers to meet and discuss issues with AFMA fisheries officers maintains the credibility of AFMA’s compliance functions and activities; particularly amongst those fishers who are generally compliant. This is because under a ‘risk based model’ without general deterrence/presence functions it is possible that those fishers who are compliant would never see an AFMA fisheries officer since they would never be targeted. Whilst this would be consistent with the general principle of only ‘interfering’ with the non-compliant section of the community the compliant community may mistake it for a lack of action by AFMA (i.e. the community wants and needs to actually ‘see’ AFMA doing its job).

In order to ensure the ‘general deterrence/presence’ role is maintained AFMA will develop and implement a program of inspections and ‘at sea’ patrols that focuses on targeting identified high risk ‘key’⁹ fishing ports, boat/operators and fish receiver premises relevant to Commonwealth jurisdiction.

⁹ ‘Key’ means key from a compliance perspective. Ports that are determined as ‘key fishing ports will be determined through the analysis of the level of compliance risk (including risk associated with the time since last inspected) and the actual level of port activity.

Voluntary Compliance

The task of promoting and achieving voluntary compliance is one which rests with the whole of AFMA and the fishing industry generally. It is not a task which is the sole responsibility of AFMA's fisheries officers.

In its fisheries management role AFMA has a responsibility to ensure that fishery management rules and the reasons for them are clearly understood and accepted by the fishing industry. AFMA has a responsibility to clearly demonstrate:

- the benefits of any rules (to the environment, industry etc.)
- how the rules achieve that beneficial outcome
- how to comply with the management rules.

AFMA's risk treatment cycle, and its National Compliance and Enforcement Program more generally, will include elements designed to promote and achieve increased rates of voluntary compliance.

Reporting Outcomes and Monitoring Performance

A key component of any compliance and enforcement program is the ability to report outcomes and assess qualitative and quantitative performance of the risk-based and general deterrence programs in place. AFMA will provide monthly and annual reports, which will outline program outcomes and will monitor the performance of its risk reduction strategies.

Reporting Outcomes (Monthly Reporting)

AFMA will report on outcomes through an ongoing monthly reporting program. The report will focus on the two key program areas under the Policy, namely:

- Status and results of the risk based programs.
- Status and results of the general deterrence programs, including port, boat and receiver inspections.

The report will also detail current caseloads, investigation outcomes and generic budgeting information¹⁰. These reports (or portions thereof) will be made available to:

- the Minister
- the AFMA Commission
- the CEO
- the OMC
- relevant regional fisheries management organisations
- internal AFMA staff
- selected industry bodies.

Monitoring the Risk Reduction Strategies in Place

Monitoring the performance of any compliance and enforcement program is inherently difficult. Often there is a temptation to report on outputs (such as numbers of inspections, offences detected, prosecution outcomes, fines issued etc.) but these do not provide a true indication of how a program is performing. Effective risk based/targeted programs are likely to result in an increase in these types of outputs (at least initially) which could be viewed as either a success (e.g. more offenders are being caught) or a failure (e.g. there are more offences occurring).

Performance should be reviewed by reference to outputs as well as outcomes. The outcome sought by AFMA (in a national compliance sense) is to optimise compliance to achieve a 'compliant' industry.

The ultimate indicator of success of the Policy (and the programs developed based on the Policy) is whether or not a program has reduced the level of a particular targeted risk. AFMA has therefore determined that a successful compliance program (and the Policy) will result in a reduction in the incidence rate¹¹ of the risk to the end result.

¹⁰ The monthly reports will form the basis of compliance reporting in AFMA's annual report

¹¹ Using the reference or benchmark established and monitored by the CRMT

How AFMA functions

National Compliance Structure

On 1 July 2009 AFMA implemented a new 'centralised' compliance structure. The centralised structure was implemented with separate Intelligence, Planning and Operations units. The structure is designed to provide a more cost effective and efficient use of resources, whilst facilitating the implementation of a risk based compliance program in Commonwealth fisheries. It allows AFMA to undertake targeted, intelligence-led operations to reduce identified risks.

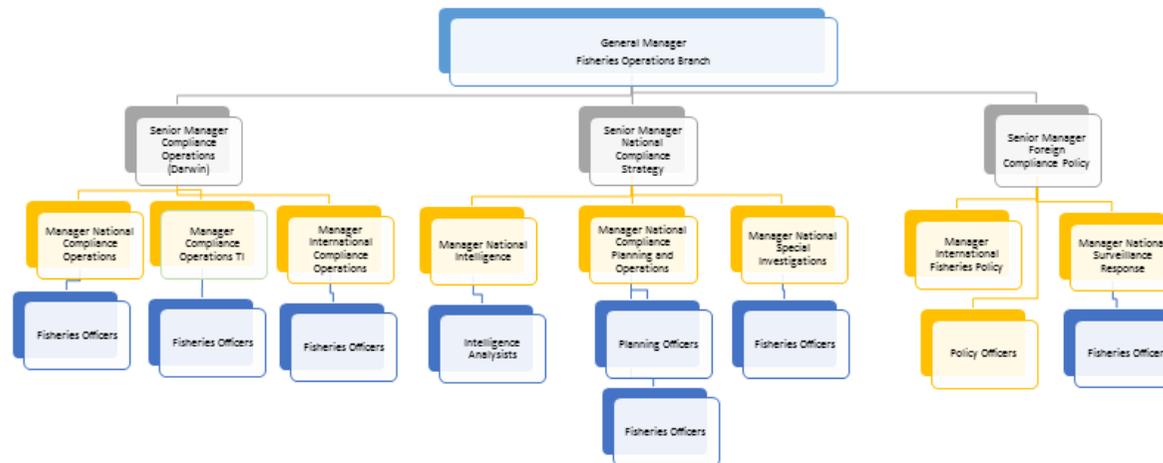


Figure 3: National Compliance Structure as at 2017

The Operational Management Committee (OMC)

OMC Function

The OMC oversees the implementation of AFMA's national compliance program and is, on the basis of advice, responsible for making the critical decisions on compliance and enforcement matters including the allocation of resources to meet compliance program objectives.

The goals of the OMC are to increase efficiency and effectiveness in AFMA's enforcement role and to improve accountability in accordance with the Australian Government Investigations Standards (AGIS).

The OMC also has responsibility for monitoring performance outcomes against AFMA's annual operating plan.

OMC Structure

The OMC consists of:

- General Manager, Fisheries Operations Branch (Chair)
- National Compliance Strategy Planning Officer (Secretariat)
- Senior Manager, Compliance Operations Darwin (Member)
- Senior Manager, National Compliance Strategy (Member)
- Manager, National Compliance Planning and Operations Canberra (Observer/advisor)
- Manager, National Investigations Taskforce (Observer/advisor)
- Manager, National Compliance Operations Darwin (Observer/advisor)
- Manager, National Intelligence (Observer/advisor)

Terms of reference

The OMC is to address identified risks by;

- Providing direction to the National Compliance team in relation to;
 - the undertaking of proactive or reactive activities, programs, investigations and/or operations
 - strategic intelligence tasks and/or intelligence collection programs
- Approving CRMT program plans and/or enforcement matrices and principles.

In order to make decisions the OMC will receive and consider advice from the relevant sections and managers (Figure 4).

The OMC will be responsible for the following;

- With respect to risk treatment (proactive) programs:
 - recommending the biennial risk assessment and annual compliance program to the CEO for approval
 - Establishing Compliance Risk Management Teams (CRMT) to address key risks
 - approving proposed programs developed by CRMTs to address prioritised risks

- With respect to investigation/monitoring (reactive) programs:
 - providing direction in relation to complex investigations into suspected breaches
 - approving standard ‘enforcement’ matrices and other tools to guide officers in making enforcement decisions of a more routine nature
- With respect to general deterrence (routine) programs:
 - providing direction in relation to complex operations
 - deciding on the allocation of resources where there are competing priorities.

OMC Decision Principles

In providing direction, or when approving program plans and/or enforcement matrices, the OMC will consider both the available resources and the significance of the impact/issue being addressed. In particular the OMC will consider:

- available resources including staff, finances, and equipment
- whether the proposal is part of a risk treatment (CRMT) program
- whether the proposal is part of a general deterrence program
- whether there are competing programs of greater importance
- if the proposal is a reactive response, or a recommendation for enforcement action, the significance of the issue (and/or the level of impact) including:
 - the impact on the marine environment
 - AFMA’s legislative obligations
 - impacts on financial equity
 - other government agency involvement or opportunities for cooperation
 - public interest
 - what is in the best interest of the industry.

OMC Referral Process

Referrals to the OMC shall be made, and presented to the OMC, by the responsible AFMA officer (and/or CRMT team member). Referrals made to the OMC will be those of a ‘complex nature’ only, other investigative matters will be noted by the OMC and captured in the existing referral form.

The referral¹² will outline:

- the issue (e.g. case details, offences, operation proposal)
- resources required (staff, equipment and costs)
- the relevant risk category that the proposal relates to
- the proposed standard responses/actions (in the event offences/issues detected)
- the circumstances when:
 - the operation commander (for specific operations) will make operational decisions ‘in the field’
 - decisions which will be referred to the relevant Senior Manager or the OMC.

¹² A template has been developed for all OMC referrals

- proposed actions to be undertaken or penalties to impose (including the decision to refer to CDPP for prosecution following the investigation)
- the risks and/or consequences (to AFMA and the industry) if the proposal is not approved
- measurables, or how it is proposed to identify that the strategy will have, or has, delivered the expected results.

OMC meetings

The OMC will meet on a quarterly basis, or such other frequency as agreed to ensure the need for 'out of session' meetings is minimised. The committee shall consider high level strategic referrals, investigations and program activities for the next quarter.

Urgent 'out of session' referrals

On occasion the OMC may be required, for operational reasons, to hold out of session meetings to consider urgent high level strategic issues which require decision/approval.

Where only one member of the OMC is available, that member may make a decision on the committee's behalf, provided the decision is made in accordance with the OMC decision principles.

If no members of the OMC are available the relevant (Operations Branch) manager may make the decision on the committee's behalf, provided it is made in accordance with the OMC decision principles.

Where an out of session decision is made, the issue, proposal and the out of session decision shall be reviewed (and endorsed or amended) at the next OMC meeting.

Principles for Enforcement Decisions

The Four Types of Discretion

It is generally accepted that regulatory agencies and their staff exercise four different types of discretion. These types are broadly defined as¹³:

1. **‘The right to set the mission’** – the ‘mission’ is usually set by executives in response to parliamentary direction.
2. **‘The right to choose what to work on’** – ‘what to work on’ is usually set by the agency and determines which issues will be addressed and which will not.
3. **‘The right to choose how to work on it’** – ‘how to work on it’ is usually determined by the agency and which ‘tools’ will be used to address the issues which have been chosen (to work on).
4. **‘Enforcement Discretion’** – is the final type of discretion and determines what action will be taken in response to identified issues.

In the context of AFMA, the four types of discretion to be exercised are defined in Table 2.

Table 2: Who will be exercising discretion?

Discretion	Exercised by	Instrument/document which gives effect to the decision
‘The right to set the mission’	<ul style="list-style-type: none"> • Australian Government • AFMA Executive • AFMA Commission • National Fisheries Compliance Committee (NFCC) 	<ul style="list-style-type: none"> • <i>Fisheries Management Act 1991</i> • <i>Maritime Powers Act 2013</i> • National Fisheries Compliance Strategy • AFMA National Compliance and Enforcement Policy
‘The right to choose what to work on’	<ul style="list-style-type: none"> • OMC • AFMA Executive • AFMA Commission 	<ul style="list-style-type: none"> • AFMA National Compliance and Enforcement Policy • AFMA Compliance Risk Assessment • AFMA Compliance program
‘The right to choose how to work on it’	<ul style="list-style-type: none"> • Australian Government • Intelligence/Planning/Operations manager • CRMT (as approved/reviewed by OMC) 	<ul style="list-style-type: none"> • Relevant Government policies • AFMA Compliance Program • CRMT programs • Operation Plans
‘Enforcement discretion’	<ul style="list-style-type: none"> • Authorised officer • Operations manager • CRMT (as approved/reviewed by OMC) 	<ul style="list-style-type: none"> • AFMA Operation Plans • AFMA National Compliance and Enforcement Policy

¹³ The Regulatory Craft – Malcolm K Sparrow, 2000

Enforcement Discretion

As outlined previously, in its 'compliance and enforcement' role AFMA's programs are principally concerned with 'deter, detect and enforce'. It is important that when making decisions about the level of enforcement AFMA considers not only the seriousness of the incident but also what level of deterrence is necessary to prevent similar incidents (either by the individual entity or the fishing community generally).

In making enforcement decisions for detected breaches of fisheries rules, AFMA will have regard to:

- the Commonwealth Director of Public Prosecutions (CDPP) prosecution guidelines¹⁴
- Commonwealth Fraud Control Guidelines
- Australian Government Investigation Standards
- AFMA's Operational Guidelines
- Also more generally in accordance with the following principles:
 - Enforcement action will be taken by an AFMA authorised under the *Maritime Powers Act 2013 (MPA)* where the objectives under the legislation AFMA administers require enforcement action to ensure ecologically sustainable and economically efficient Commonwealth fisheries.
 - Enforcement action will only be taken when the legislative prerequisites of that action are satisfied. It will be taken in proportion to the seriousness of the offence and impact of the alleged actions, and taking into account any particular circumstances.
 - Decisions on enforcement action will be appropriate to the particular circumstances, taking into account all available information. Prosecution is not a tool of last resort but will be employed as determined to be appropriate under the legislation AFMA administers.
 - Requirements under enforcement action will be sufficiently clear to enable all parties to understand what constitutes compliance. The process by which the enforcement measures to be taken is determined and will be accountable, so that any disagreement can be on the basis of fact.
 - Enforcement of the *Fisheries Management Act 1991 (FM Act)* and *MPA* requires that it be administered fairly, consistently and with equity.
 - Enforcement action must be carried out within the limitations of the powers conferred under the *Act(s)* and the processes provided under subordinate legislation or published policy. In addition, where administrative discretion is being exercised, other than where the matter is to be placed within the jurisdiction of the criminal courts, the principles of natural justice will be applied.
 - Enforcement powers are to be exercised when they are likely to produce the desired outcome in a cost effective manner. The desired outcome includes consideration of the objectives of the relevant *Act(s)*, the other principles in the Policy and the implications for the administration of the relevant *Act(s)* more generally (including consideration of deterrence and precedent).

¹⁴ CDPP prosecution guidelines <http://www.cdpp.gov.au/Publications/ProsecutionPolicy.pdf>

- Fisheries management is carried out within the context of wider government policy and other statutory requirements (both internal and external), and should endeavour to be applied consistently with broader government requirements.

AFMA will also consider, more generally, the role the action will take in the 'enforcement pyramid' (Figure 5). In particular the level of enforcement action taken should reflect the level of deterrence required (to the individual or the community) and/or the need for incapacitation.



Figure 4: Enforcement Pyramid (Adapted from the work of Ayres and Braithwaite (1992) and Gilligan, Bird and Ramsay, 1999)

Enforcement Criteria

If an investigation determines that an offence under the *FM Act/MPA* (or other Commonwealth legislation), subordinate legislation, or legislative instrument may have occurred, the alleged offender will (where appropriate) be notified of the nature of the alleged offence and informed that other enforcement action may follow (in addition to any on the spot direction to take corrective action) whether or not action is taken to rectify the situation. This notification provides clarity to the alleged offender and provides the basis for affording natural justice, should further enforcement action follow, while retaining all enforcement options.

AFMA (via the OMC) will make the decision to employ further enforcement action after considering the following criteria (and applying the above principles):

- the objectives of the *FM Act* and *MPA*
- the seriousness of the incident having regard to the extent of the impact caused and the implications for the administration of the *FM Act* and *MPA* more generally

- whether there has been failure to comply with any informal request, lawful direction or notice given by a fisheries officer
- the culpability of the person, whether it be a corporation or employee, including any mitigating or aggravating circumstances
- the previous history of the person, with particular regard to fisheries offences, including the frequency of offences
- voluntary action by the person to mitigate any impacts and put in place mechanisms to prevent any recurrence
- the level of public concern
- the need for both specific and general deterrence
- the precedent which may be set by any failure to take enforcement action
- due diligence procedures already in place and used by the person
- the enforcement measures necessary to ensure compliance with the *Acts* and those most likely to achieve the best environmental outcome
- failure to notify or delayed notification of the incident by the person to AFMA
- the co-operation given to AFMA by the person and willingness to commit to appropriate remedial action
- the length of time since the incident
- where more than one party has been involved, whether enforcement measures have been taken or are intended against others in relation to the same incident
- The enforcement approach adopted to similar incidents in the past taking into account the specific circumstances.

Enforcement Measures

The *FMA*, *MPA* and the *Fisheries Management Regulations 1992 (the regs)* regulations allow for a range of enforcement measures. These measures (or tools) can be used in combination, separately or for particular types of incidents in order to achieve the most appropriate outcome. AFMA will use the range of measures available in its 'toolbox' in order to achieve the most efficient and cost effective outcome.

Warnings

Verbal warnings may be given by a fisheries officer where:

- the impact caused by an offence is minimal
- the breach of a legislative instrument or regulation is of a minor technical nature
- a warning is fair and appropriate
- the matter is one which can quickly and simply be addressed.

Warnings are used in the circumstance of a minor event. In deciding whether a warning is an adequate response the fisheries officer must have regard to the principles contained in the Policy. A warning is recorded for future reference.

Cautions

Written cautions may be given by a fisheries officer where:

- the impact caused by an offence is minor
- the breach of a legislative instrument or regulation is minor or a 'first occurrence'
- a caution is fair and appropriate
- the matter is one which can quickly and simply be put right

- it is appropriate to advise the responsible party that a repeat occurrence will lead to more serious action being taken.

Cautions are used for more serious matters and only if the fisheries officer believes there to be prima facie evidence of an offence. In deciding whether a caution is an adequate response the fisheries officer must have regard to the principles contained in the Policy. Where a caution is not complied with in the period specified further enforcement measures may be pursued.

Commonwealth Fisheries Infringement Notices (CFINs)

The *Fisheries Management Regulations 1992* provide for infringement notices to be issued for breaches of fisheries management rules. These infringement notices require payment of the fine within a specified timeframe¹⁵.

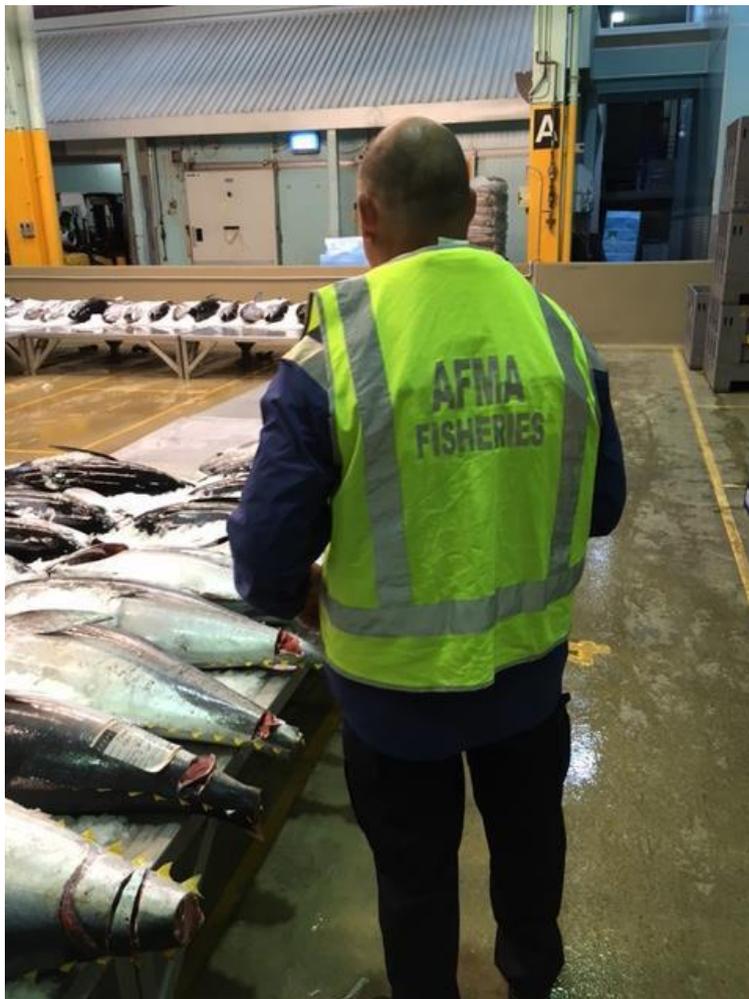


Plate 2: An AFMA fisheries officer inspecting unload at fish receiver premises (2016)

The Policy considerations for issuing a CFIN rather than prosecution are:

¹⁵ Refer Part 10, Regulations 38 – 46 *Fisheries Management Regulations 1992*

- the offence is one that may be dealt with by imposition of a fine under the *FM Act*
- the nature of the incident
- the severity of the impact
- the evidence discloses a prima facie case against the person with reasonable prospects of success
- the previous history of the person
- the culpability of the person
- Notification of the incident to AFMA, voluntary action to mitigate the impacts and a commitment to prevent future incidents.

Amendments to fishing concession conditions

Longer term action may be required to address ongoing non-compliance. Amendment to concession conditions can be used where there is a need to take additional action arising from a breach of the legislation or legislative instruments. Amendments represent an alternative to other enforcement action to achieve compliance with the *FM Act* and *MPA*. Amendments to licence conditions are subject to appeal provisions under the *FM Act*. Failure to comply with fishing concession conditions is an offence. Generally; amendments to existing conditions will be subject to AFMA's regulatory review process.

Directions by fisheries officers

Fisheries officers (under *section 69* of the *MPA*) may direct that various actions are undertaken; these being:

- that fishing activity ceases
- that a boat be taken to a particular place
- that a boat stop to allow an 'at sea' boarding.

Directions will be used where there is imminent risk of severe impacts or there are other reasonable grounds for doing so. Such reasonable grounds may include (but are not limited to) where further inspection of a boat is required for investigation of detected (or suspected) offences, or where it will directly assist in ensuring compliance for future fishing (e.g. to repair fishing gear or a Vessel Monitoring System (VMS) unit). However, as there are no appeal provisions, these powers should only be used where consideration has been given to the likely consequences of such a direction.

Failure to comply with an instruction from a fisheries officer, without reasonable excuse, is an offence.

Suspension or cancellation of fishing concessions

Pursuant to *sections 38* and *39* of the *FM Act*, fishing concessions may be suspended or cancelled under certain circumstances where:

- a fee, levy, charge or other monies have not been paid by the due date
- there are reasonable grounds that a condition has been breached
- there are reasonable grounds false or misleading information has been provided to AFMA
- in accordance with a condition on the concession certain international sanctions have been applied and are not complied with.

Since, in most cases, this would result in ceasing of fishing activity and resultant loss of income. Suspension or cancellation will be used in those circumstances that pose an unacceptable impact or where there is an attitude of non-compliance or evidence of a deliberate attempt to gain financial advantage from non-compliance.

AFMA's CEO or other delegate will, when exercising this enforcement measure, give the authorised person under the *MPA* a reasonable opportunity to 'show cause' in writing why the power should not be exercised. Suspension or cancellation should only be used for serious offences¹⁶.

Failure to comply with a suspension or cancellation of a fishing concession is an offence.

Prosecution

Prosecutions will be initiated, consistent with the principles and criteria of the Policy, where there is evidence of prima facie breaches of the *FM Act* (or other relevant Commonwealth Acts) for offences on a case-by-case basis, where prosecution is, in the opinion of the OMC, the most appropriate response to achieve personal and/or public deterrence.

¹⁶ A number of factors will be taken into account in considering whether an offence is serious enough to warrant suspension or cancellation of a fishing concession or quota. Examples of serious offences include:

1. Fishing without a valid licence, authorisation or permit
2. Failing to maintain accurate records of catch and catch-related data or serious misreporting of catch
3. Fishing in a closed area, fishing during a closed season or fishing without quota where no action is taken to cover outstanding catches
4. Directed fishing for a stock that is subject to a moratorium or for which fishing is prohibited
5. Using prohibited gear
6. Falsifying or concealing the markings, identity or registration of a fishing boat
7. Concealing, tampering with or disposing of evidence relating to an investigation
8. Multiple violations which together constitute a serious disregard of conservation and management measures or
9. Such other violations as identified on a case by case basis

Quality Assurance Reviews (QAR)

AFMA recognises that a critical part of the domestic compliance program is the need to conduct QARs. AFMA will conduct annual reviews of the national compliance program with a particular focus on:

- General Deterrence Program
- Intelligence
- Investigations (Briefs of Evidence)
- CRMT Program

The review will report its findings to the OMC on completion of each component. The overarching aim of the review will be to improve process and procedure. The review will also provide appropriate, clear and concise recommendations for suitable remedial action and ensure procedural errors, or legislative anomalies, are identified and corrected.

AFMA's QAR review will be in addition to the QAR program conducted by Australian Federal Police in accordance with the Australian Government Investigations Standards.

General deterrence QAR

The compliance review will randomly select and audit, tactical orders, post operational reports and the inspection data sheets.

Intelligence QAR

The intelligence review will randomly select and audit, all intelligence products and procedures.

Investigations (briefs of evidence) QAR

This will involve random selection and auditing of assessments, investigations plans, evidence matrices; resource spread sheets, statements, taped records of interviews and conversations, files, file notes and briefs of evidence.

The review will report its findings to OMC on completion of each component. The overarching aim of the review will be to improve process and procedure. It will also provide appropriate, clear and concise recommendations for suitable remedial action and ensure procedural errors, or legislative anomalies are identified and corrected.

CRMT Programs QAR

The CRMT component of AFMA's National Compliance program will include project planning, aims, methodologies, outcomes and specific plans and proposals.

Monitoring and Review of the Policy

Information about the outcome of applying the Policy will assist AFMA to keep the Policy up to date, relevant and effective. The lessons learned in implementing the Policy can be used to:

- evaluate the Policy
- increase the effectiveness of guidelines
- maintain internal accountability
- create deterrence
- ensure public accountability.

AFMA will continue to, on a biennial basis, analyse the effectiveness of the Policy in relation to:

- improving compliance behaviour, including compliance rates
- monitoring enforcement rates and results
- achieving prompt disclosure and correction of violations
- success in implementation of compliance programs to prevent violations improve performance, and promote stakeholder liaison.

Confidentiality

It is important to note that any release of information is conducted in accordance with the provisions of the *Privacy Act 1988*, which provides legislative requirements concerning confidentiality and privacy.

AFMA also has a 'Disclosure Policy' in place that provides overarching principles for the disclosure of information. These principles make sure that:

- public access to information held by AFMA is appropriate and in accordance with governing legislation for both the acquisition and release of information.
- the onus rests on individuals within AFMA to ensure that disclosure of information held by the government accords with relevant statutory obligations.

Communications

In accordance with the AFMA Communication Strategy, AFMA will:

- publish regular bulletins on its activities including:
 - Compliance program activities
 - enforcement programs and outcomes
 - the details of prosecutions.
- undertake communication campaigns (where appropriate) relating to programs addressing targeted risks including:
 - details of (disclosed) risks to be targeted each year
 - education programs designed to maximise voluntary compliance
 - operations and their results.

AFMA Operational Guidelines

Guidelines on the practical implementation of the Policy will be prepared for use by AFMA. These guidelines will be kept under continuous review in relation to their effectiveness and relevance and may be modified by direction of the AFMA CEO at any time.

Disclaimer

An act or omission of the AFMA CEO, or a person acting on behalf of the AFMA CEO, shall not be called into question, or be held to be invalid on the grounds of failure to comply with the Policy.

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