AUSTRAL FISHERIES
SUSTAINABLE SEAFOOD

30th March 2022

Mr Michael Carmody AO
Lead Reviewer
DCV Safety Review Panel
GPO Box 594
Canberra, ACT 2601

Dear Mr. Carmody,

Austral Fisheries operate a large and expanding fleet of domestic commercial fishing vessels as well as an internationally based fleet of deep-water fishing vessels. Our operations span across multiple regulatory jurisdictions at State and Federal level, which predominantly include Queensland, the Northern Territory, Western Australian and the Australian Antarctic region. Our endeavors are guided by a plethora of safety legislation that include the Navigation Act, the National Law Act and the Worksafe laws in each relevant State and Territory.

We welcome this opportunity to put forward our submissions on the key questions below.

Question 1: *Is Australia's legal framework for the safety of domestic commercial vessels fit for purpose?*

Austral believe there are opportunities to improve Australia's legal framework for the safety of commercial vessels to ensure it is fit for purpose. The current legal framework is particularly challenging for domestic commercial vessel operators because the framework itself necessitates that domestic commercial vessel operators play servant to two masters – AMSA and Worksafe. This will be discussed in more detail in our response to *Question 2.*

We believe the legal framework should be sufficiently flexible and intuitive to the needs of domestic commercial vessel operations to maintain the highest level of safety and minimize unnecessary cost burdens. Unnecessary costs can be incurred by domestic commercial vessel operators when laws are too rigid in their application and do not make adequate provisions for exemptions in certain circumstances. Such circumstances might include where risks are negligible, infrequent, for a short duration and can be sufficiently reduced to an acceptable level by means other than those prescribed by the applicable legislation.

To put the above statement into context, Austral recently purchased a vessel in New Zealand for use as a domestic commercial vessel in Australia (Class 3B Fishing Vessel). We encountered considerable red tape and would have incurred considerable increased costs under the current legislative framework because the vessel was required to satisfy more stringent survey requirements due to the short voyage through international waters. The voyage from New Zealand to Australia was a one-off voyage and certain equipment would have been required to be fitted to the vessel that would no longer be required after delivery of the vessel to Australia. Ultimately, the vessel was registered under a 'flag of convenience' in the Cook Islands in order to avoid the application of the Australian law. We believe that such costly and time-consuming schemes should not be necessary. Adequate provisions to facilitate such a transfer in a safe and efficient manner should be provided for in the legal framework.

An effective legal framework should also aim to minimize the burden of compliance costs for vessel operators. This could be achieved by red tape reduction and cost saving initiatives promised by the transition to AMSA from State regulators, such as longer survey coverage and reduced compliance costs for vessel operators that can demonstrate positive safety performance, implementation of a comprehensive safety management system (SMS) and well-maintained vessels. Such arrangements would go a long way towards incentivizing positive safety outcomes for vessel operators.

The fisheries management model could be explored for application in the domestic commercial vessel legal framework, where the Act serves as a 'Toolbox', setting the compliance framework, and marine orders (subsidiary legislation) serve as the management plans that can be modified with a greater degree of flexibility and without the parliamentary interference otherwise required to amend legislation.

Finally, any legal framework can only be effective if it is understood by those that are required to comply with it. With safety legislation, understanding of the laws and regulations enacted for the purpose of achieving safe outcome can only advance the pursuit of achieving safe outcomes. So better guidance material from the regulator is important to ensure operators understand the law so they can comply with it.

***Question 2**: Does the national law interact efficiently with other Commonwealth and State and Territory frameworks, particularly the Navigation Act 2012 (Navigation Act) and workplace health and safety regulations, as well as with international maritime safety obligations?*

The current legal framework as it applies to domestic commercial vessels is inefficient and confusing because of the way that it interacts with other State and Territory frameworks. Specifically, the Uniform Work Health and Safety legislation as adopted in each State and Territory (except WA, which will adopt the Uniform WHS legislation on March 31, 2022). The interaction between the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) and the Uniform Work Health and Safety Acts in each State and Territory forces domestic

commercial vessel operators to play slave to two master. This situation is further complicated for operators of vessels across multiple jurisdictions because of the significant divergence from uniformity from the uniform WHS legislation in each State and Territory since its adoption a decade ago. These complex and confusing jurisdictional matters risk negatively impacting safety outcomes because they are overwhelming for operators and they just give up. A single source of truth, clearly explained will significantly benefit operators and improve safety outcomes.

The National Law attempts to delineate the interaction between other State and Territory frameworks at Section (6)1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth). Section 6(1) is titled, "Relationship with State and Territory laws" and states:

"This Act is intended to apply to the exclusion of a law of a State or Territory that relates to marine safety so far as it would otherwise apply in relation to domestic commercial vessels."

Section 6(2) then state:

"However, subsection (1) does not apply to a law of a State or Territory so far as: (b) the law deals with any of the following matters:"

It then provides for 23 matters that the National law cedes to State or Territory laws, which includes:

- … repairs, cutting or welding occurring on board vessels (s 6(2)(b)(xiii));
- Gas and electrical safety (s 6(2)(b)(xx));
- Workplace health and safety (s 6(2)(b)(xxi));
- Emergency management and response (s 6(2)(b)(xxi)).

However, it is our experience that when an incident occurs on board a vessel at sea that we are simultaneously engaged by the relevant State Worksafe authority and AMSA and concurrently assisting with two separate investigations by the two regulators, who are simultaneously applying different legislation to the same incident. This is not just inefficient. More importantly, it offers no certainty under the law for operators of domestic commercial vessels. In any given matter one master or the other may choose to prosecute or not prosecute, and the law that will apply to the matter will depend on the prosecuting master. Different penalties and provisions would apply depending of which master is served.

The inefficient interaction of the National law with State and Territory laws also creates some precarious dilemmas for domestic commercial vessel operators that remain without a practical resolution. Electrical safety can be used as an example to demonstrate this.

The States never ceded the power to regulate electricity generation and electrical safety to the Commonwealth, so the power remains with the States. The Commonwealth can extend its power by passing laws to implement international agreements/Conventions which it signs and, in this way, the STCW international conventions permit marine engineers to perform electrical and refrigeration work on ships covered by the Navigation Act 2012. But this does not extend to Domestic Commercial Vessels which are not covered by STCW and so must conform with the

state laws on electrical work. The practical implication of this is that marine engineers cannot ("legally") perform electrical work on board vessels at sea unless they hold a certified electrical qualification issued by a State. This is despite undertaking training and competency assessments to perform electrical work on vessels as part of the Marine Engineer qualification.

It is our understanding that AMSA has entered into a memorandum of understanding (MOU) with each State to resolve jurisdictional issues and duplicity in application of the law. However, these agreements are not legally binding offer limited, if any, certainty under the law for domestic commercial vessel operators. We are of the view that these issues can only be resolved by a singular master (regulator) taking exclusive control of all matters at sea. AMSA is the most competent regulator to manage domestic commercial vessels.

The mining industry in Western Australia offers an example of a model where one law can efficiently and successfully operate at the exclusion of another. The *Mines Safety and Inspection Act* completely excluded the Western Australian *Occupational Safety and Health Act* from power over matters on mine sites (section 6A). The delineation to determine which law would apply was simple and practical. If the matter involved anything on a mine site, the *Mines Safety and Inspection Act* would apply. If the matter involved anything not on a mine site, the *Occupational Safety and health Ac*t would apply. This resolution ensured the mining industry did not play servant to two masters.

A similarly practical way the slave to two masters dilemma could be resolved for domestic commercial vessels is to delineate between matters at sea and matters not at sea. AMSA should have exclusive jurisdiction over all matters that occur at sea, and the relevant State Worksafe authority should have exclusive jurisdiction over matters not at sea.

***Question 3**: Is the scope of the definition of 'Domestic Commercial Vessels' appropriate to capture the types of vessels and operations that justify additional regulatory intervention under the National Law beyond existing WHS obligations?*

As operators of vessels that clearly fall within the definition of domestic commercial vessels, Austral are not impacted by any potential misapplication of the definition and scope under the National Law. However, we believe the definition and scope could be narrowed to exclude vessels that may be more appropriately classed as "recreational" rather than "commercial", such as jet-skis and kayaks.

***Question 4**: Should the framework ensure the Navigation Act provides the default standards for commercial vessels?*

The standards under the Navigation Act should not be applied to domestic commercial vessels as default standards. The scope and application of the Navigation Act is appropriately suited to ships that transport goods on long distance voyages outside the Australian EEZ. The commercial context and risk profile of predominantly large container vessels undertaking long

international voyages is not directly transposable in a domestic commercial context, where vessels predominantly operate within the Australian EEZ. The applicable standard should take into consideration the lower risk profile of vessels that operate within the Australian EEZ. Applying the standards under the Navigation Act to domestic commercial vessels as a default would unnecessarily increase compliance costs for domestic commercial vessel operators.

***Question 5**: Is the definition of an "Owner" of a vessel in the National Law sufficiently clear and understood?*

Businesses that operate vessels may also control land-based support operations, such as workshops and refit activities. To avoid confusion, the definition of "Owner" of a vessel should be consistent with the definition of "Person Conducting a Business or Undertaking" (PCBU) as defined under Work Health and Safety legislation.

Under the current regulatory framework, a vessel is defined as a workplace under applicable Work Health and safety legislation. Therefore, any definition of "Owner" of a vessel in the National Law must be read concurrently with the definition of a PCBU in Work Health and Safety legislation. The two definitions cannot be inconsistent because both apply to vessel owners depending on which regulator they are dealing with in relation to a matter. It is perhaps this application of the current safety law framework to domestic commercial vessels that is less clear and less understood.

***Question 6**: Would expanding the Australian Transport Safety Bureau's role to include domestic commercial vessel safety support substantially improved safety outcomes for industry, as well as regulators and policy makers?*

Austral Fisheries have had very limited dealing with the Australian Safety Bureau and we are not able to comment on this question. However, any initiative to expand the role of the Australian Transport Safety Bureau to include domestic commercial vessel safety should not create another master for vessel operators to serve, and should not lead to the creation of additional legislation applicable to domestic commercial vessels that is administered by the Australian Transport Safety Bureau.

Operators of domestic commercial vessels must already comply with safety legislation under Work Health and Safety laws in each Australian State and Territory and legislation under AMSA's jurisdiction. Introducing yet another regulatory body in the safety administration space may introduce complexities that outweigh any benefits for domestic commercial vessel operators. We are of the view that domestic commercial vessel safety should administered by AMSA at the exclusion of any other regulatory body.

***Question 7**: Would removing, in whole or in part, current grandfathering provisions substantially improve safety outcomes? If so, how could industry be supported in making that transition?*

Whilst Austral support the innovation and modernization of vessels to improve safety outcomes, we believe that any amendments to current grandfathering provisions should only be considered if a detailed case for change can demonstrate, using all available incident and accident data, that grandfathered vessels are not able to operated safely with control measures implemented to eliminate or mitigate identified risks.

It is our understanding that AMSA have limited and unreliable longitudinal data on domestic commercial vessel safety. This is largely because safety data was not managed well under State and Territory administration. Therefore, a decision to remove, in whole or in part, current grandfathering provisions would be premature, unsupported by the available safety data and prejudiced towards operators who have consistently demonstrated that grandfathered vessels can be maintained to a safe operating standard and operated safely.

Due to the complex relationship between AMSA and Worksafe legislation in each State and Territory, grandfathering provisions may provide a false sense of security for operators of grandfathered domestic commercial vessels. This is because the grandfathering provisions are not recognised by State and Territory safety legislation that applies to domestic commercial vessels in full. If anything, grandfathered safety aspects of a vessel only highlight risks that need to be reduced to as low as reasonably practicable under Worksafe laws. This limiting aspect on grandfathering provisions within the current legal framework that applies to domestic commercial vessels needs to be articulated very clearly, as we are of the view that is not sufficiently understood by operators.

Yours truly,

David Carter
Chief Executive Officer
Austral Fisheries