

Independent Review of Domestic Commercial Vessel Safety Legislation and Costs and Charging

Draft Interim Safety Report—phase 1

August 2022



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Executive summary

Australia's diverse maritime industries include tourism, transport and fishing operations. These businesses are especially important in our coastal and regional communities, as well as to the whole Australian economy. The Australian Government is committed to having an effective system of safety regulation for vessels and seafarers across these industries.

The *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (National Law Act) commenced on 1 July 2013 and established the National System for Domestic Commercial Vessel Safety (National System). The National System is a significant achievement in domestic maritime law—replacing eight different regulatory systems and regulators with a single maritime law and regulator. Schedule 1 of the National Law Act sets out the Marine Safety (Domestic Commercial Vessel) National Law (National Law).

There have been a number of recent inquiries into maritime safety regulation. On 17 June 2020, the Senate Rural and Regional Affairs and Transport Legislation Committee tabled the report of its Inquiry into the Performance of the Australian Maritime Safety Authority (AMSA). A key recommendation in this report was that the Australian Government commission an independent review of the National Law and any associated legislative instruments (such as Marine Orders).

In its response to this inquiry in December 2021, the Australian Government commissioned this independent review of the National System and the National Law. The review is being conducted by a three-person Independent Review Panel with a mix of safety, regulatory, financial and industry expertise.

Under the terms of reference, the review is to consider whether Australia's legal framework regulating the safety of domestic commercial vessels (DCVs) is fit for purpose. The review is also to consider whether this regulatory framework is being delivered efficiently and effectively, and to consider options for future cost recovery arrangements.

This draft report sets out the Independent Review Panel's findings on the extent to which the National Law framework is currently fit for purpose, and the challenges in existing arrangements under the National Law. It also provides 12 draft recommendations identifying opportunities for reform and alternative approaches.

Over February and March 2022, the Independent Review Panel undertook extensive consultation with government agencies and industry on the National Law framework. The Independent Review Panel received feedback through 23 one-on-one meetings and consultation workshops, and 43 submissions. This feedback has informed the findings and recommendations in this draft interim Safety Report - Phase 1.

You are invited to comment on the draft findings and recommendations.

The next phase of the review will focus on the delivery costs for the National System and future funding options, and will commence later in 2022.

Findings

Key Finding: While there is room for improvement, there is evidence to suggest the National Law framework has improved safety outcomes. However, the legal framework has introduced unnecessary complexity and regulatory burden and is not responsive to innovation and change.

Finding 1: Much of the complexity and regulatory burden would be reduced if the general safety duties in the National Law, supplemented by codes of practice developed by AMSA in consultation with industry, were used as the primary regulatory tool for the less risky segment of the DCV fleet. This would also allow AMSA to concentrate on the riskier segments.

Finding 2: The requirement for all DCVs to have Certificates of Survey and of Operation is unnecessary to achieve safety outcomes and has resulted in a complex and burdensome array of exemptions for less risky operations.

Finding 3: Progressively withdrawing existing grandfathering arrangements to the extent they impact on safety would substantially improve safety outcomes.

Finding 4: There is a high level of confusion within the industry about the relationship between the marine safety law and work health and safety (WHS) law.

Finding 5: The current framework provides a comprehensive range of enforcement powers for breaches of safety requirements. However, the formulation of the offences and penalties for breaches of general safety duties differs from similar provisions in WHS law and, as a result:

- the low levels of penalties that can be imposed by the courts limits their deterrence effect; and
- undermines the effectiveness of AMSA as the safety regulator of DCVs.

Finding 6: AMSA's enforcement powers should be further enhanced so that it has an effective range of powers to support a risk-based, targeted compliance and enforcement approach.

Finding 7: Expanding the Australian Transport Safety Bureau's (ATSB) role to include DCV safety incidents would provide for an independent review of systemic safety issues that would support enhanced safety outcomes.

Finding 8: There is an opportunity and need for the establishment of a concerted effort by AMSA to lead, develop and foster a safety culture within the maritime industry.

Finding 9: There is an opportunity for the Department of Infrastructure, Transport, Regional Development, Communications and the Arts and AMSA to improve the marine surveyor accreditation scheme to ensure it is up to date, fit for purpose and flexible.

Finding 10: The current requirement that changes to regulations made under the National Law be agreed by all States and the Northern Territory is a barrier to flexibility and responsiveness to innovation.

Finding 11: There is a need to further consider how the National Law framework can be future ready.

Draft recommendations

Recommendation 1: The law should be amended to better reflect a risk-based regulatory model that is flexible and able to adapt to innovation and emerging technologies by:

- retaining general safety duties on all parties that have a duty under the current law;
- removing the universal requirement for all DCV's to have Certificates of Survey and Operations;
- providing that vessels of a type or class specified in the regulations (or Marine Orders) be required to comply with NSCV Standards and/or hold a Certificate of Survey or Certificate of Operations; and
- requiring higher risk vessels to comply with the Navigation Act and associated international standards, including the International Dangerous Goods Code and the Standard of Training, Certification and Watchkeeping.

Recommendation 2: The grandfathering arrangements that are a risk to safety should be wound back in accordance with a phased risk-based program.

- All existing DCVs subject to grandfathered design and construction standards should meet acceptable baseline set of design and construction standards based on the current 'transitional standards' within seven years of implementation of this change.
- DCVs that would be required to be certified under the risk-based regulatory regime proposed under Recommendation 1, and that are subject to grandfathered survey requirements or otherwise subject to grandfathered design and construction standards, should undergo survey inspection to assess gaps and requirements to the baseline design and construction standards.
 - These inspections should occur over a two to five year period, with higher risk vessels/operations given greater priority for early inspection
 - Owners should be required to rectify inspection findings within two years of inspection.
- Grandfathered crewing and crew competency arrangements should be phased out within five years of implementation of this change.
- The Australian Government should establish and fund an Industry Assistance Package with a suite of incentives to assist attaining these standards.

Recommendation 3: AMSA should:

- review its Memorandums of Understanding with State and Territory WHS Authorities to include principles to apply to decisions around which regulator is to lead on safety duties held by persons in the maritime industry; and
- reflect these in communications and guidance to industry explaining the rationale for the dual operation of the National Law and WHS Law, and how AMSA and WHS Authorities work practically to reduce any duplication of effort and regulatory burden, including reporting requirements.

Recommendation 4: The offences and penalties in the National Law should be aligned to those in the WHS law to the extent practical.

Recommendation 5: The National Law should be amended to:

- explicitly refer to an officer's due diligence obligation to ensure that the owner of a DCV complies with their safety duties under the National Law;
- allow scaling of infringement notice penalties;
- fill a gap in the law relating to negligent navigation;
- align the present limitation period on commencement of prosecution action with WHS law; and
- introduce a power for the courts to suspend or revoke certificates.

Recommendation 6: The ATSB should be funded by the Australian Government to undertake a no-blame investigation program sufficient to support the identification of systemic safety issues. The Minister should issue a statement of expectations regarding the ATSB's DCV function.

Recommendation 7: Where a State has its own safety investigator the ATSB may engage it to undertake investigations on its behalf.

Recommendation 8: Safety incidents should be reported to one Commonwealth maritime safety authority only (AMSA or the ATSB) who will take responsibility for sharing it with each other as required.

Recommendation 9: AMSA should establish and support an Australian Government funded long-term safety engagement program with all sectors of the DCV industry to:

- promote the benefits of reporting;
- identify best data collection methods;
- investigate the creation of a 'white card' scheme; and
- develop simple and accessible guidelines for ease of compliance.

Recommendation 10: The marine surveyor accreditation scheme should be reviewed to make it fit for purpose. As part of that review, consideration should be given to introducing (among other matters):

- a tiered accreditation scheme according to size and complexity of the vessel;
- a formal continuing professional development program;
- regular random audits of surveyor approvals and subsequent standards applied;
- increasing the approval powers for accredited marine surveyors;
- greater flexibility in who can be accredited as a marine surveyor, and expanding categories of accreditation to adequately cater for new and emerging technologies; and
- a formal rulings program to provide certainty for surveyors and operators.

The review should consider a reasonable timetable for implementation of the proposed reforms.

Recommendation 11: The current requirement that changes to certain regulations be unanimously agreed by the States and the Northern Territory be removed.

Recommendation 12: AMSA should set up a taskforce to consider how to optimise and future proof the National Law framework to regulate new and emerging technologies.

- The taskforce should consider whether definitions in the National Law remain fit for purpose in the context of development, deployment and operation of new and emerging technologies.

The resourcing implications of the recommendations made in the Interim Safety Report - Phase 1 will be considered in Phase 2 of the Review.

Have Your Say

The Independent Review Panel is seeking your views on the findings and draft recommendations in this Report.

A Final Safety Report will be prepared after taking into consideration stakeholder feedback on the interim Phase 1 Report.

When to submit

Please provide your written submissions by 8 October 2022.

How to submit

Please submit your written submission by visiting www.infrastructure.gov.au.

Alternatively, you can email your submission to dcvsafety@infrastructure.gov.au.

Introduction

Context

Domestic commercial vessels (DCVs) are vessels used in undertaking commercial, government or research activities in Australia's Exclusive Economic Zone (EEZ). Australia's DCV fleet is made up of around 31,000 vessels, with an estimated 66,000 crew engaged, operating across a range of environments and industries such as tourism, passenger transport, freight and fishing.

The National System for Domestic Commercial Vessel Safety (National System) is Australia's national regulatory framework to ensure the safe design, construction, equipping, crewing and operation of DCVs operating in Australian waters.

In 2012, the Commonwealth Parliament passed the Marine Safety (Domestic Commercial Vessel) National Law (National Law) as a Schedule to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*. The National Law commenced on 1 July 2013, establishing the Australian Marine Safety Authority (AMSA) as the national regulator for DCV safety. While states and territories initially delivered this regulation, on 1 July 2018 AMSA assumed full responsibility for service delivery of the National System, implementing a nationally consistent approach to the delivery of maritime safety regulation in Australia. This ensured that standards, rules and subordinate legislation are applied consistently for vessels and seafarers across the country.

The objects of the National Law are to:

- form a single, national, cooperative scheme between jurisdictions;
- implement international obligations in relation to DCVs;
- facilitate the development of a safety culture;
- establish a national framework for the operation, design, construction and equipping of DCVs;
- enhance operations of DCVs; and
- develop a safety culture alongside an effective enforcement framework.¹

It has been ten years since the commencement of the National Law, and four years since AMSA commenced full service delivery. A comprehensive review of the National System is appropriate at this time, to assess whether it remains fit for purpose and whether the purported benefits from a truly national regulatory system are being realised. A number of recent inquiries have highlighted the need to examine the safety, application, impacts and costs of the National System and National Law.

In December 2021, the previous Government commissioned this Independent Review of Domestic Commercial Vessel Safety Legislation and Costs and Charging Arrangements (the Review). The Terms of Reference for the Review are available at **Annexure 1**. The details of the Independent Review Panel (Review Panel or Panel) are at **Annexure 2**. The Review is being conducted in two phases, with Phase 1 focusing on the extent to which the National Law meets safety objectives and whether the National Law framework is fit for purpose and Phase 2 focussing on delivery costs for the National System and future funding options. This sequencing allows for any changes identified in the first phase that impact costs to be considered during Phase 2.

This draft report sets out the Independent Review Panel's draft findings and recommendations in relation to Phase 1 of the Review.

¹ Section 3 of Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* ('National Law').

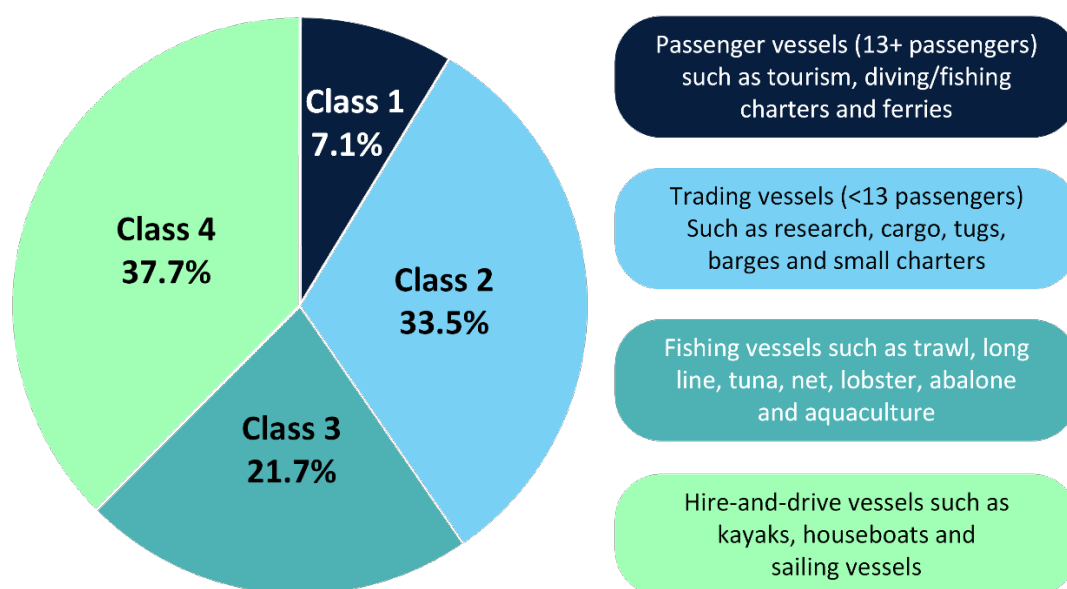
Australian Maritime Sector—Domestic Commercial Vessels

DCVs are typically vessels undertaking commercial, government or research activities in Australian waters. This can include operations relating to tourism, public transport, freight, commercial fishing or hire-and-drive. They are primarily located in regional and coastal areas and are significant employers in tourism, transport and fishing. DCVs are essential to Australia's economy, supply chain and marine ecology.

Australia's DCV fleet operates within Australia's EEZ across a diverse range of operating environments, including inland waters,² inshore operations³ and offshore.⁴ The DCV fleet is organised by the service category of a vessel, which is defined by the vessel use category and operational use category. The vessel-use categories and operational area categories are listed in **Annexure 3—Service Categories of Vessels**.

There are approximately 31,000 active DCVs. This includes approximately 7000 human powered and sail vessels, which are primarily hire and drive (Class 4) and under 7.5m in length (such as kayaks).⁵ **Figure 1** below sets out the DCV fleet distribution by vessel class:

Figure 1—Distribution of DCV Fleet by Vessel Class⁶



The largest proportion of the DCV fleet is located in Queensland, followed by New South Wales and Western Australia. The Northern Territory, South Australia, Victoria, Tasmania and the Australian Capital Territory each make up less than 10 percent of the DCV fleet.

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² Inland waters mean non-tidal waters, National Standard for Commercial Vessels ('NSCV') Part B

³ Inshore operations mean operations of a vessel that are conducted laterally along the coast from either the base or a regular port of departure of the vessel that is within 15nm from the baseline of the Australian mainland, Tasmanian mainland, a recognised island, or sheltered water limits, NSCV Part B

⁴ Offshore operations mean vessel operations that are within 200nm seaward of the baseline of the Australian mainland, the Tasmanian mainland, or a recognised island, and in waters to the outer limits of the EEZ, NSCV Part B

⁵ Australian Maritime Safety Authority ('AMSA'), [Domestic Commercial Vessel Annual Incident Report, January—December 2020](#).

⁶ Ibid. This data excludes human powered or sail vessels operating that are not uniquely identifiable.

⁷ Sections 88, 89 of the National Law.

Evolution to a National System

Prior to the commencement of the National System, the regulatory framework for DCVs was comprised of eight different marine safety regulatory systems, involving the Commonwealth, the six states and the Northern Territory.⁸ Due to the different legislative and administrative regimes in place at the time, there were significant inconsistencies across jurisdictions in safety requirements, the recognition of vessel survey, safety certification and qualifications and certificates of crew, and variations in the level and nature of ongoing monitoring of compliance with safety standards. These inconsistencies duplicated administrative requirements for businesses operating across state and territory borders and increased costs. There were concerns that safety outcomes were not being maximised.⁹

In July 2009, the then Council of Australian Governments (COAG) agreed to move to a national approach to regulating the safety of all DCVs in Australian waters.¹⁰ The proposed reform was part of a national transport reform package, intended to improve safety and reduce the regulatory burden and costs on the Australian rail, heavy vehicle and maritime industries. Other components of the maritime reform package included national shipping reforms designed to ensure the long-term future of the Australian shipping industry through tax regulation and training, and the repeal of the *Navigation Act 1912* and the enactment of the *Navigation Act 2012* (Navigation Act).¹¹

The COAG Inter-Governmental Agreement on Commercial Vessel Safety Reforms (IGA) was entered into by Australian governments on 19 August 2011. The aim of the IGA was to set out principles and processes for delivering a national safety system for commercial vessels that is effective, consistent and efficient, minimises legal and administrative costs, and does not result in an overall increase in regulatory burden.¹² The outcomes would be improved safety and decreased risk to the public, owners, operators and crew of domestic commercial vessels, as well as reduced complexity and increased certainty regarding the requirements applying to design, construction, equipment, operation and qualification/crew certification of those vessels.¹³

The IGA formalised the agreement of all Australian governments to the operating arrangements for the National System.¹⁴

The IGA stated that transitional provisions (known colloquially as ‘grandfathering’) would be included to ensure that the introduction of the National System occurred in a progressive and structured manner.¹⁵

When the National Law came into effect from 1 July 2013, a number of jurisdictions had not yet drafted their complementary application legislation to apply the National Law to any gaps in the Commonwealth’s constitutional reach.¹⁶ All jurisdictions other than Western Australia have now done this. The 2011 IGA was terminated effective from 21 August 2018. However, many of the IGA provisions still remain active in the National Law.

⁸ Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (‘National Law Bill’), Replacement Explanatory Memorandum, Outline.

⁹ [National Approach to Maritime Safety Regulation](#) (Regulatory Impact Statement, April 2009) page 6.

¹⁰ [COAG Meeting Communiqué 2 July 2009](#). This decision flowed from COAG’s earlier decision in 2008 to improve Australia’s economic productivity by delivering more consistent regulation across jurisdictions for key industries, including for ‘maritime safety’

¹¹ National Law Bill, Replacement Explanatory Memorandum, Outline.

¹² [Council of Australian Governments, Intergovernmental Agreement on Commercial Vessel Safety Reform](#) (‘IGA’), August 2011, Part 2.

¹³ IGA, Part 2, paragraph 13(b).

¹⁴ National Law Bill, Replacement Explanatory Memorandum, page 10.

¹⁵ IGA, Schedule C, paragraph C2.

¹⁶ See National Law Bill, Replacement Explanatory Memorandum, page 2. The Commonwealth applies the National Law to the extent of the Commonwealth’s constitutional reach, and each jurisdiction applies the National Law to any ‘gap’ in the Commonwealth’s constitutional reach.

National Law

The National Law sets out a national regulatory framework for the certification, construction, equipment, design and operation of DCVs inside Australia's EEZ.

Scope

The National Law defines the terms 'vessel' and 'domestic commercial vessel'. A vessel is any craft for use, or that is capable of being used, in navigation by water, however propelled or moved, and includes an air-cushion vehicle, a barge, a lighter, a submersible, a ferry in chains and a wing-in-ground effect craft, but does not include an aircraft, or a thing that is a facility for the purposes of Schedule 3 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* of the Commonwealth.¹⁷ In addition, regulations can provide that a specified thing, or a thing included in a specified class, is or is not a vessel.¹⁸

A DCV is defined as 'a vessel that is for use in connection with a commercial, governmental or research activity'. Certain vessels are excluded from the National Law and are therefore not a DCV. These include Regulated Australian Vessels,¹⁹ defence vessels, foreign vessels, or vessels owned by community groups and primary and secondary schools.²⁰ Vessels owned by community groups or primary and secondary schools can be DCVs at any time when used for a purpose or activity prescribed by regulations.²¹ In addition to these definitions, subsection 7(5) of the National Law provides that regulations can also specify whether particular vessels or types of vessels are DCVs or not. The Explanatory Memorandum to the Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 explains that 'the designation of what is and is not a domestic commercial vessel would be refined through regulations under this Bill, but the intended scope is set out in this clause. While the power to prescribe additional things as a domestic commercial vessel in the regulations under the Bill is a significant power, any addition to this definition will be by unanimous agreement by all [Standing Council on Transport and Infrastructure] SCOTI Ministers.'²²

Safety elements

Elements of DCV safety in the National Law are represented in **Figure 2** below.

¹⁷ Sections 8(1) and 8(2) of the National Law.

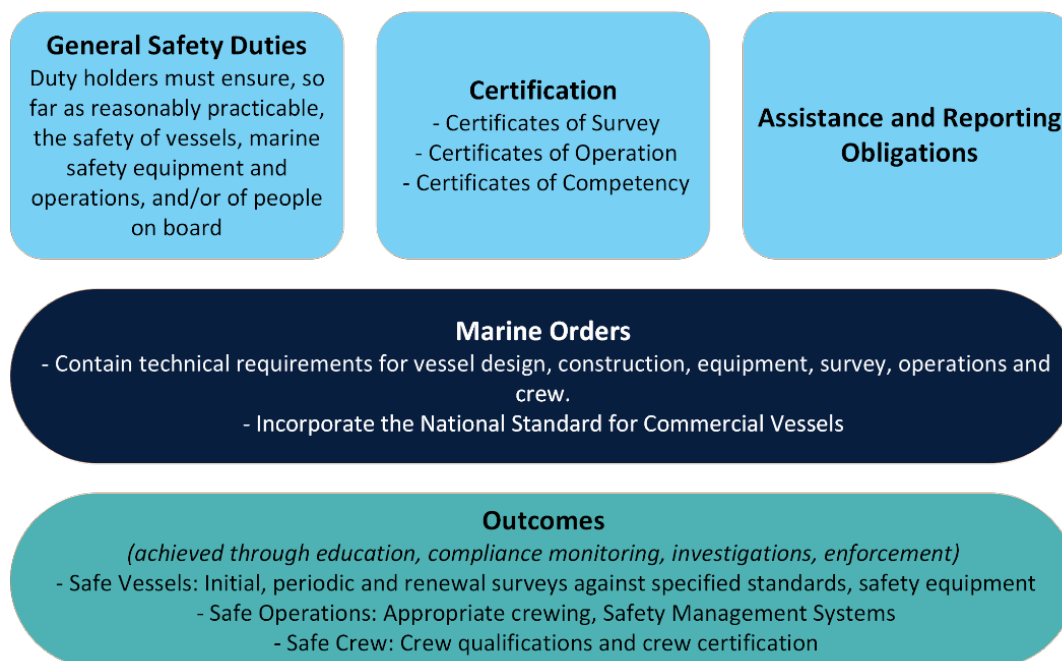
¹⁸ Section 8(3) of the National Law.

¹⁹ Regulated Australian Vessels are dealt with under the *Navigation Act 2012* ('Navigation Act').

²⁰ Section 7 of the National Law.

²¹ Section 7(4) of the National Law.

²² National Law Bill, Replacement Explanatory Memorandum, page 24. The Standing Council on Transport and Infrastructure (SCOTI) was established in September 2011 and brought together Commonwealth, State, Territory and New Zealand Ministers with responsibility for transport and infrastructure issues, as well as the Australian Local Government Association. The Infrastructure and Transport Minister's meeting is SCOTI's successor body.

Figure 2 - Elements of DCV Safety

General Safety Duties

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Under the National Law the general safety duty holders include owners, masters, crew and passengers of DCVs, persons who design, commission, construct, manufacture, supply, maintain, repair or modify DCVs, and certain other persons for example persons embarking, disembarking or on board a DCV.²⁴

The general safety duties require that each duty holder must ensure, so far as reasonably practicable, the safety of vessels, marine safety equipment and operations, and/or of people on board. Designers, manufacturers and importers of DCVs must ensure, so far as reasonably practicable, that the vessel and its equipment are safe for their intended use. Among other things, section 12(2) of the National Law requires the owner of a DCV to implement and maintain a safety management system that ensures that the vessel and the operations of the vessel are, so far as reasonably practicable, safe. A corresponding duty is also placed on the master of a vessel to implement and comply with a safety management system.²⁵

Certification

The National Law sets out requirements for the issuing by AMSA of Certificates of Competency, Certificates of Survey and Certificates of Operation of DCVs. The owner and master of a vessel commit an offence if:

- a DCV is operated and Certificates of Survey and Certificates of Operation are not in force, or the operation is not authorised by the certificate in force,²⁶ unless the vessel is exempted from the requirement,²⁷ or
- if a condition of the relevant certificate is breached.²⁸

²³ National Law Bill, Replacement Explanatory Memorandum, page 29.

²⁴ Sections 12, 14, 16, 19, 21, 23 and 24 of the National Law.

²⁵ Section 16(2) of the National Law.

²⁶ See for instance, sections 43, 44, 53, 54 of the National Law.

²⁷ Section 143 of the National Law.

²⁸ See for instance sections 45, 46, 55, 56 of the National Law.

Certificates of Survey provide evidence that a vessel meets specified standards for design, construction, stability and safety equipment.²⁹ AMSA issues the Certificate of Survey on the basis of a report by an accredited marine surveyor or recognised organisations confirming that the vessel meets the required standard.

Certificates of Operation provide permission to conduct a kind of DCV operation and set out the conditions attached to that permission. The conditions may include the number of crew required to be on board when in operation, qualifications of the master and crew, the number of crew and passengers that may be on board, limitations on use by reference to geographical and meteorological factors and time of day, operating hours and compliance with prescribed standards.³⁰ In order to obtain a Certificate of Operation, operators must demonstrate they have the appropriate competence and capability in relation to the safe operation of the vessel, and declare that they have an appropriate safety management system at the time of applying for a Certificate of Operation.³¹ They must also be a fit and proper person.³² When assessing an application for a Certificate of Operation, AMSA may ask the applicant to provide details of the safety management system.

A Certificate of Competency is only required if it is specified by the regulations (Marine Orders).³³

The granting of a Certificate of Competency provides evidence that a seafarer has met the requirements for their specified grade and permits them to serve on a vessel as a master, officer or crew member with deck and/or engineering responsibilities.³⁴ Section 58 of the National Law provides that regulations may make provision in relation to Certificates of Competency which enables AMSA to incorporate Certificate of Competency requirements into Marine Orders.

Additionally, DCVs must have, and display, a unique identifier while operating unless they are exempt.³⁵ A unique identifier is a number that stays with the vessel for its entire life, even if the vessel changes ownership. Unique identifiers help to identify DCVs.

Regulations

AMSA is able to make Marine Orders on most matters about which regulations are made, except for the provisions of subsections 7(4) and 7(5) (definition of DCV), 8(3a) (definition of vessel), 150(1) (fees) and 160(1)(a) (accreditation) in the National Law, that may only be dealt with in the regulations made by the Governor General.³⁶

Before the Governor-General makes a regulation for the purposes of subsections 7(4) and 7(5), the Commonwealth Minister must be satisfied that the COAG Council has been consulted in relation to the proposed regulation and has agreed to the making of the proposed regulation.³⁷ COAG Council is defined in section 6 as the council established by COAG that has responsibility for marine safety.³⁸

²⁹The specified standards are defined in Marine Order 503—(Certificates of survey—national law) 2018.

³⁰ Section 48 (5) of the National Law.

³¹ Marine Order 504 (Certificates of operation and operation requirements—national law) 2018.

³² Section 74 of the National Law and section 5 of Marine order 501—(Administration—national law) 2013.

³³ Sections 65, 66, 67 of the National Law.

³⁴ National Law Bill, Replacement Explanatory Memorandum, page 35.

³⁵ Section 35(1) of the National Law.

³⁶ Section 163(1) of the National Law.

³⁷ Sections 159(6) and 160(3) of the National law.

³⁸ Following the ceasing of the Council of Australian Governments (COAG) and the rationalisation of former COAG Councils in 2020, the Infrastructure and Transport Ministers' Meetings now provides the forum for intergovernmental collaboration and decision-making in relation to infrastructure and transport matters, including the National Law.

The Marine Safety (Domestic Commercial Vessel) National Law Regulation 2013 (Regulations) made under section 159 of the National Law:

- makes provision in relation to the application of the National Law by:
 - excluding certain activities/vessel uses from the scope of the National Law (e.g. vessels used by members of Community Groups, schools and surf life saving vessels within 2 nautical miles of the coastline’);
 - prescribing things that are not DCVs (e.g. a vessel that would not otherwise be a DCV being used for promotional activity, or under the control of a dealer); and
 - prescribing things that are and are not a vessel.
- prescribes accreditation standards and sets out the process for applications, and conditions of accreditation, for marine surveyors,
- prescribes fees relating to the accreditation of marine surveyors, unique identifiers, certificates and other approvals, and
- includes transitional provisions in relation to certification in force at the commencement of the National Law.

One of AMSA’s functions is to accredit persons for the purposes of the National Law and to survey vessels and deal with matters relating to the survey of vessels by accredited surveyors.³⁹ AMSA administers the marine surveyor accreditation scheme.

Marine Orders and Standards

One of the objects of the National Law is ‘to provide a framework for the development and application of consistent national standards relating to the operation, design, construction and equipping of DCVs.’⁴⁰

Under Section 10 of the National Law, AMSA’s functions include:

- making and maintaining Marine Orders, and
- developing and maintaining national standards, guidelines and codes of practice relating to marine safety.⁴¹

Marine Orders are legislative instruments for the purposes of the Legislation Act 2003.

AMSA has made the following Marine Orders under the National Law:⁴²

Marine order 501—(Administration—national law) 2013

Marine order 502—(Vessel identifiers—national law) 2017

Marine order 503—(Certificates of survey—national law) 2018

Marine order 504—(Certificates of operation and operation requirements—national law) 2018

Marine order 505—(Certificates of competency—national law) 2013. This will be repealed by Marine order 505—(Certificates of competency—national law) 2022 when the latter instrument commences on 1 January 2023.

Marine order 507—(Load line certificates—national law) 2018.

³⁹ Section 10 of the National Law.

⁴⁰ Section 3(d) of the National Law.

⁴¹ Section 10 of the National Law.

⁴² [Marine Orders 501—507 that apply to domestic commercial vessels](#). Marine Orders 1–98 that generally give effect to international obligations and standards apply to some domestic commercial vessels.

The Marine Orders contain detailed technical requirements for a wide range of matters, including vessel survey, construction, equipment, and design; vessel operations and crewing; navigational safety; communications; crew working and living conditions and qualifications.

Marine Orders may apply, adopt or incorporate material contained in any written instrument in force or existing from time to time, including but not limited to the National Standard for Commercial Vessel (NSCV) and the Uniform Shipping Laws Code (USL Code).⁴³

The NSCV promotes a uniform national approach to the safety of commercial vessels and the protection of the environment by:

- providing information on the safety obligations and responsibilities of people who design, build, operate and otherwise exercise control over the safety of commercial vessels
- specifying nationally agreed standards to be adhered to for vessel design, construction and equipment for the issue of Certificates of Survey, and
- specifying nationally agreed standards for the issue of Certificates of Competency.⁴⁴

Sections have been added to the NSCV which were not addressed by the USL Code, for instance standards for vessels travelling at speed. The NSCV also references numerous other documents, including Australian and international standards and codes. Some sections of the USL Code still apply under the NSCV.

Compliance with relevant aspects of the NSCV is required by Marine Order 503 (Certificates of Survey—National Law) 2018. All vessels constructed after the commencement of the National Law are generally required to be designed, constructed and equipped to the NSCV. Older vessels may be subject to older technical standards such as the USL Code.

Exemptions

AMSA, as the National Regulator, can exempt specified vessels and people, or classes of vessels and people, from the National Law, or specified provisions of the National Law.

There are two types of exemption under the National law:

1. Specific exemptions—these may be granted on application in accordance with regulations contained in Marine Order 501 (National law—administration) 2013.
2. General exemptions—these typically apply to vessels, persons, and operations that meet the relevant criteria and conditions in the general exemption.

AMSA must not grant an exemption unless it is satisfied that the exemption and the conditions to which it is subject, will not jeopardise the safety of a vessel or a person on board a vessel.⁴⁵

AMSA has made 35 general exemptions related to vessels, operations and qualifications under the National Law.⁴⁶ AMSA has issued a total of 1,210 specific exemptions since the National System came into force on 1 July 2013.

⁴³ Section 164 of the National Law.

⁴⁴ When Marine Order 505 commences on 1 Jan 2023, the NSCV will only specify design, construction and equipping requirements (i.e. matters about the vessel).

⁴⁵ Section 143(6) of the National Law.

⁴⁶ [General exemptions made under the National Law](#).

Compliance and Enforcement powers

The National Law establishes a national compliance and enforcement framework that enables AMSA to appoint Marine Safety Inspectors who have the power to check and enforce industry compliance. The National Law provides Marine Safety Inspectors with a broad mix of monitoring, enforcement, seizure, direction, detention, improvement, prohibition and infringement notice powers.⁴⁷ A range of compliance and enforcement options are available to AMSA under the National Law including infringement notices,⁴⁸ improvement notices,⁴⁹ prohibition notices⁵⁰, directions,⁵¹ detention of vessels,⁵² enforceable voluntary undertakings,⁵³ suspension or revocation of certificates,⁵⁴ prosecution and civil penalties.⁵⁵

⁴⁷ See Part 6 of the National Law.

⁴⁸ Section 138 of the National Law.

⁴⁹ Section 110 of the National Law.

⁵⁰ Section 111 of the National Law.

⁵¹ Section 109 of the National Law.

⁵² Section 101 of the National Law.

⁵³ Section 159(4) of the National Law.

⁵⁴ Sections 41, 42, 51, 52, 63 and 64 of the National Law.

⁵⁵ Section 162 of the National Law.

Previous inquiries and key recommendations

The Review has considered the findings and recommendations of previous inquiries which highlighted key safety and legislation issues within the maritime sector, and noted the potential impact to industry in resolving these issues.

Senate Inquiry into the Performance of the Australian Maritime and Safety Authority

On 17 June 2020, the Senate Rural and Regional Affairs and Transport Legislation Committee tabled the report of its inquiry into the performance of AMSA.⁵⁶ The Government supported all recommendations from the report.⁵⁷ These recommendations are available at **Annexure 4**.

Of relevance to this review, a key recommendation of the report was that the Australian Government commission an independent review of the National Law and any associated legislative instruments (such as Marine Orders).

Productivity Commission Inquiry into National Transport Regulatory Reform

On 1 October 2020, the Productivity Commission publicly released the report of its inquiry into National Transport Regulatory Reform.⁵⁸ The Government response to the inquiry was published on 21 October 2021.⁵⁹ Of relevance to this review, the Commission recommended that the Australian Government negotiate with State and Territory governments to return responsibility for regulating Class 4 DCVs to State and Territory agencies. Additionally, the report highlighted the potential safety deficiencies of grandfathered vessels, and recommended that maritime incident reporting and public disclosure be improved. These recommendations are available at **Annexure 5**.

Senate Inquiry into the Policy, Regulatory, Taxation, Administrative and Funding Priorities for Australian Shipping

On 15 December 2020, the Senate Standing Committee on Rural and Regional Affairs and Transport tabled the report of its inquiry into the Policy, Regulatory, Taxation, Administrative and Funding Priorities for Australian Shipping.⁶⁰

Of relevance to this review, the Committee recommended that the Australian government expand the jurisdiction of the Australian Transport Safety Bureau (ATSB) to include incidents on DCVs; and that the government commission an independent review of the National Law. The Committee also recommended amending the Navigation Act to restore the appropriate balance between Regulated Australian Vessels and DCVs, ensuring the Navigation Act provides the default standards for Australian commercial ships. These recommendations are available at [Annexure 6](#).

⁵⁶ Senate Standing Committee on Rural and Regional Affairs and Transport Legislation, *Performance of the Australian Maritime Safety Authority* (Report, June 2020).

⁵⁷ Australian Government Response to the Senate Rural and Regional Affairs and Transport Legislation Committee Report: Performance of the Australian Maritime Safety Authority, May 2021.

⁵⁸ Productivity Commission, *National Transport Regulatory Reform* (Report, October 2020).

⁵⁹ Australian Government Response to the Productivity Commission Inquiry Report: National Transport Regulatory Reform, October 2021.

⁶⁰ Senate Standing Committee on Rural and Regional Affairs and Transport, *Policy, Regulatory, Taxation, Administrative and Funding Priorities for Australian Shipping* (Report, December 2020).

Consultation

Following the public release by the Independent Review Panel of the Consultation Aid in February 2022, 43 submissions were received, including 11 confidential responses. The Review Panel also conducted 23 virtual meetings with stakeholders representing the maritime sectors and government. Virtual meetings were preferred over face to face meetings due to COVID 19 restrictions. The Review Panel intend to revert back to in-person meetings for input to the Interim Safety Report — Phase 1 and to commence deliberations for Phase 2.

In response to the overarching question of ‘is Australia’s legal framework for the safety of DCVs fit for purpose’, 61% of respondents felt the system required reform, with a further 26% of respondents indicating that the system is not fit for purpose. A list of stakeholders that provided non-confidential submissions can be found at **Annexure 7**, and all non-confidential submissions received are available on the Review website at www.infrastructure.gov.au/have-your-say/review-domestic-commercial-vessel-safety-legislation.

Findings

Key Finding

While there is room for improvement, there is evidence to suggest the National Law framework has improved safety outcomes. However, the legal framework has introduced unnecessary complexity and regulatory burden and is not responsive to innovation and change.

Supporting safe vessel operations

The National Law replaced eight federal, state and territory regulators with one national marine safety regulator. It also replaced 50 pieces of legislation in seven jurisdictions with a single national law for DCVs, providing clarity and consistency for Australia's seafarers and commercial vessel owners.

The impact of this in practical terms is that marine safety standards are now consistent across Australia. This, in theory, would make DCVs safer as there would be clearer standards, less confusion on what was required and less resources diverted towards getting multiple vessel certificates from different state regulators.

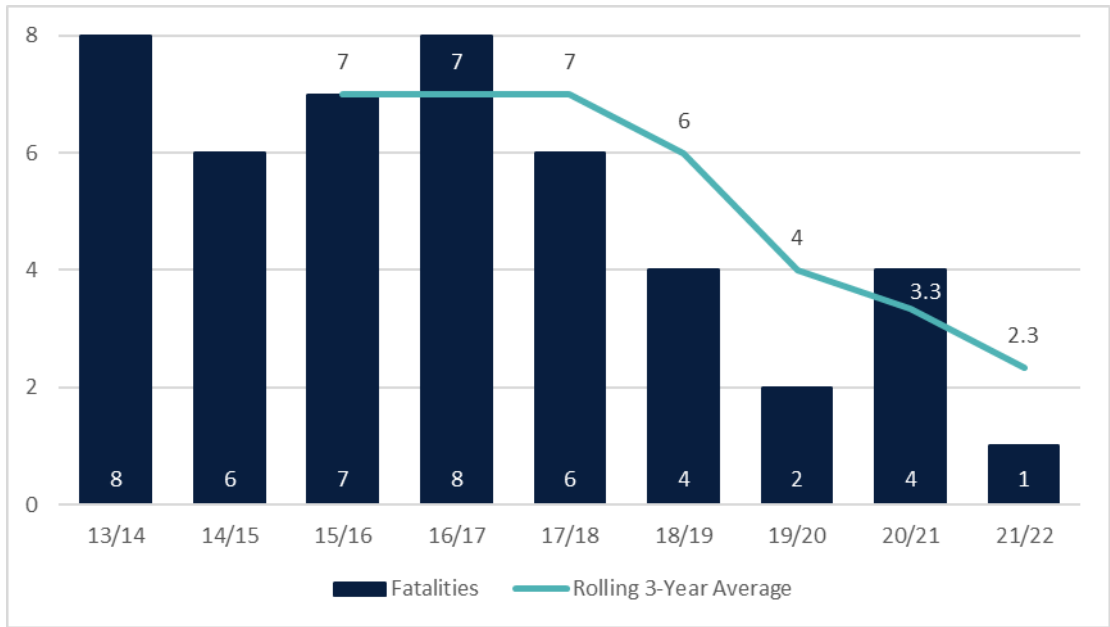
With this in mind, the Panel examined the data to see if safety outcomes have improved. In short, the Panel found that the current legal framework has produced solid safety outcomes since coming into effect from 1 July 2013.

Safety outcomes

DCV fatalities have trended down since full service delivery responsibility transitioned to AMSA from 2018.

Figure 3 shows the trend in the number of operational-related fatalities on DCVs by financial year since 1 July 2013,⁶¹ with the three-year rolling average decreasing from 2016–2017 to 2021–2022.⁶² However, the numbers are from a low base, and for a relatively short period of time.

Figure 3—Domestic Commercial Vessel fatalities



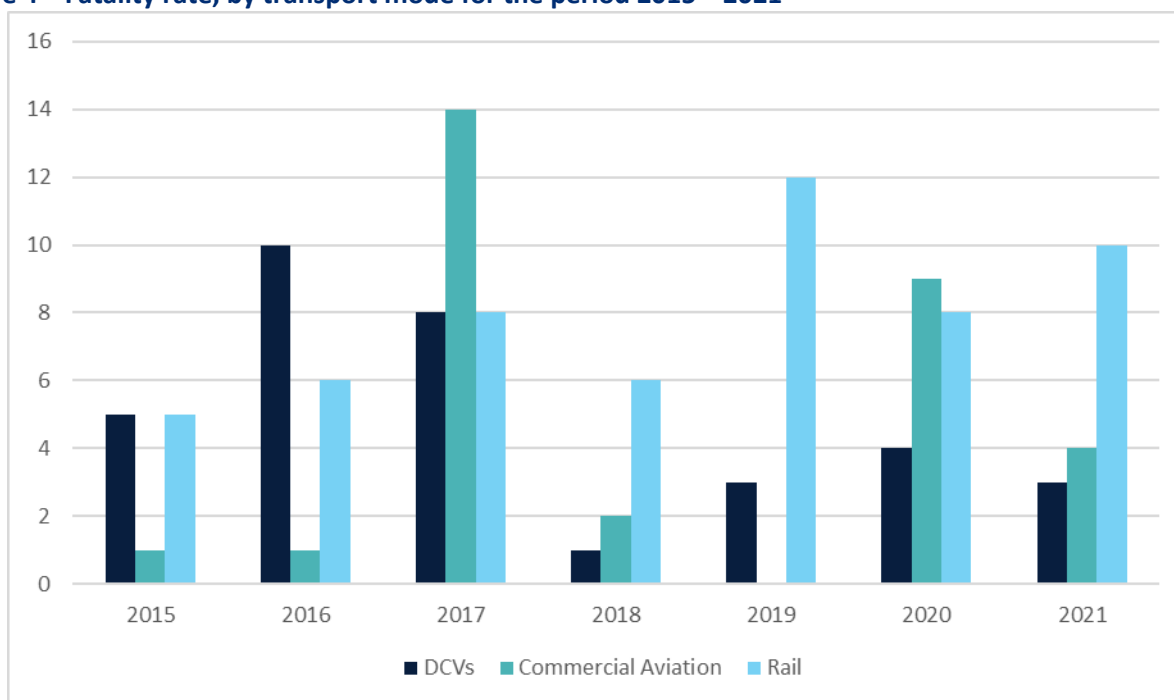
⁶¹ Only fatalities that have occurred since July 2018 have been reported directly to AMSA. For data prior to July 2018, AMSA interrogated various data sources, including coronial records, to confirm that the reported number of operational related fatalities is correct.

⁶² The figures for 2021–22 only include data for the first ten months (July 2021–April 2022).

Comparison with other transport modes

This downward trend compares favourably with other transport modes (See **Figure 4** below).

Figure 4—Fatality rate, by transport mode for the period 2015—2021⁶³



Road fatalities have been excluded from the graph, as its much higher values makes it difficult to see other transport mode data when compared in scale.

Table 1 below).

The same conclusion holds true when we examine injury rates. In the past, DCV serious injury rates⁶⁴ have trended above that of other transport modes (not including heavy vehicles).

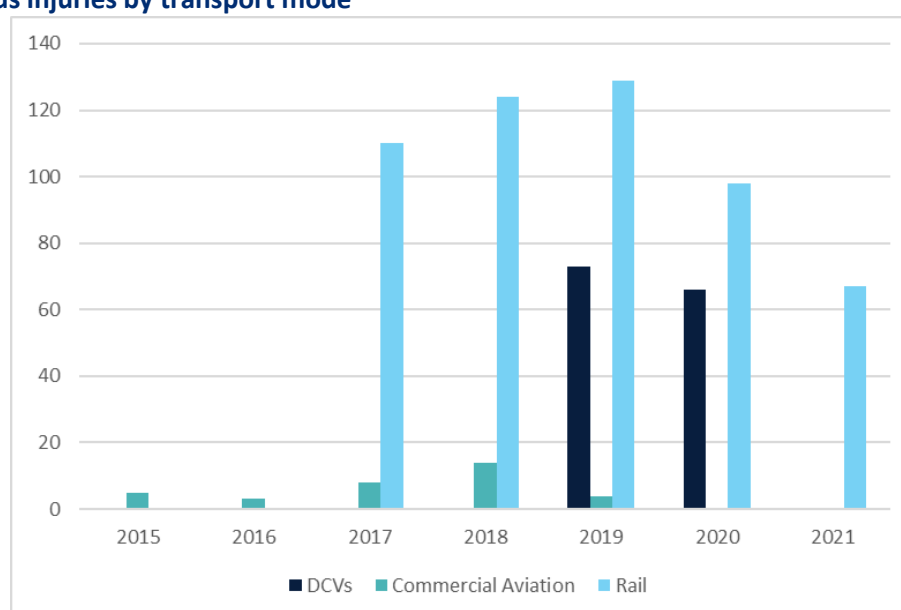
⁶³ DCV operational fatalities provided by AMSA, May 2022. Discrepancies with Figure 4 are due to the differences in reporting by financial year vs calendar year. Commercial aviation figures taken from ATSB *Aviation Occurrence Statistics (rates update) 2015 to 2019*, Figure 3. 2020 and 2021 figures obtained from ATSB's [Aviation safety investigations & reports database](#). Numbers exclude flight training fatalities. Rail fatalities taken from ONRSR *Safety Data Key Occurrences March 2022 Report* and only include from 2015 to 2021. Excludes suspected suicides, suicide attempts or trespassing.

⁶⁴ Differences in the way each sector defines a 'serious injury' may affect the comparison. For DCVs, a serious injury includes injuries that require emergency treatment.

Table 1—Average fatalities and serious injuries by transport mode

	Fatalities	Serious injuries ⁶⁵
Domestic Commercial vessels⁶⁶	11.6	70.5 ⁶⁷
Heavy vehicles⁶⁸	182.4	560.6 ⁶⁹
Commercial aviation⁷⁰	8.7 (2.4 in commercial air transport, 6.3 in aerial work and flying training)	6.3 (2.4 in commercial air transport, 3.9 in aerial work and flying training)
Rail⁷¹	8	42.1 ⁷²

However, since responsibility transitioned to AMSA in 2018, there has been a decrease in DCV serious injuries and it is expected that this will continue (**Figure 5**).

Figure 5—Serious injuries by transport mode

⁶⁵ There are difficulties in comparing modes due to the differences in kilometres or nautical miles (nm) travelled by the fleets, and the numbers of passengers carried. These figures are provided for context purposes only.

⁶⁶ Annual average figure for 2015–2019 (inclusive).

⁶⁷ Average annual figure based on data in AMSA's 2019 DCV Annual Incident Report and 2020 DCV Annual Incident Report. A serious injury includes injuries that require emergency treatment, in most cases leading to an emergency medivac from the vessel, and/or hospitalisation.

⁶⁸ Figure represents average annual deaths involving heavy vehicles as opposed to heavy vehicle occupants only. Averaged over the period 2015–2019. Taken from: 'Road trauma involving heavy vehicles—2019 statistical summary': [Road Trauma Involving Heavy Vehicles—Annual Summaries | Bureau of Infrastructure and Transport Research Economics \(bitre.gov.au\)](https://www.bitre.gov.au/publications/road-trauma-involving-heavy-vehicles-2019-statistical-summary)

⁶⁹ Covers only heavy truck occupants. Serious injury covers 'hospitalised injuries' and 'high threat to life injuries'. Based on data covering the period 2010–2019. Taken from: 'Road trauma involving heavy vehicles—2019 statistical summary' available here: [Road Trauma Involving Heavy Vehicles—Annual Summaries | Bureau of Infrastructure and Transport Research Economics \(bitre.gov.au\)](https://www.bitre.gov.au/publications/road-trauma-involving-heavy-vehicles-2019-statistical-summary)

⁷⁰ Australian Transport Safety Bureau, *Transport Safety Report—Aviation Occurrence Statistics—1 July 2003 to 30 June 2012*. Figure shown is the average annual rate during the 10 years from 2010–2019.

⁷¹ Data for the period 2016–2019 and excludes fatalities from suspected suicides and trespass (the average annual figure is 118.25 when this is included). Data taken from the ONRSR website: [Key occurrences—Office of the National Rail Safety Regulator \(onrsr.com.au\)](https://www.onrsr.com.au/key-occurrences)

⁷² Annual average based on data from Jul 2016 to Jun 2020. Excludes serious injuries from suspected suicide attempts/trespass (if included, the serious injury annual average is 54). Data taken from the ONRSR website: [Key occurrences—Office of the National Rail Safety Regulator \(onrsr.com.au\)](https://www.onrsr.com.au/key-occurrences)

In conclusion, DCV fatality and serious injury rates are now at, or below, similar levels to that of rail (fatality and injury) and aviation (fatality)—two transport modes generally recognised for their exemplary safety records.




The Panel considers that the data discussed above suggests there have been improvements in safety outcomes since the introduction of the National System. The Panel acknowledges that the data to support the analysis is limited in some respects. The Panel has not been able to find data that allows injury and incident data to be normalised across modes so that the level of activity and exposure to risk can be factored in. The data is also qualified by a relatively small number of fatalities and serious injuries, and a less than ideal culture of reporting. The Panel has made recommendations (see Finding 7 and Recommendation 8) to encourage better incident reporting and data collection.

Benefits of a National System

The National System provides a consistent approach to safety for owners, operators, and crew of commercial vessels working in Australia.

Since taking responsibility for the National System in 2018, AMSA has progressed a number of reforms aimed at boosting safety or simplifying regulations.

Examples of AMSA Reforms

<p>Sending a signal: Float-free emergency position-indicating radio beacons (EPIRBs)</p> 	<p>In harmony: Transitioning to a national approach</p> 
<p>From 1 January 2021, float-free EPIRBs became mandatory on certain types of commercial vessels.</p> <p>These beacons offer significant safety advantages for crew and passengers on vessels in distress. A float-free EPIRB can activate itself and float free to the water's surface when a vessel is submerged to a depth of one to four metres underwater. This enables the float-free EPIRB to send a call for help within minutes of being submerged in water, without any action by the crew. They can also be manually activated without it being submerged in water.</p>	<p>On 1 July 2018, the new survey regime commenced and moved all vessels required to have a <i>Certificate of Survey</i> into one consistent set of risk-based periodic survey requirements. In addition to improving safety, the changes will save industry and government approximately \$76 million over 10 years.</p> <p>Also, on 1 July 2018, requirements for operational safety standards were harmonised (previously being state-specific) and now apply to all vessels, except 'minimum crewing' which remains grandfathered.</p>
<p>Simplifying without compromising: New equipment lists for small fishing vessel operators</p> 	<p>Spotlight on safety— National Safe Boating Week</p> 
<p>Industry expressed concerns that the safety equipment requirements for operators of small fishing vessels operating close to land were too onerous and not reflective of the risks of these operations.</p> <p>In response, AMSA developed two new simplified equipment lists for small fishing vessels—one for operators of vessels within two nautical miles of land, in specified warm waters, and one for operators in beach fisheries operating within 200 metres of land. The items of equipment to be carried under each list is scaled depending on the distance from land and came into effect in early 2021.</p> <p>Not only do the new lists represent a risk-based, 'common sense' approach to equipment requirements for small fishing vessels operating close to land, they will also save these operators money.</p>	<p>The National Safe Boating Week is held at the start of the spring boating season and is a collaborative government initiative to promote safety on the water and increase awareness of responsible boat practices. It is targeted towards boating enthusiasts and anyone spending time on the water, Australia-wide and across the Tasman.</p> <p>National Safe Boating Week involves seven days of activities designed to raise safety awareness. It is supported by a national communication campaign aimed at getting boaties prepared for the summer season. With strong calls to action, the campaign prompts water users to have everything ready before they set off on the water.</p> <p>From 2 to 8 October 2021, the 2021 National Safe Boating Week highlighted three key aspects of safe boating—maintenance, safety equipment and wearing lifejackets.</p>

Findings 1 & 2

Finding 1: Much of the complexity and regulatory burden would be reduced if the general safety duties in the National Law, supplemented by codes of practice developed by AMSA in consultation with industry were used as the primary regulatory tool for the less risky segment of the DCV fleet. This would also allow AMSA to concentrate on the riskier segments.

Finding 2: The requirement for all DCVs to have Certificates of Survey and of Operation is unnecessary to achieve safety outcomes and has resulted in a complex and burdensome array of exemptions for less risky operations.

Risk-based regulatory framework:

While the available safety data indicates that there has been an improvement in safety outcomes since the adoption of the National Law, a wide range of stakeholders argued in their submissions to this Review that the National Law framework is unnecessarily complex and the complexity creates unnecessary regulatory burden.

This complexity is largely driven by the universal application of requirements on all DCVs within scope of the legislation to comply with prescriptive safety obligations over and above their general safety duties. This includes requirements to have:

- a unique identifier;
- a Certificate of Survey; and
- a Certificate of Operation.

The obligation of all DCVs to have Certificates of Survey and Certificates of Operations does not align with the relatively low level of risk arising from the design or operation of a large number of vessels in the DCV fleet. To avoid applying these obligations on low-risk operations, exemptions are used extensively to exclude certain operators and types of vessels from the prescriptive requirements. This leads to unnecessary complexity and imposes an avoidable regulatory burden on those who have to interpret the complex operation of the Act and Marine Orders to determine whether they need to comply with the requirements or apply for an exemption. It also diverts AMSA's limited resources to unnecessary low-risk activity in assessing applications and administering exemptions.

At the other end of the risk spectrum, there are a number of vessels that have a risk profile akin to international ships regulated under the Navigation Act. However, the National Law is the default framework for DCVs, unless such high-risk vessels opt in to the Navigation Act framework.

While the National Law standards are appropriate for the risk profile of much of the DCV fleet, the Panel is not persuaded that these standards are suitable for high-risk DCVs.

Prescription versus Flexibility

The Productivity Commission, in its report on National Transport Regulatory Reform, noted that it is important to set a regulatory approach suited to the structure of an industry and the nature of its safety risks. It argued that striking the right balance between prescription and flexibility not only helps to minimise compliance costs without diminishing safety, but also potentially improves the management of safety risks overall.

The Commission concluded that approaches to regulation should take account of which party is best placed to understand and manage safety risk. This will usually require a mix of prescription and flexibility in order to address a range of safety risks and to suit businesses of different sizes and capabilities.⁷³

⁷³ Productivity Commission: *National Transport Regulatory Reform* (Inquiry Report 2020) pages 4-5.

The Panel is of the view that a more contemporary approach to risk-based regulation in the National Law—one that ensures that regulatory requirements are proportionate to the safety risk that they pose—would deliver clear benefits in terms of safety and productivity. It would have the effect of reducing the complexity of the legislative framework, removing unnecessary regulatory burden on the regulated community and freeing up AMSA's limited resources to focus on safety outcomes, rather than rules-driven compliance and administration.

It would also provide AMSA with the ability to respond with greater flexibility to innovative and emerging technologies. The challenges of regulating in an environment of rapid innovation and change is discussed further under Findings 11 and 12.

How would a risk-based framework be implemented in practice?

In summary, the Panel proposes that the National Law, Regulations and Marine Orders be reviewed and amended to provide for the following risk-based regulatory approach:

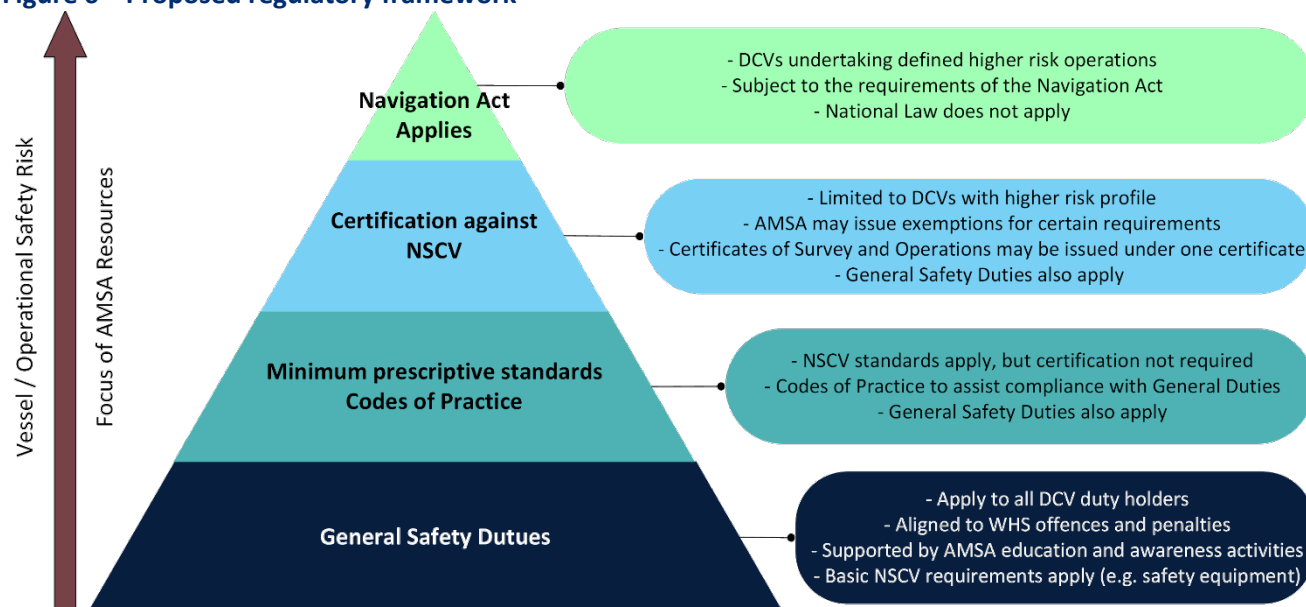
- **General Duties:** as is currently the case, all DCV owners,⁷⁴ masters, crew and passengers and other relevant duty holders under the National Law should be subject to general safety duties. General safety duties are consistent with the notion that safety should be managed by those best placed to understand and manage safety risk. If any party breaches their safety duties, AMSA may investigate such breaches and, if warranted, take action to prosecute offenders. The framing of the offences and penalties should be amended to align with similar provisions in the Work Health and Safety (WHS) Model Law.⁷⁵
- **Guidance material and Codes of Practice:** AMSA should encourage compliance with the general safety duties by publishing guidance material, including Codes of Practice, that demonstrate how duty holders may comply with their safety duties. Codes of Practice may be particularly beneficial for vessels and operations that do not warrant prescriptive regulation, but where guidance about how to comply with the general safety duties could enhance safety management (e.g., hire and drive businesses; letting of vessels through shared economy arrangements; fixed accommodation on water attached to marinas; etc.). Guidance material and Codes of Practice should be developed in close consultation with industry to ensure they reflect good industry practice and explain what may be reasonably practicable to achieve safety outcomes.
- **NSCV:** As is currently the case, the National Law will provide that DCVs of a type and class must comply with the NSCV as prescribed in Marine Orders (or Regulations).
- **Certificates of Survey and Certificates of Operation:** The National Law should be amended to provide that only those vessels of a type and class prescribed by the Regulations (or Marine Orders) would be required to hold a Certificate of Survey or Certificate of Operation. Further, the National Law should allow for AMSA to issue a single certificate that covers both survey and operations.
- **Exemptions:** AMSA should retain the ability to exempt specified persons or classes of persons or vessels or classes of vessels from the application of the National Law.
- **Surveys, Audits and Inspections:** As is currently the case, the frequency of surveys by maritime surveyors or other audits/inspections by Maritime Safety Inspectors should be based on risk.
- **Application of Navigation Act Requirements:** The Law should provide that vessels of a type and class that present higher safety risk, akin to international shipping, be required to comply with the Navigation Act.

This risk-based approach to safety regulation is depicted in **Figure 6** below.

⁷⁴ The definition of an owner of a vessel under the National Law includes someone who has overall general control and management of the vessel.

⁷⁵ The current framing of the general duties, offences and penalties in the National Law are not consistent with similar provisions in the Work Health and Safety (WHS) Model Law. The relationship between the National Law and WHS Law is discussed further at Finding 4 of this Report.

Figure 6—Proposed regulatory framework



Under this framework:

- AMSA would be the lead regulator of all duty holders that have general safety duties relating to DCVs under the National Law and enforce compliance with the NSCV (and requirements for Certificates of Survey, Operations and Competency, where applicable);
- State and Territories would remain responsible for those matters where boating officers are better placed to enforce on-water activities, including for example compliance with speed limits, navigation aids, traffic management plans, drug and alcohol use,⁷⁶ and
- WHS laws in each State and Territory would continue to apply. AMSA and WHS Authorities would apply Memorandums of Understanding (MoUs) to set out where each regulator would take the lead on particular regulatory requirements (this relationship between maritime safety and WHS law is discussed further at Finding 4 of this report).

Implicit in this approach is that AMSA should be allocating its finite resources to those parts of the industry that give rise to the greatest safety risk. AMSA in consultation with industry will need to determine the characteristic or risk profiles of vessels that are appropriate for regulation within each layer of the pyramid.

For example, small workboats and human powered vessels are likely to fall in the base (lower risk) tier of the risk-based pyramid. These DCVs would be subject to general safety duties supported by codes of practice. These low risk vessels would still need to comply with basic requirements for safety equipment for human powered vessels imposed through the NSCV. Passenger vessels and trawlers are examples of vessels that could be subject to certification requirements in addition to compliance with general safety duties. The highest risk vessels, for examples vessels carrying dangerous goods, would be required to comply with the Navigation Act and standards under that Act.

While businesses that operate small vessels on relatively safe protected waters must ensure the safety of their vessel and operations, it is not envisaged under a risk-based model that AMSA would devote significant resources to proactively regulate for these activities. Rather:

- AMSA would provide general guidance to owners (and operators) on how to manage risk in a maritime context, including through Codes of Practice;

⁷⁶ Section 6(2) of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* sets out a range of matters that remain the responsibility of State and Territory regulators.

- AMSA may investigate breaches where serious safety incidents occur and where compliance action may have the effect of deterring others in the industry from failing to take their safety duties seriously;
- Masters and crew would be required to comply with any on-water rules applied by States and Territories (such as speed, compliance with navigational markers, drugs and alcohol etc.); and
- DCV owner/operators, who are also 'Persons Conducting a Business or Undertaking' under WHS Law, must also comply with WHS requirements, including requirements to consult with workers in relation to safety hazards and risks.

The bulk of AMSA's resources under a risk-based regulatory approach would be dedicated to ensuring compliance by higher risk vessels and operations that require greater regulatory oversight through the administration of the marine surveyor accreditation scheme, audits and inspections by Maritime Safety Inspectors and investigations. Maintaining high compliance with safety requirements will have a larger material effect on safety outcomes.

Stakeholders from a range of sectors submitted that the multiplicity of regulatory instruments (i.e. Marine Orders, exemptions and standards) and the interaction between these adds to the complexity of the National Law framework and imposes unnecessary regulatory burden. Stakeholders suggested that the greatest burden of this complexity falls on smaller and medium-sized operators. Stakeholders also commented that the existing regulatory instruments are hard to navigate as they contain cross references to multiple documents and international standards.⁷⁷

The Panel's view is that the simplification of certification requirements will in part address the issue of complexity of legislation and resulting unnecessary regulatory burden. While there is already guidance on certain aspects such as the NSCV, it would be useful for AMSA to develop overarching guidance documents directed at each tier of the regulatory pyramid described at **Figure 6**. The aim should be to develop a 'one-stop' guide for each tier so that vessels in that risk category are able to more easily navigate and understand compliance requirements under the National Law as well as the marine orders/standards that apply. To reduce the multiplicity of regulatory instruments, the National Law should provide AMSA with the ability to include exemptions relating to the unique identifier, Certificate of Survey and Certificate of Operation into Marine Orders.

Recommendation 1: The law should be amended to better reflect a risk-based regulatory model that is flexible and able to adapt to innovation and emerging technologies by:

- retaining general safety duties on all parties that have a duty under the current law;
- removing the universal requirement for all DCV's to have Certificates of Survey and Operations;
- providing that vessels of a type or class specified in the regulations (or Marine Orders) be required to comply with NSCV Standards and/or hold a Certificate of Survey or Certificate of Operations; and
- requiring higher risk vessels to comply with the Navigation Act and associated international standards, including the International Dangerous Goods Code and the Standard of Training, Certification and Watchkeeping.

⁷⁷ See for example Maritime Industry Australia Limited Submission, March 2022, page 12, Australasian Institute of Marine Surveyors Submission, March 2022, page 3, Maritime Survey Australia Submission, March 2022, page 4.

Finding 3

Progressively withdrawing the existing grandfathering arrangements to the extent they impact on safety would substantially improve safety outcomes.

Current situation

Grandfathering arrangements allow a vessel to continue to meet the requirements applied to that vessel on 30 June 2013 instead of meeting all of the contemporary requirement for a new entry vessel. For some vessels this means they may never have been required to formally meet some safety standards, such as obtaining a Certificate of Survey. These arrangements are prescribed in subordinate legislation as follows:

Table 2—Grandfathering Arrangements

Grandfathering arrangements	Implemented through
Vessel design and construction standards	<p>The pre-existing design and construction standards that applied to an existing vessel under State or Northern Territory law continue to apply to that vessel.</p> <p>Existing vessels with exemptions from the USL Code or local equivalent solutions to the NSCV, and pre-USL Code vessels, can take advantage of the grandfathered design and construction standards provided the vessel does not change operations, is not modified and does not move its geographic area of operation.</p>
Survey exemptions	<p>A vessel that was exempt from the requirement to hold a Certificate of Survey, and undergo periodic surveys, at 30 June 2013 remains exempt, provided the vessel does not change operations, is not modified and does not move its geographic area of operation.</p>
Vessel crewing requirements	<p>Pre-existing minimum crewing requirements continue to apply, unless the owner/operator elects to comply with the current national standard. However, the vessel must be operated in accordance with an appropriate crewing assessment (completed by the owner/operator).</p> <p>Existing vessels with exemptions to the USL Code or local equivalent solutions to the NSCV, and pre-USL Code vessels, can take advantage of the grandfathered crewing arrangements if the vessel does not change operations, is not modified and does not move its geographic area of operation.</p>

Grandfathering arrangements		Implemented through
Certificates of competency	Existing certificates of competency are recognised within the State or Territory in which it was issued. Existing interstate endorsements are also recognised. When an existing certificate of competency required revalidation or renewal, the holder transitioned to a national certificate of competency.	Marine Order 505 / NSCV Part D/ General exemptions

At the time of transition, grandfathering of these existing state-based standards was used to facilitate transition to a harmonised National System by reassuring existing operators that they would not be any worse off. These arrangements were first flagged in the 2011 IGA's statement of intent, which stated that transitional/grandfathering provisions were being designed to ensure introduction of the National System occurs in a progressive and structured manner. The development of the National Law was predicated on the agreement that the reform would have minimum impact on the existing fleet, where possible, through preserving existing arrangements.

As the National System has matured, these grandfathered provisions mean that older vessels have little incentive to transition to modern safety standards, resulting in inconsistencies between different vessels and operators. Over time the disparity in safety standards between grandfathered vessels and non-grandfathered vessels increases, making the playing field increasingly uneven for vessels operating in the same industry. Grandfathered arrangements also discourage fleet penetration of newer 'safer' vessels.

As demonstrated in **Table 2** above, grandfathering increases difficulty in navigating requirements for the regulated community by adding an additional layer of complexity to the framework. Given the National System is now well established, and in the absence of a defined sunset date for the expiry of these provisions, the original arguments in favour of grandfathering should be re-tested against the safety implications of maintaining these in perpetuity.

Where an existing vessel makes certain changes to its operations, is modified, or moves its geographic area of operation, the grandfathering arrangements for the vessel end. Generally, this means the vessel will become a transitional vessel and must meet the transitional vessel standards, or comply fully with the NSCV in force at the time of the change. The transitional vessel standards are a combination of the USL Code and NSCV—that is, a combination of current and older recognised standards.

It is estimated that more than half the DCV fleet (approximately 16,500 vessels) remain subject to some form of grandfathering.⁷⁸ The Panel has found the task of assessing the risks and impacts of the grandfathering arrangements challenging due to the limited availability of data comparing safety outcomes for grandfathered and non-grandfathered vessels.

Views of other inquiries

The Senate Standing Committee on Rural and Regional Affairs and Transport Legislation in its report on its inquiry into the Performance of AMSA noted that, while it expects over time the regulatory inconsistencies will dissipate as older vessels go off line, there are still some in place that need to be addressed, particularly around a vessel's physical safety standards, and the adequacy of crewing arrangements.⁷⁹

⁷⁸ Australian Maritime Safety Authority Submission, March 2022, pages 7-8.

⁷⁹ Senate Standing Committee on Rural and Regional Affairs and Transport, *Performance of the Australian Maritime Safety Authority* (Report, June 2020), Executive Summary.

In its report on National Transport Regulatory Reform, the Productivity Commission recommended that COAG and AMSA should wind up the grandfathering of safety regulations under the National Law, with priority given to ending grandfathering arrangements that relate to vessel survey requirements and fire detection and smoke detection systems. The Commission recommended that grandfathering arrangements be removed where the safety benefits exceed the costs.⁸⁰

Coronial Findings

State and territory coroners have recommended over many years that older, existing vessels be required to meet contemporary standards, in order to address major safety risks associated with these vessels. Coroner recommendations stemming from these inquiries are summarised below:

In a coronial inquest in relation to the *Norlaus* in 2016, the Coroner's Court of Queensland recommended that:

AMSA require vessels formerly grandfathered to standards applicable at the start of the National Law and to which this new standard would otherwise apply, to comply at the end of a transition period no greater than 2 years.⁸¹

A coronial inquest in relation to the *Returner* in 2017 by the Coroner's Court of Western Australia recommended:

That AMSA, as the National Regulator of the National Law, should give consideration to establishing a transitional approach to ending the grandfathering of safety standards for existing vessels. Compliance with current standards in regard to vessel operations and safety equipment should be given priority.⁸²

The Coroner's report highlighted an important difference in the National Law between how 'existing vessels' and 'new vessels' are treated, in that if the *Returner* had been a new vessel, at that time it would have required an automatic stability test as part of the five-year renewal survey it was undergoing.⁸³ The Coroner subsequently recommended that AMSA give consideration to establishing a transitional approach to ending the grandfathering of safety standards for existing vessels. Compliance with current standards in regard to vessel operations and safety equipment should be given priority.

A joint coronial inquest into the sinking of the *Cassandra* and the *Dianne* in 2019 by the Coroner's Court of Queensland recommended:

Perhaps the best way forward is for the vessels without original surveyed construction plans to undergo a stability test, or at least an assessment by an appropriate naval architecture or marine surveyor at the time of any sale of that vessel. At the very minimum I would hope that each vessel have its own plans and configurations when first launched so that the skipper and crew operating that vessel knows immediately what modifications have been made to it. That may be of assistance in how they use the vessel including conditions they feel comfortable operating in.⁸⁴

A coronial inquest in relation to the *Dynasty* in 2012 by the Coroner's Court of Queensland recommended '... the need for further guidance to regulators about the application of current stability requirements to vessel constructed and compliant with the 1996 standards.'⁸⁵

⁸⁰ Productivity Commission, *National Transport Regulatory Reform* (Inquiry Report 2020), page 28.

⁸¹ [*Inquest into the death of Glenn Anthony Wilson*](#) (Coroner's Court of Queensland, Coroner Kevin Priestley, 24 May 2016), page 17.

⁸² [*Inquest into the death of Mason Laurence Carter and Murray Allan Turner and Chad Alan Fairley*](#) (Coroner's Court of Western Australia, Coroner Linton, 28 Feb 2018), page 71.

⁸³ *Ibid*, page 16.

⁸⁴ [*Joint Inquest into the presumed deaths of David Barry Chivers and Matthew Neil Roberts from the FV Cassandra and Adam Jeffrey Bidner and Zachary John Feeney and Christopher David Sammut and Eli Davey Tonks from the FV Dianne and the deaths of Adam Ross Hoffman and Benjamin Patrick Leahy from FV Dianne*](#) (Coroner's Court of Queensland, Coroner Magistrate D O'Connell, 29 August 2019), page 25.

⁸⁵ [*Inquest into the death of Nathan Kevin Robinson and Scott Tschannen*](#) (Coroner's Court of Queensland, Coroner Kevin Priestly, 10 December 2012), page 13.

Stakeholder views

The consultation aid question ‘would removing, in whole or in part, current grandfathering provisions substantially improve safety outcomes?’ solicited a diverse range of views and opinions regarding these arrangements. The Panel observed a consistent sentiment among stakeholder groups that grandfathered provisions are not fit for purpose, with this view held from a regulatory, safety or economic standpoint depending on stakeholder group.

Vessel owners and operators are generally of the view that just because a vessel does not meet today’s standards does not mean the vessel is inherently unsafe. In its submission, the Australian Commercial Vessel Operators Association supports a risk-based review rather than wholesale removal of grandfathering standards, noting the need to clearly articulate why a vessel does not meet a particular standard rather than deeming it unsafe—for example, a grandfathered vessel may not have a residual current device fitted to the electrical system, but mitigations are still available to deal with power surges.⁸⁶

There is a concern that removing grandfathering and requiring vessels to meet modern standards would make large sections of industry unviable, particularly smaller businesses. Seafood Industry Australia note in their submission that any process to force vessels that are sound and fundamentally safe to operate in their current environment into a different status would place a significant portion of the industry at risk and severely compromise many owner operator and small businesses ability to meet any new standard. Smaller operators indicated the removal of grandfathering would cripple the industry, with many not able to replace or upgrade vessels if this was required.⁸⁷

Some sections of industry felt transitional provisions were too stringent, and that these provisions may lead to diminished safety outcomes due to operators fearing safety upgrades for risk of these changes impacting a vessel’s grandfathered status. Owners and operators generally felt that the transitional arrangements adopted by AMSA in 2018 are confusing and create a disincentive to modernising the fleet due to simple upgrades potentially triggering transitional vessel provisions, which are costly and impractical for vessel owners.

The Australasian Institute of Marine Surveyors (AIMS) notes in its submission that some operators exploit grandfathering arrangements to avoid periodic inspections, which are a potential safety risk. AIMS also notes that if grandfathering were to sunset, consideration needs to be given to those vessels that could not meet transitional vessel requirements or would choose to discontinue commercial operation.⁸⁸

Survey Exemptions

Generally, vessels are required to have a Certificate of Survey to operate as a commercial vessel in Australia. A Certificate of Survey is evidence that a vessel has been surveyed and meets specified standards for design, construction, stability and safety equipment that apply to the vessel. Operators of DCVs required to have a Certificate of Survey need to undergo survey inspections at specified times and to a specified level of detail.

Exemption 02, Division 5 allows an existing vessel to not hold a Certificate of Survey under the National Law where it was not required to hold a Certificate of Survey on 30 June 2013. As vessels age, inspections ensure that they continue to meet appropriate standards. This means that a number of grandfathered vessels, which may not have been inspected for over 20 years, may now be unsafe.

AMSA advises that this issue is particularly acute in Queensland due to commercial vessels in this state not being required to hold a Certificate of Survey or to undergo periodic surveys prior to the National System. As a result, AMSA advise that some larger, passenger-carrying vessels are exempt from periodic survey requirements, as are some fishing vessels operating offshore in higher-risk operations such as trawling.⁸⁹

⁸⁶ Australian Commercial Vessel Operators Association (ACVOA) Submission, March 2022, pages 6-7.

⁸⁷ Seafood Industry Australia Submission, May 2022, pages 9-10.

⁸⁸ Australasian Institute of Marine Surveyors (AIMS) Submission, March 2022, page 4.

⁸⁹ Australian Maritime Safety Authority Submission, March 2022, page 17

It is unknown how many of these vessels are not meeting safety standards, or how severe these deficiencies may be. Therefore, AMSA do not have an accurate idea of the number and quality of vessels in the fleet. This lack of visibility impedes AMSA's ability to understand, prioritise and respond to safety issues.

Under current arrangements, a non-survey scheme for lower risk vessels also applies under the National Law. It covers vessels <12m, operating only in sheltered waters and not engaged in high-risk activities. These vessels are exempt from survey, whereas new 'survey-type' vessels, being vessels that are ≥12m, or which operate offshore, or which carry more than four passengers, or which have a high-risk attribute (such as a high deck load), are required to hold a certificate of survey. This means that the grandfathered survey arrangements which allow 'survey type' existing vessels to continue to operate without holding a certificate of survey and undergo periodic survey, are significantly different to the requirements that apply to new vessels under the National Law.

A number of stakeholders supported the removal of grandfathered survey exemptions.⁹⁰

Deficiency data obtained through vessel inspections

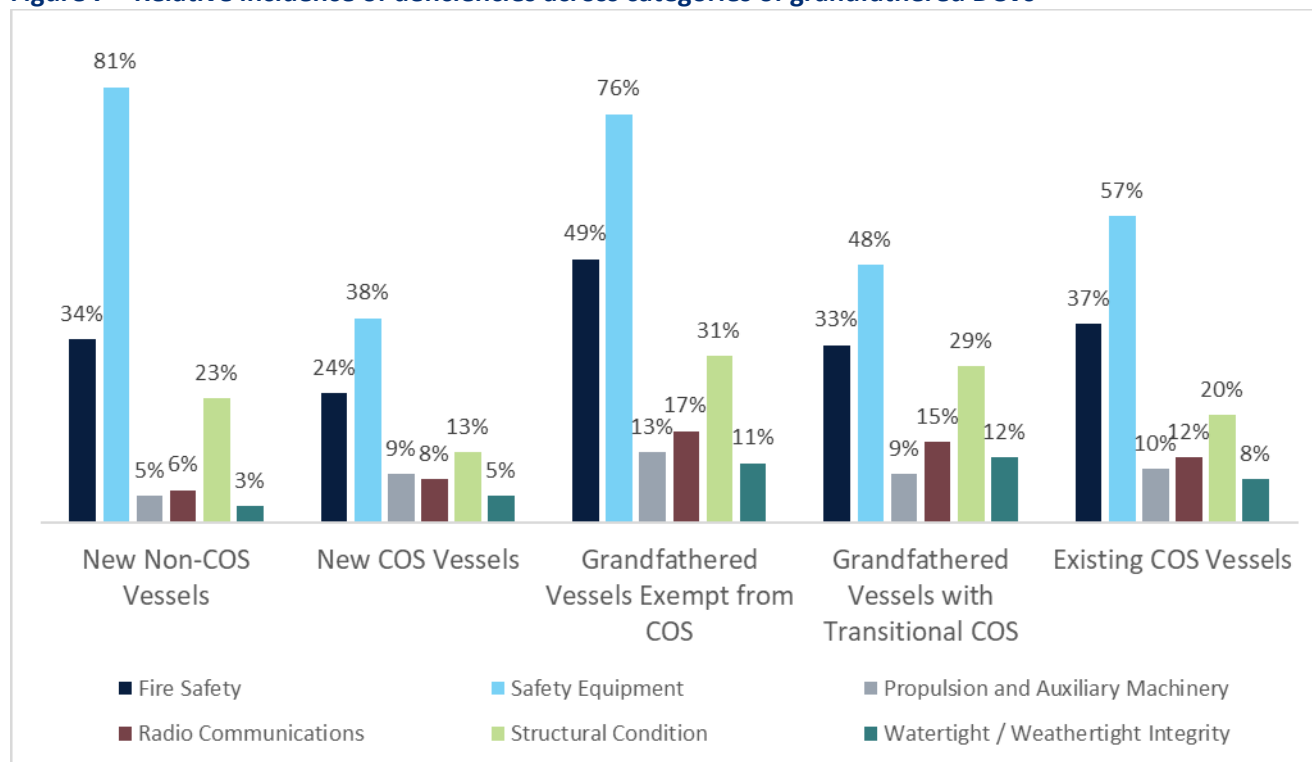
AMSA and AMSA's compliance partners—including Water Police and State and Territory marine safety agencies—conduct vessel inspections on a targeted (risk) basis as well as undertaking random inspections. Non-compliances with standards, or regulatory requirements, identified during an inspection are called 'deficiencies'. These deficiencies are recorded and categorised by vessel aspect. A faulty or non-compliant fire safety system, for example, is a 'fire safety deficiency'. Altogether, approximately 2,500 inspections of DCVs are undertaken each year. The data contained in this section is based on inspections undertaken between 1 July 2019 and 27 August 2021.

To compare the rates of deficiencies between grandfathered and new vessels, AMSA have divided the data into the following categories:

- **New non- certificate of survey (COS) vessels.** Non-survey vessels are generally <12m, operate only in sheltered waters, carry four or fewer passengers and do not have a high-risk attribute (such as carriage of dangerous goods). 'New' vessels are those which entered the fleet on or after 1 July 2013.
- **New COS vessels.** A new Certificate of Survey vessel is a vessel that entered the fleet on or after 1 July 2013 which is ≥12m, operates offshore, carries more than four passengers, or has a high-risk attribute. All of these vessels must hold a valid Certificate of Survey in order to operate.
- **Grandfathered vessels exempt from COS.** This includes all vessels that operated in the two years prior to 1 July 2013 and which were not required to hold a Certificate of Survey under the applicable State or Northern Territory law at that time. Almost 40% of existing Exemption 02 vessels are 'survey type' vessels which have been grandfathered as 'survey exempt'.
- **Grandfathered vessels with transitional COS.** A transitional vessel is an existing vessel which has been modified or changed operations or operational area. A transitional vessel is required to meet the current national standard (the NSCV), or a combination of the USL Code and NSCV, and its compliance to those standards is verified through a survey process.
- **Existing COS vessels,** being all vessels that held a Certificate of Survey in the two years prior to 1 July 2013, and which have not been modified, changed operations or changed operational areas.

Figure 7 below provides an overview of the likelihood that a deficiency was issued to a vessel in each vessel category in the areas of fire safety, propulsion and machinery, radio communications, structural conditions, watertight or weathertight integrity and safety equipment.

⁹⁰ See for example Australasian Institute of Marine Surveyors Submission, March 2022, page 4; Maritime Union of Australia Submission, April 2022, page 5.

Figure 7—Relative incidence of deficiencies across categories of grandfathered DCVs

It is apparent from **Figure 7** that the rate of deficiencies is generally higher for grandfathered vessels that are not in survey compared to vessels that are in survey. In addition, **Figure 7** shows that existing Certificate of Survey vessels are generally no more likely to receive a deficiency in these areas than transitional vessels.⁹¹

The rate of safety equipment deficiencies, particularly for vessels not undergoing regular survey (i.e. new non-survey vessels and existing Exemption 02 vessels) is high. Safety equipment deficiencies will often be issued for overdue servicing of equipment, such as lifejackets. Appropriate servicing of lifesaving appliances can be an important safety factor in the event of an incident. This high rate of deficiencies for safety equipment for vessels not subject to regular survey illustrates one of the benefits of periodic surveys—to ensure that safety equipment servicing obligations are met.

Based on previous inquiries, submissions received for this review, evidence from coronial inquests and the available data the Panel believes the ongoing grandfathering of survey requirements poses an unacceptable safety risk.

Vessel Design and Construction Standards

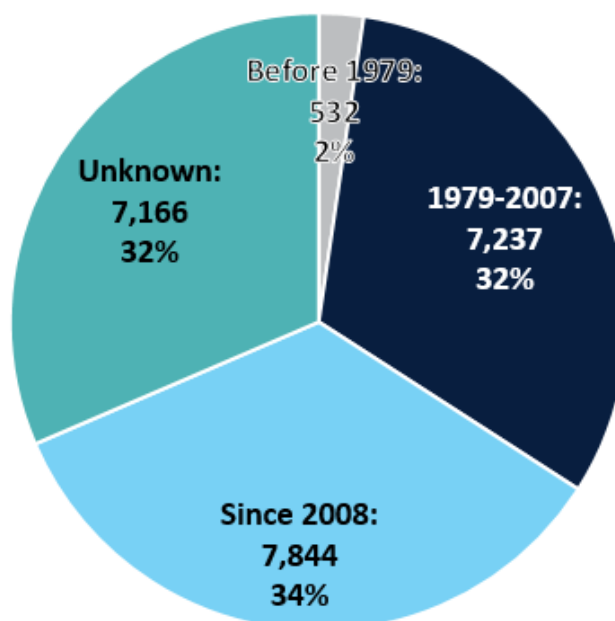
Under the grandfathering arrangements, the design and construction standards that applied to an existing vessel on 30 June 2013 continue to apply to that vessel. However, contemporary safety equipment and emergency position indicating radio beacon (EPIRB) requirements apply.

The perpetual grandfathering of vessel design and construction standards is unique to DCV regulation, and does not occur in other transport regulatory regimes in Australia. The Panel believes that, from a safety perspective, this approach does not allow AMSA to apply a risk-based approach to its regulatory activities and does not represent best practice regulation.

⁹¹ A transitional vessel is an existing vessel which has been modified or changed operations or operational area. A transitional vessel is required to meet the NSCV, or a combination of the USL Code and NSCV, and its compliance to those standards is verified through a survey process. Transitional vessels are required to hold a certificate of survey and are permitted to operate nationally within the assigned service category.

AMSA advises that more than half of the current fleet operated prior to 1 July 2013 and may be subject to a grandfathering arrangement. Looking at the build date of vessels in the fleet provides some indication of the standards to which the fleet has been built.

Figure 8—Build Date of Fleet



The community expects that all vessels—particularly those that carry passengers such as ferries—boarded by individuals in Australia are safe, and that all necessary safety precautions are in place to prevent and minimise incidents at sea. Similarly, the community expects that all employees, in all industries, can participate in a safe workplace. Due to the grandfathering of vessel design and construction standards, there may be vessels that currently do not meet those expectations.

Competitive Neutrality

By allowing the continued application of disparate state-based standards in perpetuity, grandfathered arrangements increasingly provide certain pockets of industry subject to these arrangements an element of competitive advantage. In its submission, AMSA raised concerns that grandfathering creates an uneven playing field by providing some operators of grandfathered vessels with a competitive advantage over new entrants by reducing the compliance costs of grandfathered vessels. As stated by AMSA in its submission, the grandfathering arrangements exempting survey-type vessels from periodic survey and allowing vessels to be operated without a Certificate of Survey significantly reduce the compliance costs for operators of grandfathered vessels. These cost savings inflate the value of grandfathered vessels and may create an incentive to extend a vessel's working life, therefore increasing the safety implications of the grandfathered arrangements over time as the vessels age.⁹²

Good Regulatory Practice

The perpetual grandfathering of historic standards does not align with modern, best practice risk-based regulation. Permitting the continued application of these arrangements will only further misalign regulatory oversight with risk over time.

The application of these arrangements by way of Marine Orders and general exemption is also problematic from a regulatory perspective. The grandfathering of survey requirements has been given effect to through an

⁹² Australian Maritime Safety Authority Submission, March 2022, page 20

exemption. The grandfathering of design and construction standards and crewing requirements is achieved through Marine Orders 503 and 504, as well as Exemption 02.

Under section 143 (1) of the National Law, the National Regulator may exempt from the application of this Law: (a) a specified vessel or class of vessels; or (b) a specified person or class of persons.

Section 143 (5) states that an exemption is subject to such conditions (if any) as are specified in the instrument of exemption. Section 143 (6) requires that the National Regulator must not grant an exemption, or impose conditions under subsection 5, unless the National Regulator is satisfied that the exemption concerned, taken together with the conditions to which it is subject, will not jeopardise the safety of a vessel or a person on board a vessel.

This puts AMSA in a precarious position as a regulator, whereby it needs to maintain these blanket exemptions to uphold the grandfathering commitments made in the IGA, while also being satisfied the exemptions will not jeopardise safety as prescribed under section 143 of the National Law.

Baseline Safety Requirements

The Review Panel notes the position of a large portion of DCV owners and operators and acknowledges that older grandfathered vessels may not be inherently unsafe despite not being required to comply with modern standards. The costs associated with the wholesale removal of grandfathered arrangements may not be justified in terms of safety improvements.

If the grandfathering of design and construction standards is to be removed, the Panel considers that a baseline set of safety standards would need to be established as it may not be possible for an older grandfathered vessel to meet all of the same modern standards as would be required of a new vessel.

Transitional vessel standards are set out in Schedule 1 to Marine Order 503, generally allow compliance with either the USL Code or the NSCV, and currently apply to vessels which undertake certain modifications or change operations. The transitional vessel standards appear to establish an appropriate baseline set of standards. The transitional vessel scheme is well established, being in place since 2018, and many existing vessels (including grandfathered survey-type vessels) have successfully transitioned to these standards. Industry and surveyors are now accustomed to using the transitional vessel standards.

If the transitional vessel standards are used as the baseline set of standards for phasing out grandfathering arrangements, any rectification would be for compliance with the transitional standards and not the standards for new vessels.

Minimum Safety Standards

During consultation, the Panel heard the key safety risk areas are vessel stability, fire safety and electrical safety.

Vessel Stability

Stability has contributed to a number of fatal incidents involving DCVs, mainly in the fishing vessel fleet. Stability is a particular issue for older vessels as modifications and changes to the vessel, or to its deck load, may reduce the vessel's stability over time.

Stability refers to the ability of a vessel to return to its upright position after being heeled over by wind, waves or other forces. If a vessel does not have sufficient stability, it may capsize, placing lives at risk and potentially resulting in fatalities. Stability is particularly an issue for commercial fishing vessels because:

- their nets can become hooked on objects on the sea floor, adversely affecting a vessel's stability;
 - they may have a high deck load due to the fishing tanks installed on the vessel, reducing redundant buoyancy, and
- the action of hauling in fish can place greater pressure on the vessel's stability.

Since 1 July 2013, there have been three fatal incidents in which stability has been confirmed as being a causal or contributing factor, all of which involved fishing vessels: Returner⁹³ Norlaus⁹⁴ and Cassandra.⁹⁵ Six fishing vessel crew died in these incidents, which occurred in Queensland and Western Australia. In addition, in a further three fatal incidents resulting in five fatalities—Seabring (Queensland—2016), Sea Jay Nomad (Queensland -2014) and Night Raider (Queensland -2016), a fishing vessel overturned or sank, but no concrete conclusions have been drawn as to the contributing factors at this stage. In these three incidents, stability may have been a factor, but this has not been confirmed.

Fire Safety

Fire safety requirements include means to prevent a fire from starting and/or spreading, and preserve the integrity of escape routes ('passive fire protection measures'), and means to quickly detect smoke and contain and extinguish a fire once alight ('active fire protection measures').

Currently, as a result of the grandfathering arrangements, some grandfathered pre-USL Code passenger vessels with berthed accommodation are able to continue to operate without the most basic fire safety requirements, such as smoke detectors. In addition, fires in the engine room or wheelhouse are currently the subject of a high number of reported incidents across the fleet, including for passenger vessels. In 2018 and 2019, 21 incidents involving smoke and/or fire were reported on DCVs. Eight involved passenger vessels. Of these, three required evacuation of passengers, and two involved the abandonment and complete loss of the vessels.

Although fire is not attributable to any fatalities on DCVs since the National Law's inception, the potential for catastrophic loss from fire aboard a vessel warrants consideration of minimum standards. This possibility is demonstrated through a relatively recent example in the United States, where on 5 September 2019, 34 people (passengers and crew) died when the anchored dive vessel, the *Conception*, caught fire.⁹⁶

Electrical Safety

One fatality since the commencement of the National System was found in a coronial inquiry to be caused by a lack of compliance with Residual Current Device (RCD) requirements. The incident involved the tragic death of a young and new first mate, who was electrocuted when using an electric angle grinder on board a fishing vessel. RCD requirements did not apply to the vessel under the National Law due to the grandfathering arrangements. Although the Coroner found that the vessel, as a workplace, was required to comply with RCD requirements under work health and safety law, it was clear from the coronial report that the lack of clarity regarding the RCD requirements under the National Law may have prevented the non-compliance from being identified or actioned prior to the tragedy.⁹⁷

Crewing

Appropriate crewing refers to the number of certified or uncertified personnel that are required to safely operate a vessel. Minimum crewing refers to the minimum number of certified and uncertified crew, including the master, applicable to a vessel based on length.

⁹³ See [Inquest into the death of Mason Laurence Carter and Murray Allan Turner and Chad Alan Fairley](#) (Coroner's Court of Western Australia, Coroner Linton, 28 Feb 2018).

⁹⁴ [Inquest into the death of Glenn Anthony Wilson](#) (Coroner's Court of Queensland, Coroner Kevin Priestley, 24 May 2016).

⁹⁵ [Joint Inquest into the presumed deaths of David Barry Chivers and Matthew Neil Roberts from the FV Cassandra and Adam Jeffrey Bidner and Zachary John Feeney and Christopher David Sammut and Eli Davey Tonks from the FV Dianne and the deaths of Adam Ross Hoffman and Benjamin Patrick Leahy from FV Dianne](#) (Coroner's Court of Queensland, Coroner Magistrate D O'Connell, 29 August 2019).

⁹⁶ National Transportation Safety Board, [Fire Aboard Small Passenger Vessel Conception, Platts Harbor, Channel Islands National Park, Santa Cruz Island, 21.5 miles South-Southwest of Santa Barbara, California](#) (Report, 2 September 2019).

⁹⁷ [Inquest into the death of Ryan Harry Donoghue](#) (Coroner's Court Darwin, Coroner Judge Greg Cavanagh, 3 June 2016), pages 34—37.

Under current grandfathered crewing arrangements, the minimum crewing requirements that applied to an existing vessel on 30 June 2013 continue to apply to that vessel. Grandfathered crewing arrangements only apply where the vessel continues to operate in the same manner and geographic area as it did prior to the National System, and is not modified.

Prior to the establishment of the National System, jurisdictions generally applied the USL Code or NSCV minimum crewing requirements, or specified crewing levels in their regulations. However, for a number of operation types, no Certificate of Competency was required (the operator was generally required to hold a recreational boating licence).

Crew Competency

In NSW, Queensland and the Northern Territory, certificates for crew competency were issued based on the requirements of the USL Code, while Victoria, South Australia and Tasmania applied the newer national standard, the NSCV. Western Australia applied specific requirements that were based on the USL Code, with NSCV revalidation and renewal requirements for sea service and medical certificates.

Jurisdictions also relied heavily upon issuing ‘restricted certificates’, that is certificates designed to accommodate the needs of specific industries. These restricted the holder to specific operations, such as on inland waters only, or on oyster punts or pearling vessels. Some jurisdictions had also developed their own requirements for new certificate types—such as general purpose hands and Master 5 (Sail) certificates.

Under the National System’s grandfathering arrangements, existing State and Territory certificates of competency were recognised until they expired, at which point a national Certificate of Competency was issued, based on the previous State and Territory certificate. Perpetual state and territory Certificates of Competency continue to be recognised.

Transition Flexibility

The winding back of grandfathered requirements should be accompanied by flexibility within the regulatory system to enable vessels to transition to the baseline set of standards.

Moving survey type vessels into a survey regime will require an initial survey. The initial survey would need to be phased in over a period of two to five years to avoid pressure on AMSA, surveyors and repairers, with higher risk vessels required to complete the initial survey earlier. AMSA should determine which vessels or operations are higher-risk and develop a schedule for a phased initial survey of the grandfathered fleet.

DCVs that comply with grandfathered design and construction standards should also be inspected within a five-year period, according to a phased inspection schedule determined by AMSA.

Owners should have two years from the inspection date to rectify inspection findings for compliance with the baseline (transitional) standards.

The requirement for a survey inspection would only apply to DCVs that would be required to be certified under the risk based regulatory regime proposed under Recommendation 1.

AMSA should retain the ability to exempt vessels from the baseline (transitional) set of standards on a case by case basis.

Survey costs

The costs of the proposed removal of the grandfathered survey exemptions include:

- **The cost of an ‘entry’ survey.** The cost of this survey will vary depending on the kind of survey required to be undertaken, the kind of vessel, and the availability of original vessel plans and other documentation; and

- The costs of ongoing periodic **survey**. These costs vary per periodic survey depending on the size of the vessel and the type of survey (in water or out of water). How often the vessel will need to be periodically surveyed is scaled based on risk—for example, a passenger vessel will undergo four surveys in a five-year survey cycle whereas a small workboat will undergo survey less frequently.

Although the grandfathering arrangements require the vessel to continue to meet the standards that applied to it on 30 June 2013, vessels may no longer comply with those standards due to modifications being made to the vessel and these not being verified by an accredited marine surveyor. This means there may be additional costs associated with undertaking remedial work where the applicable standard was not met—for example to bring a vessel's stability up to the standard that already applies to the vessel (in the event of modification), and costs of repairing electrical systems. This may mean bringing a vessel into survey may be costlier for some than others, regardless as to which standard is applied to the vessel. Further, if changes are also made to the standards that an existing vessel must meet (see below), then there may be additional survey-related costs on account of additional inspections and/or documentation needing to be prepared.

It is expected that this change will predominately affect survey-type grandfathered vessels operating in Queensland, however there may also be impacts for a small number of other operators in other states which are not covered by the new National System non-survey scheme—for example class 2 or 3 vessels operating close to shore in Western Australia and the Northern Territory, as well as some larger class 2 vessels in New South Wales.

Design and Construction Standards

The application of more contemporary standards to an older vessel is likely to impose significant costs. The costs will be driven by the size and type of vessel, the extent to which it already complies with the requirements and how it has been maintained, and of course, what standards the vessel will be required to meet. Further, rates for survey and repair work are set by private businesses and therefore can range considerably between accredited marine surveyors and the like. As such, it is very difficult for AMSA to be able to estimate what the costs with any changes may be. Stakeholder consultation, including with accredited marine surveyors, on potential costs will be essential.

Crewing

The cost impact of requiring operators currently exempt from the Certificate of Competency requirements to obtain a Certificate of Competency will depend on what will be required of persons who do not hold a Certificate of Competency but have been operating a DCV for many years. Further training may be required by some crew to upgrade their skills. Where appropriate, submitting a statutory declaration on their experience may be less costly than undertaking a course.

Risk-Based

The Panel notes that if its recommendation to adopt a more risk-based regulatory framework (refer finding 1 and 2) is adopted, not all vessels will automatically be required to hold a Certificate of Survey and Certificate of Operation as a result of grandfathering arrangements being wound back. Under a re-aligned risk-based framework, smaller vessels with lower risk characteristics are unlikely to be required to undergo survey and may only be required to meet the general safety duty.

Industry Assistance

It is clear from consultation and the available data that the removal of grandfathered arrangements will have a significant impact on the financial viability of some operations. This impact will likely be concentrated in the locations, industries and operations where grandfathering was most prevalent at the time of transition. The National System was formed on the understanding that, where a vessel was not modified or its operations changed, that vessel could continue to operate in accordance with its existing state based regulatory requirements which were in place at the time of transition. In light of the fact the removal of grandfathering arrangements would be a significant change to policy set out in the IGA, the Panel is of the view that the

Australian Government should make available some form of assistance to industry to help transition the DCV fleet that is impacted by the removal of the grandfathered arrangements to modern safety standards.

The assistance could be by way of 'cash for transition', where the government offers to compensate in full or part owners who retire older vessels unable to meet modern standards. Alternately, some form of subsidisation of the cost of new vessels or major upgrades to existing vessels may be considered. Ultimately, the method and quantum of assistance is a matter for Government.

The Panel will consider the cost impacts of the removal of grandfathering arrangements on industry in greater detail in Phase 2 of the Review.

Recommendation 2: The grandfathering arrangements that are a risk to safety should be wound back in accordance with a phased risk-based program.

- All existing DCVs subject to grandfathered design and construction standards should meet acceptable baseline set of design and construction standards based on the current 'transitional standards' within seven years of implementation of this change.
- DCVs that would be required to be certified under the risk-based regulatory regime proposed under Recommendation 1, and that are subject to grandfathered survey requirements or otherwise subject to grandfathered design and construction standards, should undergo survey inspection to assess gaps and requirements to the baseline design and construction standards.
 - These inspections should occur over a two to five year period, with higher risk vessels/operations given greater priority for early inspection
 - Owners should be required to rectify inspection findings within two years of inspection
- Grandfathered crewing and crew competency arrangements should be phased out within five years of implementation of this change.
- The Australian Government should establish and fund an Industry Assistance Package with a suite of incentives to assist attaining these standards.

Finding 4

There is a high level of confusion within the industry about the relationship between marine safety law and work health and safety law.

Feedback from industry during consultation was that there is considerable confusion about the delineation between ‘marine safety’ as regulated by AMSA and ‘work health and safety’ as regulated by WHS Authorities.⁹⁸ Further, industry participants were concerned that they needed to report to two ‘masters’, creating uncertainty and unnecessary regulatory burden.

There are numerous examples of high-risk industries that are subject to both WHS law and industry specific safety legislation. This reflects societal concern about the potentially catastrophic consequences for human health and safety in high-risk industries that fail to effectively manage risk, or favour production over safety. In the transport sector, industry-specific safety legislation applies to the maritime, aviation, rail, and heavy vehicles sectors.

The purpose of applying industry-specific safety laws in high-risk industries is typically to:

- apply more targeted and, often, prescriptive obligations on participants in the industry (e.g. the requirement to have a Certificate of Survey); and
- to provide for an industry-specific safety regulator with expertise and knowledge about the types of hazards that give rise to safety risk in that industry and good practice in managing those risks (e.g. AMSA).

In all these regimes, operators must comply with both the WHS law and the industry-specific safety laws.

This is to ensure that all of the obligations in WHS law are met by duty holders in all industries (including, for instance, the requirement to consult workers in relation to risks; the rights of workers to cease unsafe work; prohibitions on discriminatory, coercive and misleading conduct etc.).

Rationale for General Safety Duties in the National Law

To minimise duplication in the oversight of safety risk between industry specific regulators and jurisdictional WHS Authorities, the general safety duties from WHS law are usually replicated in the industry specific law.

This is reflected in Part 3 of the National Law which is framed around general safety duties relating to DCVs. The duty holders include: owners, designers, builders and suppliers, masters, crew, passengers and other persons who embark, board or disembark from a DCV.

The general safety duties in the National Law are, by design, similar to the general duties in WHS Law, but are particularised to the DCV industry.

For example, under WHS law, an owner of a DCV must, as a Person Conducting a Business or Undertaking, ensure, so far as is reasonably practicable, the safety of its workers and others put at risk by its business. Under the National Law, that same owner must, so far as is reasonably practicable, ensure the safety of the vessel, marine safety equipment that relate to the vessel and its operations. The duty under the WHS law is broader than under the National Law. But in the absence of the National Law, DCV owners would still have the duty to manage the risks around the safety of the vessel and its operations.

So, while the framing is similar, the focus of the duty in the National Law is around maritime related risks. Broadly this means that AMSA can focus on regulating for maritime related safety risks while the WHS authority can focus on non-maritime related safety risks. In sum, the purpose of replicating these duties in the National Law is to give AMSA jurisdiction to regulate over safety and risk management in the DCV context.

⁹⁸ Work Health and Safety legislation is administered by authorities at the State and Territory level. For the purposes of this report, these agencies are collectively referred to as “WHS Authorities”.

Hypothetical Case Study:

A company operates a fishing fleet out of a port in Western Australia. The Company's head office is in Broome.

A Master of one of the company's vessels is injured when she walks through a construction site at the company's headquarters in Broome.

The incident is not related to the safety of a vessel or its operations. AMSA therefore does not have jurisdiction to investigate this matter under the National Law. In accordance with an MOU between AMSA and WorkSafe WA, the incident is investigated by WorkSafe WA and AMSA plays no role in regulating the matter.

Around the same time, a crew member of another vessel in the fleet is injured when he slips from the deck of the vessel and falls into the ocean. The incident is related to the safety of the vessel, its equipment and operation. Both AMSA and WorkSafe WA have jurisdiction to investigate this matter for a potential breach of general duties under the National Law and the *Work Health and Safety Act 2020* (WA), respectively. However, in accordance with the MoU between AMSA and WorkSafe WA, they agree that AMSA will lead on the investigation as the incident related to safety in a maritime context, and AMSA is best qualified and placed to investigate the matter. This decision avoids duplication of effort and unnecessary confusion and complexity.

Relationship between the National Law and WHS Law

The National Law Act provides that the National Law does not apply to the law of a state or territory in so far as it relates to a range of matters, including 'workplace health and safety'.⁹⁹ This exclusion has led some to argue that WHS is a different concept to 'marine safety'. In particular, that WHS relates to worker or employee safety while marine safety refers to the safety of vessels.

The Panel does not agree with this view. The reforms to the WHS law a decade ago introduced a broad approach to safety regulation that moved away from a focus on employees only, and to one where there is an obligation on a business to ensure, so far as is reasonably practicable, the health and safety of any worker (whether directly employed by the business or not) and to protect other persons from risks associated from work activities. This can include customers, visitors to workplaces or even passers-by. Ensuring the safety of any worker or other person put at risk by a business is therefore applicable to commercial owners and operators of DCVs.

Rather than there being a distinction between maritime safety and WHS, the Panel's view is that maritime safety can be viewed as a sub-set of WHS. That is, it relates to the obligation to ensure safety, so far as is reasonably practicable, in a maritime context.

As described in the case study above, a breach of a general safety duty under the National Law is likely also to be a breach of the WHS Law. The application of the National Law effectively gives AMSA jurisdiction to investigate and pursue breaches of such duties under its legislation rather than having to refer the matter to a relevant WHS authority.

To avoid duplication of effort and confusion within the industry, it is therefore important that the MoUs between AMSA and WHS Authorities set out in practical terms which regulator will take the lead where there are breaches of general safety duties i.e. to give greater clarity around where the matter falls within the jurisdiction of AMSA (i.e. relates to the safety of a vessel, its equipment and operation).

The examples used in the case study above appear relatively clear about which laws would apply, and which regulator is better placed to enforce the law. However, there are understandably practical examples where there are shades of grey.

⁹⁹ Section 6(2)(b)(xxi) of the National Law Act.

Some examples that have arisen during the review include:

- the safety of workers and others while a vessel is being maintained in dry dock where the hazard or risk is not related to the vessel, its equipment or operation;
- the mental health and well-being of a crew member;
- the safety of vessels used as accommodation but permanently fixed to a marina;
- when a vessel is in port and reprovioning whilst tied up (i.e. not at sea); and
- heavy lifts on a barge that are maritime specific (this has all the same lifting of a land-based crane and similar stability considerations).

In the absence of precedent set by courts, these shades of grey need to be practically managed between AMSA and the WHS Authorities. This is done through existing MoUs between AMSA and the respective WHS Authorities in each State and Territory. The Panel is of the view that these MoUs could be enhanced by including a set of principles against which decisions about which regulator will take the lead on matters can be assessed. That is, that consideration should be given to:

- whether the matter falls within the scope of the National Law and / or the WHS Law (noting that some matters may fall under both—see discussion around general duties above);
- where the matter may be subject to oversight by both the National Law and WHS, which regulator is best placed to manage the matter and secure safety outcomes (in terms of geographic proximity, expertise and capability); and
- what outcome minimises the regulatory burden on industry and confusion within industry.

In the Panel's view, these principles point to AMSA, generally, taking the lead on 'on-water' safety issues. Effort should also be made to explain this relationship as clearly and simply as possible to the regulated community so they can understand their obligations and the focus of both AMSA and WHS Authorities in the regulation of safety.

Recommendation 3: AMSA should:

- review its Memorandums of Understanding with State and Territory WHS Authorities to include principles to apply to decisions around which regulator is to lead on safety duties held by persons in the maritime industry; and
- reflect these in communications and guidance to industry explaining the rationale for the dual operation of the National Law and WHS regulation, and how AMSA and WHS Authorities work practically to reduce any duplication of effort and regulatory burden, including reporting requirements.

Finding 5

The current framework provides a comprehensive range of enforcement powers for breaches of safety requirements. However, the formulation of the offences and penalties for breaches of general safety duties differs from similar provisions in the WHS law and, as a result:

- the low levels of penalties that can be imposed by the courts limit their deterrence effect; and
- undermines the effectiveness of AMSA as the safety regulator of domestic commercial vessels.

At the time that the National Law was being developed, the federal, state and territory governments were also developing a Model WHS Law, but the timing didn't allow the two Bills to be fully aligned. As a result, while the formulation of the National Law duties are broadly consistent with the Model WHS Law, the offence and penalty provisions are not.

Table 3 provides one example of how the offences and penalties differ for a breach of the general safety duty of the owner of a vessel. Similar differences exist in the offences and penalties for other duty holders. For an offence committed on or after 1 July 2020, the value of a Commonwealth penalty unit was \$222.

Table 3—Comparison of offences and penalties structure in the National Law and Model WHS Law respectively for a breach of a general safety duty by the owner/operator of a DCV

DCV National Law (sections 12 and 13)		Model WHS Law (sections 19 and 31–33)	
Offence	Penalty	Offence	Penalty
Intend the act/omission to be a risk to safety	Individual 2 years imprisonment 1,800 penalty units \$399,600 Body Corporate 9,000 penalty units \$1,998,000	No equivalent offence	
Reckless as to whether the act/omission is a risk to safety	Individual 200 penalty units \$44,400 Body Corporate 1,000 penalty units \$222,000	Reckless as to the risk to an individual of death or serious injury	Individual 5 years imprisonment \$600,000 Body Corporate \$3,000,000
Negligent as to whether the act/omission is a risk to safety	Individual 120 penalty units \$26,640 Body Corporate 600 penalty units \$133,200	The failure exposes an individual to a risk of death or serious injury	Individual \$300,000 Body Corporate \$1,500,000
The act/omission contravenes the duty	Individual 60 penalty units \$13,320 Body Corporate 300 penalty units \$66,600	The person fails to comply with their duty	Individual \$100,000 Body Corporate \$500,000

The lack of alignment between the Model WHS Law and National Law means that AMSA has to meet a higher hurdle to establish the most serious of offences under the National Law, that is, that there is an intent on the part of the duty holder. Having done so, the penalty for a breach under the National Law is significantly less than would apply under Model WHS Law.

Hypothetical Case Study:

A company operating charter tours on Sydney Harbour fails to maintain its vessels in accordance with acceptable industry standards in an effort to reduce costs. The steering mechanism on its charter boat fails and it collides with a sailing boat resulting in serious injuries to both charter passengers and the crew of the sailing boat.

In accordance with an MoU between AMSA and SafeWork NSW (the WHS Regulator), AMSA undertakes a safety investigation under the DCV National Law and recommends to the Commonwealth Director of Public Prosecutions (CDPP) that the company be prosecuted for the most serious offence against its general safety duty to ensure, so far as is reasonably practicable, the safety of the vessel (section 12, National Law).

If the investigation is unable to uncover sufficient admissible evidence to prove the high burden that the company 'intended' its poor maintenance practices to be a risk to the safety of its passengers or the charter vessel beyond a reasonable doubt, the CDPP would be unable to pursue the highest fine under the National Law of \$1,998,000 or seek a custodial sentence for any individual.

If the evidence established that the company was reckless as to whether the poor maintenance practices were a risk to the safety of passengers or the charter vessel, the maximum penalty available to a sentencing Court would be a fine of \$222,000. Had the action been taken under the state WHS law, the offence of acting recklessly could have resulted in a fine of up to \$3,000,000 for the owner/operator (as a Body Corporate), and imprisonment of up to 5 years and/or a \$600,000 fine for any officer of the company who may have breached the officer's duty to exercise due diligence.

To rectify this anomaly, Schedule 2 of the *Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments) Act 2012* (Consequential Amendments Act) proposed amendments to the National Law to align the offences and penalties under the National Law with the Model WHS Law. These amendments have not come into force because their commencement relies on the Minister being satisfied that each State has passed laws that correspond substantially to Part 2 of the *Work Health and Safety Act 2011* (WHS Act 2011). Since 2011, all States and Territories, with the exception of Victoria, have adopted the Model WHS Law.

The Panel is of the view that a substantial alignment of the offence and penalty provisions in relation to breaches of general duties in the National Law with similar breaches in WHS legislation would rectify the anomaly that a breach of a safety duty under the National Law would incur much lesser penalties than if action was taken under the WHS law.

Some further amendment may be necessary to further align the relevant offence provisions in the National Law with those in the WHS Act 2011, for instance to make it clear that each offence under the National Law is an offence of strict liability unless otherwise expressly provided (for equivalence to section 12F(2) of the WHS Act).

Recommendation 4: The offences and penalties in the National Law should be aligned to those in the WHS law to the extent practical.

Finding 6

AMSA's enforcement powers could be further enhanced so that it has an effective range of powers to support a risk-based, targeted compliance and enforcement approach.

A contemporary, risk-based approach to safety regulation relies on the regulator having access to a graduated array of enforcement tools and associated penalties that are proportionate to the nature of the breach of regulatory obligations.

While the commencement of Schedule 2 of the Consequential Amendments Act could significantly enhance the offences and penalties prescribed under the National Law, this Review identified a number of gaps in the provisions of the National Law. Addressing these gaps would require further amendments to the Law.

Officer Due Diligence Obligations

WHS Law provides that 'officers' of a body corporate (i.e. those people who effectively make decisions on behalf of the corporate entity) must exercise due diligence in ensuring the corporate entity meets their safety duties. This means that the obligation to ensure safety rests not only with the corporate entity, but with those people who determine the way in which risk is managed in the business. This effectively 'lifts the corporate veil' and require officers to exercise due diligence in ensuring that the business does not put the health and safety of people at risk.

There are no equivalent provisions to officer due diligence under the current National Law. This means that individuals under the National Law can only be prosecuted for the most serious offence (to intend an act or omission to cause harm). Further, the Panel understands that, if the owner is a body corporate, only the body corporate can be prosecuted for contravening the general safety duty.

The commencement of Schedule 2 of the Consequential Amendments Act would introduce to the National Law the concept of an 'officer'. However, it is unclear how the officer duties are linked and whether an officer could be prosecuted for a breach of an owner's duty under the National Law.

To remove any doubt, the National Law should explicitly refer to an officer's obligations to exercise due diligence to ensure that the owner of a DCV complies with their safety duties under the National Law.

Scaling of infringement notice penalties

Infringement notice penalties under the National Law are higher than in other transport safety regimes. This potentially indicates that the penalties are not in line with community expectations and may not be commensurate with the risk or harm caused by the offence. Further, a disproportionately high penalty amount may create a barrier for marine-safety inspectors to issue infringement notices for lower-risk offences and also result in non-payment or the penalty being contested in court.

For most National Law Act offences, the infringement notice penalty is \$2,640. This is substantially higher than infringement notices in the other safety regimes—for heavy vehicles, infringement notices are generally \$172—\$1149;¹⁰⁰ in rail safety, infringement notices are \$500—\$2,000; in workplace health and safety, they range from \$144—\$720 (in NSW and SA); and in civil aviation they range from \$210—\$1,050.

The National Law Act does not provide the flexibility to 'scale' the penalty amount to the nature of the offence. Instead, subsection 138(2) of the National Law fixes the penalty amount to one-fifth of the maximum penalty that a court could impose on a person as a penalty for that offence.

¹⁰⁰ National Heavy Vehicle Regulator, '[Penalties and infringements](#)', National Heavy Vehicle Regulator, 2021, accessed 18 May 2022.

AMSA submitted that the National Law needs to be amended to allow for infringement penalty amounts to be scaled rather than being pegged at one-fifth of the maximum penalty for an offence. AMSA noted that the current inflexibility leads to penalties that are higher than in other safety regimes, acting as a barrier to safety inspectors issuing certificates. Another confidential submission reaffirmed that the National Law is currently inflexible in relation to infringement notices.

The Panel considers that amending the National Law so that infringement notice penalties can be up to, rather than equal to, one-fifth of the maximum penalty a court could impose on a person as a penalty for that offence will have the effect of bringing those penalties in line with community expectations as well as allowing for those penalties to be scaled by AMSA commensurate with the consequences of the safety breach. The Explanatory Memorandum for the Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 noted that the intent of the provision was to allow for the effective enforcement of the National Law without imposing an unnecessary burden on the court system.¹⁰¹ In the Panel's view, this is now best achieved by allowing infringement notices to be up to, rather than equal to, one-fifth of the maximum penalty a court could impose. This approach is also consistent with the Navigation Act which provides that infringement notice penalties must not exceed one-fifth of the maximum penalty that a court could impose on a person for a contravention of a provision.¹⁰²

Unsafe or negligent navigation

Prior to the National Law, State and Territory commercial vessel legislation included the offence of negligent navigation. Such an offence placed a broad obligation on the master or operator of a vessel at any point in time not to operate the vessel unsafely, negligently or recklessly.

The current drafting of the National Law would only capture 'unsafe navigation' if it was done by the master of the vessel. Unsafe navigation by a crew member may fall within the scope of the general duty on crew, depending on the circumstances. However, if the person operating the vessel was the hirer of the vessel, any unsafe, reckless or negligent actions would not fall within the current offence provisions.

AMSA submitted that there is a gap in the current offence provisions as there is no offence to capture unsafe navigation for hirers of vessels. This gap also extends to passengers or special personnel on board the vessel. AMSA noted that there have been cases of hirers of DCVs operating in a dangerous manner which could have resulted in injury or death to others.

Limitation period for bringing prosecution cases

The National Law currently imposes a limitation period of 12 months to bring a prosecution action. This limitation period applies to all offences except intentional breaches of the general safety duties. This contrasts with the WHS Act where the default limitation period is two years with allowances for other factors such as whether a coronial inquest is being held. A shorter limitation period may mean that the Commonwealth is unable to prosecute offences due to the time-consuming nature of investigations.

The Senate Inquiry into the Performance of AMSA also considered this issue and recommended that the limitation period for bringing non-custodial charges be extended from 12 months to two years. This was on the basis that it would enable AMSA to better 'enforce the National Law and take prosecutorial action against serious safety breaches which pose a threat to health and safety'.¹⁰³

AMSA noted that the 12-month limitation period acts as a significant barrier to prosecution. This is heightened in situations such as where AMSA only becomes aware that an offence was committed sometime after the fact and where a police, coronial or other report is being prepared to inform the decision to prosecute.

¹⁰¹ National Law Bill, Replacement Explanatory Memorandum, page 72.

¹⁰² Section 305(2) of the Navigation Act.

¹⁰³ Senate Standing Committee on Rural and Regional Affairs and Transport, *Performance of the Australian Maritime Safety Authority* (Report, June 2020), page 58

The CDPP also submitted that the 12-month limitation period makes it difficult to prosecute offences. The CDPP noted the steps involved in bringing a prosecution include investigating the alleged offence, compiling a brief of evidence, seeking pre-brief advice, referring a brief to the CDPP and the CDPP then assessing the evidence and issues involved in the matter. These processes take time and are further impacted by the fact investigations for National Law offences are complex and typically require engaging experts as well as working with multiple agencies.

Power for courts to suspend or revoke certificates

AMSA submitted that the National Law does not currently empower a court to suspend a person's certification, such as their Certificate of Competency or Certificate of Operation, even where the court thinks that doing so would be in the interests of safety. While AMSA has the power to revoke and suspend certificates, this is subject to show cause processes.¹⁰⁴ This is problematic as a court may convict someone of an offence under the National Law but then cannot prevent that person from working on, or operating a vessel. This may lead to repeated instances of unsafe behaviour that put the community at risk. Greater efficiency and certainty (including for the certificate holder /offender) would be delivered if courts had the power to suspend a person's certification.

The Panel considers that the National Law can be further improved to address the gaps identified by AMSA, the CDPP and other stakeholders. Doing so would enhance AMSA's ability to take a graduated, risk-based approach to compliance and enforcement.

Recommendation 5: The National Law should be amended to:

- explicitly refer to an officer's due diligence obligation to ensure that the owner of a DCV complies with their safety duties under the National Law;
- allow scaling of infringement notice penalties;
- fill a gap in the law relating to negligent navigation;
- align the present limitation period on commencement of prosecution action with WHS law; and
- introduce a power for the courts to suspend or revoke certificates.

¹⁰⁴ Section 72, National Law.

Finding 7

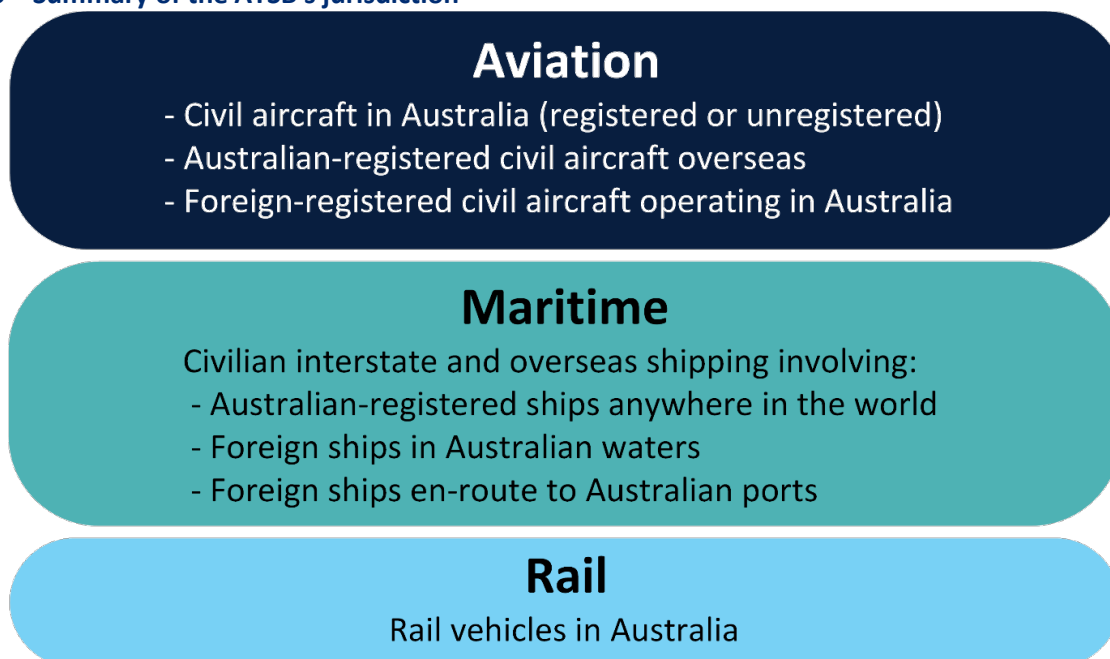
Expanding the ATSB's role to include DCV safety incidents would provide an independent review of systemic safety issues that would support enhanced safety outcomes.

The ATSB is an independent statutory agency of the Australian Government. It is governed by a Commission and is entirely separate from transport regulators, policy makers and service providers. Its role as a 'no-blame' investigator is to improve transport safety through the independent investigation of transport accidents and other safety occurrences; safety data recording, analysis and research; and influencing safety and action.

The ATSB's jurisdiction covers accidents and incidents in aviation, rail and maritime transport modes. Their maritime jurisdiction is limited to civilian interstate and overseas shipping. The ATSB has conducted a small number of short DCV investigations demonstrating capability,¹⁰⁵ but does not have a mandated role or funding for the investigation of DCV incidents as is the case with other transport modes.

Previous inquiries and several submissions to the consultation process recommended the ATSB should undertake a more substantial role in investigating maritime accidents. A summary of the ATSB's jurisdiction is as follows:

Figure 9—Summary of the ATSB's jurisdiction



'No-Blame' investigation

In accordance with the *Transport Safety Investigation Act 2003* (TSI Act), the ATSB cannot apportion blame, assist in determining liability or, as a general rule, assist in court proceedings.¹⁰⁶ Its sole focus is the prevention of future accidents and the improvement of safety. The ATSB is also required to be independent, in the interests of avoiding conflicts of interest and external interference in its role. The ATSB is able to identify systemic safety factors that other entities cannot or do not consider, including within the regulator. Submissions have consistently argued that maritime safety would be enhanced if AMSA's role as the regulator was supplemented by an expanded role for the ATSB as an independent no-blame investigator.

¹⁰⁵ Australian Transport Safety Bureau, [Safety Investigations and Reports](#), Australian Transport Safety Bureau, 2022.

¹⁰⁶ The only exception is where a Coronial inquest is called. See the ATSB's guide for Coronial inquests at <https://www.atsb.gov.au/publications/2011/a-guide-for-police-and-coronial-officers/>.

Where the ATSB determines it will investigate a safety occurrence, it may conduct short, defined, systemic or major investigations, aimed at determining the key safety factors and issues and any relevant safety messages. If a transport safety occurrence does not warrant an investigation, it can produce a short summary of the event known as an 'Occurrence Brief'. It also produces safety studies that use ATSB transport safety information over a longer timeframe (often ten years) to provide insights into current and future trends in transport safety.

Several respondents supported expanding the ATSB's role to include DCV safety. For example, in their response, Seafood Industry Australia stated a "no blame" approach to safety investigations is supported to improve and further enhance a safety culture'.¹⁰⁷

The Australian Maritime College stated in their response:

The role of the... ATSB's as an independent statutory agency (separate from transport regulators, and without apportioning blame or determining liability) and AMSA as a statutory authority (Australia's national maritime regulator) are viewed as complimentary, and together provide a means of incident analysis, and separately a framework to pursue compliance and enforcement. The no-fault nature of ATSB investigations, and the inadmissibility of ATSB findings in legal proceedings by a Regulator means that regulatory bodies probably need to maintain their own investigative function. If, however, the expansion of the ATSB's role as described in the question was through additional funding or resourcing, with no disadvantage to the resourcing or capability of the Regulator, the lessons which could be learned from ATSB reports of DCV investigations would certainly provide improved safety outcomes.¹⁰⁸

Similarly, the Maritime Union of Australia recommended:

...that the ATSB's role and resources be expanded to encompass all maritime incidents, in Australia, including Domestic Commercial Vessels. The ATSB must also be directed to identify organisational failures leading to incidents, including vessel regulation, seafarer qualifications and training, the application of safety management systems, and seafarer fatigue.¹⁰⁹

Reporting

A concern repeatedly raised during consultation was that safety incidents are being under-reported due to a fear of possible enforcement action by AMSA. In their submission, Maritime Industry Australia Limited stated "There are many circumstances whereby, despite operators conducting their own investigations into incidents, upon reporting such an incident, they find themselves the subject of enforcement action. In such circumstances, there can be no demonstrable safety benefit to undertaking compliance action, but it certainly serves to discourage future reporting and in the long term, can have a perverse effect on the targeting of compliance resources".¹¹⁰

The ATSB allows confidential reports to be submitted by telephone, email, fax, or post. Any person may report a reportable safety concern, be they a member of the marine industry or the public. Reportable safety concerns include (but are not limited to):¹¹¹

- Procedures, practices or conditions that endanger the safety of marine operations, e.g. unsafe navigation, unsafe cargo storage, vessel condition, or lack of training;
- Non-compliance with legal requirements relating to radio, training or fire prevention; and
- Anything else not reportable under a mandatory reporting scheme that could endanger safe marine operations.

¹⁰⁷ Seafood Industry Australia Submission, May 2022, page 13.

¹⁰⁸ Australian Maritime College Submission, March 2022, page 2.

¹⁰⁹ Maritime Union of Australia Submission (Attachment 3), July 2019, page 11.

¹¹⁰ Maritime Industry Australia Limited Submission, March 2022, page 9.

¹¹¹ Australian Transport Safety Bureau, '[REPCON- Marine Confidential Reporting Scheme](#)', Australian Transport Safety Bureau, 7 March 2019, accessed 20 May 2022.

Public benefit

Through its independent investigation function for the rail and aviation sectors, the ATSB has provided these sectors and their regulators important insight into broader systemic issues which traditional ‘compliance focussed’ regulators do not produce. The benefits of these investigations, as well as the broader ATSB trend analysis and safety issues raised are not attributable directly to any single individual. Rather, the national reach of the ATSB and interconnectedness of modern transport systems means the benefit of safer transport systems is realised by all Australians.

The Panel notes that some review submissions raised concern that the burden of increasing ATSB funding might fall on industry. For example, in their response, Spencer Gulf & West Coast Prawn Fisherman’s Association Inc. stated:

Any additional bodies introduced to the framework would need to be incorporated into the current regulatory processes. There doesn’t need to be any further layers of complexity. We are not familiar with how the Australian Transport Safety Bureau service would be applied or charged for, so if this was to be a consideration that would need to be optional and not an additional expense to industry.¹¹²

Western Australian Fishing Industry Council (WAFIC) said ‘...any move to a new process such as the ASTB [sic] will require an understanding of costs and how those costs are attributed’.¹¹³

The Panel believes there is a demonstrable public interest in the ATSB adopting an independent investigation function for DCVs. The optimal size of this function in terms of the quantum of investigations conducted is less clear.

State and Territory ‘No-Blame’ investigators

As indicated by the NSW Office of Transport Safety Investigations (OTSI), the New South Wales and Victorian Governments retain capacity for independent ‘no-blame’ investigations through OTSI and the Chief Investigator Transport Safety (CITS) respectively. Under NSW Legislation, OTSI’s remit for DCVs is defined to include vessels that carry eight or more passengers for a fare. Under Victorian legislation, CITS has the power to investigate any transport safety matter. Both of these organisations have previously investigated DCV safety independently of the ATSB.

OTSI and CITS are predominantly focused on managing the safety of passenger vessels operating within their jurisdictions. There is currently no collaboration between the ATSB and these agencies in the same way that there is for rail under the national transport safety system. In commenting on a potential expanded ATSB role, OTSI noted in its response:

Perhaps the focus should initially be on identifying where independent safety investigation would provide the greatest safety benefit. This may be more easily answered once the scope of the safety regulatory framework for commercial vessels is clarified through this review; and

Once this remit is clear, the value of independent safety investigation could then be properly considered... existing arrangements in NSW and Victoria for independent safety investigation for domestic commercial vessels would need to be considered in any final scope for independent investigation and the institutional arrangements needed to support it.¹¹⁴

While an ATSB role in DCVs would consider safety incidents and trends in the national context, OTSI and CITS remit is limited to NSW and Victorian safety outcomes respectively. Where possible, duplication in effort should be minimised and use of interchangeable resources be maximised where appropriate. The ATSB, OTSI

¹¹² Spencer Gulf & West Coast Prawn Fisherman’s Association Inc. Submission, March 2022, page 2.

¹¹³ Western Australian Fishing Industry Council Submission, March 2022, page 8.

¹¹⁴ Office of Transport Safety Investigations Submission, March 2022, page 6.

and CITS should negotiate and establish MoUs for the undertaking of investigations and the exchange of information where this can maximise safety outcomes and make best use of existing resources.

Duplication

Currently, the TSI Act allows DCV operators to meet their reporting obligations by submitting incident reports to either the ATSB or AMSA. Typically, vessel owners and operators are also required to provide incident reports to AMSA as per the National Law and other regulatory obligations. Reports are triaged by AMSA and those that are relevant are escalated to the ATSB.

A theme among consultation respondents was concern that an expansion of the ATSB's role could lead to another layer of bureaucracy for operators and increased overhead. As an example of this, Austral Fisheries noted the following in their response:

...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.¹¹⁵

Similarly, Seafood Industry Australia noted:

The use of a further entity to be involved in the administration of the national legislation creates concerns at the risk of increased administration and costs to owners, as well as the risk of overlap of responsibilities under the competing legislation.¹¹⁶

Stakeholder submissions have also called for improvements around incident reporting arrangements, such as a central reporting structure and streamlining the reporting requirements and process across jurisdictions through the use of consistent definitions and requirements. Sections 88 and 89 of the National Law puts an obligation on the owner and master to report death of, or injury, to a person associated with the operation of the vessel, amongst others. State and Territory WHS regulators also have similar reporting requirements, which may also oblige persons conducting a business or undertaking in relation to a DCV to report a maritime safety incident twice.

Recommendation 6: The Australian Transport Safety Bureau should be funded by the Australian Government to undertake a no-blame investigation program sufficient to support the identification of systemic safety issues. The Commonwealth Transport Minister should issue a statement of expectations regarding the ATSB's DCV function.

Recommendation 7: Where a State has its own safety investigator the ATSB may engage it to undertake investigations on its behalf.

Recommendation 8: Safety incidents should be reported to one Commonwealth maritime safety authority only (AMSA or ATSB) who will take responsibility for sharing it with each other as required.

¹¹⁵ Austral Fisheries Submission, March 2022, page 5.

¹¹⁶ Seafood Industry Australia Submission, May 2022, page 9.

Finding 8

There is an opportunity and need for the establishment of a concerted effort by AMSA to lead, develop and foster a safety culture within the maritime industry.

Under the proposed regulatory risk-based model (see Findings 1 and 2 and related discussion), better data to help inform decision making is vital to help raise the level of understanding of safety incidents within the maritime industry. This sentiment was expressed throughout the stakeholder consultation process.

Industry and regulators suggested that more education and clarification around reporting requirements would be appreciated. A confidential submission suggested that AMSA could provide more resources and information about reporting obligations in the context of the National Law, tailored to each state's own WHS legislation. On a related note, Transport for NSW (TfNSW) suggested that better stakeholder education and engagement (such as education campaigns about workplace safety) about roles, responsibilities and rights as well as understanding of safety would support and empower reporting obligations.¹¹⁷ OTSI likewise suggested that greater sharing of information with operators so they can learn from incidents and act on relevant safety improvements.¹¹⁸

The Panel has formed the view that the level of incidents and accidents reported is, in reality, substantially below the actual numbers of incidents and accidents occurring. The low level of reporting can be partially attributed to a concern of follow up regulatory action from authorities if reported. Establishing a rapport with industry over the benefits of reporting is essential to overcome this. An AMSA-driven education campaign in association with the ATSB and industry bodies, would be a good means of achieving this.

With the complexities of the current system, there is a need to increase industry awareness of the obligations to comply with requirements under the National Law. This could be assisted through a series of clear and accessible process guidelines and rulings. Further, these could be framed around the tiers of the risk-based approach proposed in Findings 1 and 2. This would also present an opportunity for AMSA to collaborate with industry bodies to develop programs and actions within and across the maritime sectors to identify best practices and nurture safety leaders, both individuals and companies.

There is currently no formal mechanism for maritime workers to port their skills, training and experiences between and across the broader DCV maritime sectors, particularly the generic skill sets and underlying training that could be universally recognised.

With seasonality affecting a significant component of employment in the maritime sector (e.g. whale watching, prawn trawling, etc.), the Panel has formed the view that the universal recognition of employees and contractors experience, skills, training and qualifications across sectors could be enabled by a 'White' card or equivalent concept and the feasibility of this concept should be further investigated.

The 'White' card would recognise completion of pre-sea safety training and serve as a first-step in a trainees' safety training journey, complementing subsequent on-board inductions, drills, and other safety training and act as the record keeper for individuals.

It would be transferable between many maritime industries, jurisdictions, fishery sectors, and employers and also ultimately help retain personnel. It has the potential to contribute to increased safety awareness and performance, allowing individuals, training organisations and industry sectors to keep track of skill sets and safety training. It is however important that the various associations and bodies within and across the DCV sector are engaged to help facilitate the design, uptake and ongoing maintenance of the 'White' card concept in partnership with AMSA.

¹¹⁷ Transport for NSW Submission, March 2022, pages 6-7.

¹¹⁸ Office of Transport Safety Investigations Submission, March 2022, page 8.

Recommendation 9: AMSA should establish and support an Australian Government funded long-term safety engagement program with all sectors of the DCV maritime industry to:

- promote the benefits of reporting;
- identify best data collection methods;
- investigate the feasibility of creating a 'White' card scheme; and
- develop simple and accessible guidelines for ease of compliance.

Finding 9

There is an opportunity for the Department and AMSA to improve the marine surveyor accreditation scheme to ensure it is up to date, fit for purpose and flexible.

Accredited marine surveyors are third party individuals accredited by AMSA to perform surveying of DCVs. Vessel surveys are required in order to obtain a certificate or approval under the National Law. AMSA relies on recommendations from surveyors when considering applications for Certificates of Survey, load line certificates and other approvals issued under the National Law. Surveys must be conducted by an accredited surveyor or a Recognised Organisation.¹¹⁹

The marine surveyor accreditation scheme is a national scheme with accredited marine surveyors located in all states and territories. The scheme plays an essential role in achieving the public safety objectives of the National System by ensuring that there is a nationally consistent approach to accrediting marine surveyors, ensuring that there is a competent marine surveyor workforce to survey DCVs and maintaining public confidence in Australia's maritime transport sector. The scheme imposes specific obligations on marine surveyors as a condition of their accreditation. Under the National Law non-compliance by an accredited marine surveyor with their conditions of accreditation is an offence. The National Law thus provides a mechanism for AMSA to hold accredited surveyors accountable.¹²⁰

The framework for marine surveyor accreditation is set out in the Regulations.¹²¹ The scheme is administered by AMSA. The scheme has not been reviewed since its introduction in 2015.

Stakeholder submissions highlighted that the scheme is not up to date. AMSA submitted that there are a range of issues with the current arrangements including a lack of appropriate limitations on accreditations, particularly relating to vessel length, a lack of pathways for trainees and provisional marine surveyors to enter the profession and outdated categories of surveying that do not contemplate new and emerging vessel types and technologies. Maritime Survey Australia suggested that more focus is needed on accreditation of surveyors rather than ongoing auditing of surveyors. The Australian Association for Uncrewed Systems submitted that regulation should enable the development of a forward-thinking licensing and accreditation process to enable Australia to become a leader of international autonomous systems development. Trusted Autonomous Systems submitted that accredited marine surveyors, generally do not have the skills, qualification or experience to check the safety of software or the algorithm's performance in the case of autonomous vessels.

The Panel considers that the marine surveyor accreditation scheme is a significant safety assurance mechanism and it is important that it stay up to date and be fit for purpose, particularly in relation to new and emerging technologies. The Regulations are due to 'sunset' on 1 October 2023. This is a timely opportunity for the scheme to be reviewed to make it more flexible and fit for purpose.

¹¹⁹ Recognised Organisations known as Classification Societies are appointed by AMSA to undertake delegated functions on AMSA's behalf. These organisations are members of the International Association of Classification Societies.

¹²⁰ Section 161 of the National Law.

¹²¹ Part 3, Regulations. See also Marine Surveyors Manual—parts 1 and 2 (amsa.gov.au). See also Marine Surveyors Manual—parts 1 and 2 at www.amsa.gov.au/vessels-operators/domestic-commercial-vessels/marine-surveyors-manual-parts-1-and-2

Recommendation 10: The marine surveyor accreditation scheme should be reviewed to make it fit for purpose. As part of that review, consideration should be given to introducing (among other matters):

- a tiered accreditation scheme according to size and complexity of the vessel;
- a formal continuing professional development program;
- a regular random audit of surveyor approvals and subsequent standards applied;
- increasing the approval powers for accredited marine surveyors;
- greater flexibility in who can be accredited as a marine surveyor, and expanding categories of accreditation to adequately cater for the skills that will be required to assess the performance of new and emerging technologies; and
- a formal rulings program to provide certainty for surveyors and operators.

The review should consider a reasonable timetable for implementation of the proposed reforms.

Finding 10

The current requirement that changes to regulations made under the National Law be agreed by all States and the Northern Territory is a barrier to flexibility and responsiveness to innovation.

Under the proposed regulatory risk-based model (see Findings 1 and 2 and related discussion), it is important that the National Law provide AMSA with the appropriate flexibility to adapt its regulatory approach proportionate to the level of risk to safety, whilst at the same time not provide a barrier to innovation and change.

A large proportion of the National Law scope on technical and operational related matters is contained in subordinate legislation. This includes legislative instruments such as Regulations and Marine Orders. Generally, across the board, the use of subordinate legislation is necessary and often justified by its ability to adjust administrative detail without undue delay, its flexibility in matters likely to change regularly or frequently, and its adaptability for other matters such as those of technical detail.

Sections 7(4) and (5) of the National Law expressly permit the making of regulations that alter the definition of a DCV for the purposes of the National Law. However, amendments to the Regulations for the purposes of altering the definition of DCVs currently require the unanimous agreement of state and territory transport ministers.¹²² This can restrict AMSA's ability to adapt flexibly to new regulatory challenges and provide clarity to industry on how emerging vessel types and uses should be treated. Even with goodwill of all parties, the approval requirement inevitably prolongs the change process.

As a workaround, AMSA currently utilises its exemption framework to accommodate unique and innovative vessels however this can create inefficiency, confusion, and a time and cost barrier for operators. In addition, the exemption powers available to AMSA under section 143 of the National Law require AMSA to be satisfied the granting of an exemption will not jeopardise the safety of a vessel or a person on board a vessel.

Stakeholders expressed their concern that the lack of flexibility available in the current regulatory approach does not cater for emerging technologies and "causes a reliance on exemptions, which is not a suitable way to regulate beyond providing short term relief, facilitating temporary operations, or for very novel vessels."¹²³

The National Law forms part of a cooperative scheme between the Commonwealth, the States and the Northern Territory that provides a single national framework for ensuring the safe operation, design, construction and equipping of DCVs.¹²⁴ At the time of drafting the National Law, it was recognised that the Commonwealth's constitutional reach regarding DCV regulation was limited. To circumvent this challenge and allow for the creation of a National System and Commonwealth national regulator, States and Territories enacted legislation that cedes the applicable functions and powers to the Commonwealth in order to fill any constitutional gaps.

From 2013 to June 2018, the States and the Northern Territory were initially responsible for service delivery of the National System as delegates of AMSA under an IGA. On 1 July 2018 AMSA assumed full service delivery of the National System.

With States and the Northern Territory having initial responsibility for the service delivery of the National System, unanimous agreement for changes to scope, operational and technical matters was justifiable. Now that the IGA has been terminated and AMSA has taken over full-service delivery of the National System, the current requirement for State and Territory unanimous approval to change certain provisions in the regulations presents a barrier to flexibility and responsiveness to innovation. As that responsibility has been transferred solely to the Commonwealth and AMSA, the requirement should be removed.

¹²² See subsection 159(6) of the National Law.

¹²³ See for example Trusted Autonomous Systems submission, March 2022, page 5.

¹²⁴ Section 3 of the National Law.

The objective of the National Law was to create a single National Regulator and consistent national regulation of the DCV industry across Australia. That objective remains unchanged. The intent of the proposed changes is to enable greater flexibility in ensuring that new and emerging technologies are appropriately regulated under the National Law. It is expected that changes to the Regulations will be to include vessels within the definition of DCV rather than exclude.

The Panel is of the view that the existing requirement that the Commonwealth Transport Minister consult with State and Territory Transport Ministers before making regulations for the purposes of sections 7(4) and (5) of the National Law should be retained and that administrative arrangements should be developed to guide the exercise of the power by the Minister.

Recommendation 11: The current requirement that changes to certain regulations be unanimously agreed by the States and the Northern Territory be removed.

Finding 11

There is a need to further consider how the National Law framework can be future ready.

Stakeholders have submitted that emerging technologies are not well addressed by the National Law framework.

Trusted Autonomous Systems submitted that certain definitions such as ‘crew’ and ‘master’ are outdated and as a result, key mechanisms within marine orders do not appropriately address the risks of autonomous operations. It also submitted that the definition of ‘defence vessel’ in the National Law is not fit for purpose because it appears to be premised on an assumption that defence vessels will always be built and operated as ‘traditional vessels’ while in practice the Department of Defence funds and works with numerous industry participants to develop a range of different vessels and platforms, which are intended for Department of Defence purposes. These vessels are increasingly used in a diverse range of operational settings.¹²⁵

Submissions highlighted a number of issues in relation to autonomous vessels, for instance, that the framework is not adaptive to the risk profile of uncrewed systems; the unique hazards of uncrewed systems are not addressed by existing legislation while the risk controls that are in place (such as minimum crewing) are not applicable; surveyors and regulators have minimal experience in uncrewed systems; testing and evaluation of systems under development does not have a fit for purpose pathway; there is a lack of licensing or accredited training programs suitable for systems and there is a need for guidance on the typical safety management system architecture for uncrewed systems. The uncertainty in approval and assurance processes causes regulatory uncertainty as it is hard for stakeholders wishing to deploy the technologies to quantify the amount of regulatory effort required to gain approval.¹²⁶

The Panel considers that the adoption of the regulatory risk model, the simplification of certification requirements (see discussion under Finding 1 of this report) and the recommendation to increase the flexibility and adaptability of the Regulations (Recommendation 10 above) will increase the flexibility of the regulatory framework and enable it to address at least in part, some of the issues raised by stakeholders. As discussed under Finding 10 of this report the forthcoming review of the Regulations presents an opportunity for the Minister to review the accredited marine surveyors scheme and consider the need for greater flexibility in who can be accredited as a marine surveyor, and expanding categories of accreditation to adequately cater for new and emerging technologies.

The Panel considers that the general safety obligation imposed by section 14 of the National Law is an important safety assurance mechanism that extends to persons who design, commission, construct, manufacture, maintain, repair or modify vessels that use emerging or innovative technologies.

The Panel considers that the range of issues raised by submissions would be better considered by a dedicated taskforce led by AMSA, including:

- whether definitions in the National Law (for example definitions of ‘crew’, ‘master’ or ‘defence vessel’), remain fit for purpose in the context of development, deployment and operation of new and emerging technologies;
- the development of a fit for purpose pathway for testing and development of autonomous systems; and
- the development of appropriate licensing and accreditation programs and the need for guidance on the typical safety management system architecture for uncrewed systems

The taskforce in consultation with industry, should consider how the regulatory framework can be future proofed and optimised for new and emerging technologies (including vessels that use alternative fuels).

¹²⁵ Trusted Autonomous Systems submission pgs. 12 and 13.

¹²⁶ Australian Institute of Marine Sciences submission, March 2022; Trusted Autonomous Systems submission, March 2022; Australian Association for Uncrewed Systems submission, March 2022.

Recommendation 12: AMSA should set up a taskforce to consider how to optimise and future proof the National Law framework to regulate new and emerging technologies.

- The taskforce should consider whether definitions in the National Law remain fit for purpose in the context of development, deployment and operation of new and emerging technologies.

Annexure 1—Terms of Reference

Independent Review of Australia’s Domestic Commercial Vessel Safety Legislation, and Costs and Charging Arrangements

Purpose

The Australian Government has commissioned an independent review to consider whether Australia’s legal framework regulating the safety of domestic commercial vessels is fit for purpose.

The review is also to consider whether this regulatory framework is being delivered efficiently and effectively, and to consider options for future cost recovery arrangements.

Context

Australia’s diverse maritime industries include tourism, transport and fishing operations. These businesses are especially important in our coastal and regional communities, as well as to the whole Australian economy.

The Australian Government is committed to having an effective system of safety regulation for vessels and seafarers across these industries. This is important to ensure that passengers and crew are confident they will come home safely, and to support the productive contributions of our marine industries. As part of considering the effectiveness of our maritime safety regime, it is also important to consider how much it costs to deliver, and how it should be funded.

The National System for Domestic Commercial Vessel Safety (National System) is Australia’s national regulatory framework to ensure the safe design, construction, equipping, crewing and operation of commercial, government and research vessels operating in Australian waters. Since mid-2018, the National System has been delivered by the Australian Maritime Safety Authority (AMSA) under the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (National Law) and related legislative instruments.

This legislative and charging review fulfils the Government’s commitments made in the context of recent inquiries by Senate Committees and the Productivity Commission into aspects of maritime safety regulation, and in the context of AMSA taking responsibility for the National System in 2018.

The review will be conducted in two stages, commencing with a review of the legislation and followed by a review of AMSA’s costs and charges.

Scope—Safety Legislation

In assessing whether the National Law and related instruments are fit for purpose to achieve their safety objectives, the review should consider whether these laws:

- **support safe vessel operations**—the laws should support safe behaviour, foster a safety culture across industry, and encourage continuous improvement and adoption of best practice. The laws should support people to have and maintain the skills needed to safely design, construct, equip, crew and operate vessels. The review should include comparison of safety outcomes across sectors.
- **promote a risk-based approach**—the laws should impose safety requirements proportionate to the risk of different operations.
- **minimise burden**—the laws should support safety outcomes in a manner that minimises regulatory and administrative burden for industry.
- **are flexible**—the laws should cater to the diversity of regulated businesses, individuals and vessels, and accommodate innovation and changes in technology.
- **are simple and transparent**—the laws should be informed by wide consultation, be accessible and clear, and support operators to understand and comply with safety requirements that apply to them.

- **support effective compliance**—the laws should provide an effective and practical range of compliance powers and enforcement tools for AMSA.

The review should also specifically consider:

- whether the National Law interacts effectively with other Commonwealth and state and territory legislative frameworks, particularly the *Navigation Act 2012* and workplace health and safety regulations, as well as with international maritime safety obligations.
- whether expanding the Australian Transport Safety Bureau's (ATSB) role to include domestic commercial vessel safety could support substantially improved safety outcomes for industry, as well as regulators and policy-makers.

The review should advise the Government of the extent to which the National Law framework is currently fit for purpose. It should have regard to any challenges in existing arrangements under the National Law.

The review should make recommendations to Government where the National Law framework is not fit for purpose, or where it identifies opportunities to improve outcomes by reforming the laws. As part of these recommendations the review should provide advice on possible alternative approaches.

The review should always have regard to the views of stakeholders.

Scope—Costs and Charges

In considering the costs of delivering the National System under the National Law, as well as future options for industry charging, the review should consider:

- **efficient and effective resourcing and delivery**—AMSA's effort and approach to delivering the National System should be sufficient to support safety objectives, while also minimising AMSA's delivery costs, underpinned by the best available data, evidence and information, and risk-based decision-making.
- **delivery cost challenges and opportunities**—the benefit of safety regulation, and the expected benefit of any changes, should ultimately exceed associated cost impacts for industry. In considering potential changes and opportunities to improve safety, the review should also consider potential cost challenges for industry and AMSA.
- **existing and future charges**—current industry fees, and any future charges, should support the achievement of the Government's safety objectives and align with the Australian Government Charging Framework. The review should consider the merits of a range of options for potential future industry charges for Government to consider, with regard to the nature and diversity of industry, and how users interact with the National System.
- **charging challenges and opportunities**—future charging should support the efficient and sustainable delivery of safety regulation. In assessing options for future charges, the review should consider implementation challenges for these options, and opportunities to support safety outcomes.

The review should also specifically consider:

- whether changes to grandfathered arrangements (as recommended in past inquiries) or to exemptions may give rise to cost challenges or safety opportunities, and if so, how these could be addressed.
- if a role for the ATSB is recommended, how this role could be implemented in an efficient, cost-effective manner, with due regard for the independence of the ATSB and its existing multi-modal responsibilities and funding arrangements.

The review should provide advice to Government of the extent to which AMSA's delivery costs are efficient and proportionate to the risks being managed.

The review should make recommendations to Government on options for future funding arrangements for the National System, including considering alternative delivery approaches. Recommended options should seek to improve safety, reduce costs for industry where appropriate, and provide financial stability and certainty for industry and AMSA.

The review should have regard to the outcomes of consultation.

Process

The review will be undertaken by an independent expert panel, supported by the Department of Infrastructure, Transport, Regional Development, and Communications. The DPM, in consultation with the PM, has appointed Michael Carmody AO, Carolyn Walsh, and John Harrison. These eminent reviewers have been selected due to their experience and skills as senior advisers to government, their diverse and complementary expertise across regulatory, safety and maritime industry sectors, as well as their availability to conduct the review within timeframes required by Government.

The review is to commence in 2022 and be conducted in two phases. The first phase is to focus on whether the National Law framework is fit for purpose and should conclude by mid-2022. The second phase is to consider whether delivery of the National System is cost-effective, and options for future charges.

The review will be informed by significant stakeholder consultation, including public discussion papers, supported by efforts to encourage public submissions including industry engagement. An interim report is to be released for further public comment at the conclusion of each phase.

Subject to progress of the review, the Government expects to receive a final report by the end of 2022.

Annexure 2—The Independent Review Panel

Panel Member	Biography
Mr Michael Carmody AO Lead Reviewer	<p>Mr Michael Carmody AO has held several senior roles in Government including as Commissioner of Taxation, CEO of the Australian Customs Service and Inspector of Transport Security.</p> <p>During his time as Commissioner, he was highly regarded internationally for what was viewed as an innovative approach to tax administration. During his almost 13-year career as Federal Commissioner of Taxation, Mr Carmody oversaw the modernisation of the Australian Taxation Office, the implementation of a number of significant reforms to the Australian taxation system, and the design and implementation of a new compliance management program.</p> <p>Mr Carmody will be able to apply his skills and experience to provide expert, impartial advice to Government on the effectiveness of the maritime safety regulation and how to improve it, and an informed perspective on associated delivery costs and charging options</p>
Ms Carolyn Walsh	<p>Ms Carolyn Walsh is the Chair of the National Transport Commission and has extensive public service experience, including in the NSW Government as Chief Executive of the Independent Transport Safety and Reliability Regulator, and as Executive Director for the Office of the Coordinator General of Rail. She has also held several positions within the Commonwealth Department of Industry, Science and Resources.</p> <p>Her experience as a Commissioner of the Australian Transport Safety Bureau and Board Member of NSW WorkCover will be directly relevant to considerations of the broader legislative and operational contexts for domestic commercial vessel safety.</p> <p>Ms Walsh's particular expertise in safety and risk more broadly will provide outstanding support to the Review's focus on improving commercial vessel safety outcomes, and will help ensure the Review's consideration of costs and charges also maintains due focus on safety policy objectives.</p>
Mr John Harrison	<p>Mr John Harrison has extensive experience working in Australian marine businesses and advising Government on matters impacting Australia's domestic commercial vessel industries, particularly in fishing sectors.</p> <p>Mr Harrison has held a number of senior roles including as Chief Executive of Western Australian Fishing Industry Council and as a member of the Western Australian Marine Science Institution Board. He was also a member of the Australian Maritime Safety Authority's former fishing industry advisory committee. He was the inaugural Executive Chair of the Fisheries Research and Development Corporation's Seafood Industry Safety Initiative program.</p> <p>Mr Harrison's lived experience in the fishing industry and passion for improving industry safety will bring a real-world perspective to consultation and consideration of laws and cost options.</p>

Annexure 3—Service Categories of Vessels

The service category of a vessel is defined by the vessel use category and operational use category. This is displayed as the vessel-use category, followed by the operational area category.

Four vessel-use categories are used:

Class	Vessels
Class 1—Passenger vessels	Passenger vessels are permitted to carry over 13 passengers. These vessels are typically used in operations such as tourism, diving or fishing charters and ferries
Class 2—Non-passenger vessels	Non-passenger vessels are often trading vessels, and are permitted to carry up to 12 passengers. These vessels are typically used for small charter and research operations, and can include cargo, tugs and barges.
Class 3—Fishing vessels	Fishing vessels, such as trawl, long line, tuna, net, lobster, abalone and aquaculture.
Class 4—Hire and Drive vessels	Hire-and-drive and leisure vessels such as kayaks, houseboats, jet skis and sailing vessels.

Seven operational area categories are used:

Category	Details
A—Unlimited domestic operations	For DCVs operating greater than 200nm of the coastline. Vessels that operate beyond Australia's EEZ, approximately 200nm from the coastline, are generally Australian regulated vessels and regulated under the Navigation Act 2012.
B Extended—Extended offshore operations	For DCVs operating to the outer limits of the EEZ, beyond 200nm from the baseline of the Australian coastline.
B—Offshore operations	For DCVs operating up to 200nm of the coastline, but within the EEZ.
C—Restricted offshore operations	For DCVs generally operating within 30nm of the Australian coastline.
C Restricted—Restricted offshore operations—specified areas	For DCVs operating in sheltered waters and in specified lower risk C waters
D—Partially smooth water operations	For DCVs operating in sheltered waters.
E—Smooth water operations	For DCVs operating in sheltered waters, with a low maximum wave height.

As an example, a passenger ferry with a capacity of 30 operating out to 15 nautical miles (nm) from the coastline would have a service category of 1C.

Annexure 4—Recommendations from the Senate Inquiry into the Performance of AMSA

The Senate Inquiry Report considered three specific coronial inquiries where concerns were raised about the role and actions of AMSA and the National Law. Four recommendations were made by the Committee:

Recommendation 1

The Committee recommends that amendments be made to the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (the National Law) in regards to penalties imposed on an operator of a vessel for acting in a reckless or negligent manner, regardless of intent. In particular, the Committee recommends that consideration should be given to situations where the operator of a vessel has been found to be acting in a negligent or reckless manner which has the potential to result in the loss of life.

Recommendation 2

The Committee recommends that general safety duties offences relating to domestic commercial vessels, contained within the Marine Safety (Domestic Commercial Vessel) National Law Act 2012, be augmented by a more serious offence and subsequent penalty in cases where a breach of the general safety duties leads to a loss of life.

Recommendation 3

The Committee recommends that the limitation period for bringing non-custodial charges under the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (the National Law) be extended from 12 months to two years.

Recommendation 4

The Committee recommends that the Australian Government commission an independent review of the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 and any associated legislative instruments (such as Marine Orders). The review should consider whether the laws remain fit for purpose and whether they improve marine safety on domestic commercial vessels without being overly burdensome or complex.

In addition to the recommendations above, the report also highlighted potential areas for reform. Labor Senators provided additional comments to the report, raising concern with the definition of an operator in Recommendation 1, and noting safety concerns with Marine Orders 503 and 504. In light of these concerns, Labor Senators provided the following amendments to Recommendation 1 in the report, and two additional recommendations:

Recommendation 1—Amendment

The Committee recommends that amendments be made to the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (the National Law) in regards to the penalties imposed on an owner of a vessel for acting in a reckless or negligent manner, regardless of intent. In particular, the committee recommends that consideration should be given to situations where the owner of a vessel has been found to be acting in a negligent or reckless manner which has the potential to result in the loss of life.

Recommendation

The Committee recommends that Australian Maritime Safety Authority amend Marine Order 503 (Certificates of survey—national law) 2018 in order to phase out grandfathered survey requirements and to ensure that all domestic commercial vessels comply with modern safety standards as soon as possible.

Recommendation

The Committee recommends that Australian Maritime Safety Authority amend Marine Order 504 (Certificates of operation and operation requirements—national law) 2018 as soon as possible in order to cease grandfathered crewing arrangements.

Annexure 5—Productivity Commission Inquiry into National Transport Regulatory Reform

On Friday 5 April 2019, the then Minister for Infrastructure, Transport and Regional Development, announced the Australian Government had requested the Productivity Commission (the Commission) undertake a review into national transport reforms to ensure they are delivering national productivity benefits and safety.

The final report, released 1 October 2020, detailed the findings and recommendations of the Commission. Of relevance to the Review were 11 recommendations, listed below. Government response to the inquiry was published on 21 October 2021.

Recommendation 4.2

The Transport and Infrastructure Council should agree to transfer all regulatory functions still held by participating jurisdictions to the National Heavy Vehicle Regulator by 2022.

To ensure consistent application of the national laws, the National Heavy Vehicle Regulator and Australian Maritime Safety Authority should phase out service-level agreements with State and Territory agencies.

However, where there is a business case for the national regulators to retain service-level agreements with third parties, those parties should act under the direction of the national regulators to ensure consistent decisions across jurisdictions.

Recommendation 10.2

The national regulators should move towards cost recovery arrangements in line with the Australian Government's Cost Recovery Guidelines. Consistent arrangements across the three transport regulators will reduce the risk of distorting intermodal choices.

Recommendation 8.3

The Australian Government should impose a general safety duty on all parties with a significant influence over the safe operation of autonomous transport technologies. The creation of a general safety duty should not preclude the use of prescriptive rules where the assessed risks are high.

Recommendation 9.2

The Australian Government should work with the Transport and Infrastructure Council to develop a statement of expectations for the National Heavy Vehicle Regulator (NHVR) and the Australian Maritime Safety Authority (AMSA). The statement should direct the national transport safety regulators to take a risk-based approach to regulation, enforcement and other functions

Recommendation 6.6

The Council of Australian Governments and the Australian Maritime Safety Authority should wind up the grandfathering of safety regulations under the Marine Safety National Law. Priority should be given to ending grandfathering arrangements that relate to vessel survey requirements and fire detection and smoke detection systems.

The Australian Maritime Safety Authority should use the information from vessel survey and other sources to review the safety risks arising from other grandfathering arrangements and the costs to vessel operators of removing the arrangements. Where the safety benefits exceed the costs, grandfathering arrangements should be removed.

Recommendation 5.3

The Australian Government should negotiate with State and Territory governments to return responsibility for regulating Class 4 Domestic Commercial Vessels (Hire and Drive) to State and Territory agencies.

Recommendation 6.5

The Australian Government should direct the Australian Maritime Safety Authority to take steps to improve:

- incident reporting by owners of domestic commercial vessels
- its public disclosure of safety incidents.

AMSA should report fatalities and injuries in greater detail, including a state-by-state and vessel-type breakdown of fatalities and injuries.

Recommendation 7.1

The National Heavy Vehicle Regulator, the Office of the National Rail Safety Regulator and the Australian Maritime Safety Authority should monitor compliance costs and report on these costs, disaggregated by key regulatory activity, commencing in 2021.

Recommendation 7.2

The National Heavy Vehicle Regulator, the Office of the National Rail Safety Regulator and the Australian Maritime Safety Authority should disaggregate their administrative costs by key regulatory activity in their annual reports.

Recommendation 9.3

Governments (and their agencies) and industry should consider how best to harness logistics and telematics data to improve incentive-based safety regulation, with the aim of influencing behaviours that increase safety and productivity.

Governments and regulators should aim to facilitate operators' adoption of technologies to generate and share data by:

- providing legal assurances about the acceptable use of such data
- clarifying the value to individual operators of their participation in data-sharing regimes

Recommendation 9.4

The Australian Government should:

- provide a sufficient annual appropriation to enable the Australian Transport Safety Bureau (ATSB) to carry out its functions, both existing and as proposed in this inquiry
- formalise the role of the ATSB in conducting investigations and research involving Domestic Commercial Vessels and rail
- amend the Transport Safety Investigation Act 2003 to enable the ATSB to conduct research and investigate incidents involving heavy vehicles, and autonomous vehicle technologies
- direct the ATSB to undertake a clearly defined, phased transition into the heavy vehicle role, including an initial period of data collection and research to identify any systemic issues and incident types with the potential to inform policy.

The costs of the ATSB should not be subject to cost recovery from industry, but the States and Territories should support the Australian Government by providing a consistent contribution to its total costs, rather than on a case-by-case basis.

Annexure 6—Senate Inquiry into the Policy, Regulatory, Taxation, Administrative and Funding Priorities for Australian Shipping

On 15 December 2020 the Senate Standing Committee on Rural and Regional Affairs and Transport tabled the report of its inquiry into the Policy, Regulatory, Taxation, Administrative and Funding Priorities for Australian Shipping.

The final inquiry report made 28 recommendations, six of relevance to the Review, listed below.

Recommendation 5

The Committee recommends that the Australian government requires foreign-flagged vessels to pay crew wages equal to those of Australian vessels while operating in Australian waters.

Recommendation 6

The Committee recommends that the Australian government reviews the maritime tax concessions currently in place to ensure that Australia's tax system is competitive with other jurisdictions, and that it promotes the use of Australian ships and crews.

Recommendation 16

The Committee recommends that the Australian government strengthens the Australian Maritime Safety Authority's ability to detain ships which have caused, or are suspected of having caused, environmental damage, irrespective of the type of event which caused the damage.

Recommendation 21

The Committee recommends that the Australian government continues to advocate for improved safety standards, including work health and safety standards; working conditions; and wages for international seafarers, and rigorously enforces all existing protections and standards.

Recommendation 23

The Committee recommends that the Australian government improves safety on domestic vessels, including by expanding the jurisdiction of the Australian Transport Safety Bureau to include incidents on domestic vessels; and that the Australian government commissions an independent review of the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 to consider whether it provides clear and simple standards for training, crewing, and qualifications to improve marine safety on domestic commercial vessels.

Recommendation 24

The Committee recommends that the Australian government amends the Navigation Act 2012 to restore an appropriate balance in ships that are covered by the Navigation Act as Regulated Australian Vessels, and those covered by the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 as Domestic Commercial Vessels, to ensure the Navigation Act provides the default standards for Australian commercial ships.

Annexure 7—Stakeholder consultation responses

Public submissions received

- Austral Fisheries
- Australasian Institute of Marine Surveyors
- Australian Association for Uncrewed Systems
- Australian Commercial Vessel Operators Association
- Australian Institute of Marine Science
- Australian Maritime College
- Australian Maritime Safety Authority
- Australian Transport Safety Bureau
- Boating Industry Association
- Commonwealth Director of Public Prosecutions
- International Institute of Marine Surveyors
- Maritime Industry Australia Limited
- Maritime Survey Australia
- Maritime Union of Australia
- Nathan Hall
- Nautilus Federation
- Office of Transport Safety Investigations
- Projects Global
- Royal Institution of Naval Architects
- Seafood Industry Australia
- SeSafe
- Spencer Gulf and West Coast Prawn Fisherman's Association
- Sunshine Sailing Australia
- Tasmanian Seafood Industry Council
- Tassal
- Transport for NSW
- Trusted Autonomous Systems
- Western Australian Fishing Industry Council
- Western Rock Lobster Association

In addition to the above, three anonymous and 11 confidential responses were provided.