

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

## Safety Report—Phase 1

September 2023



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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 was 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 has 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 commissions 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 Australia's Domestic Commercial Vessel (DCV) Safety Legislation, and Costs and Charging Arrangements for DCVs (the Review). The Review is being conducted by a three-person Independent Review Panel (the Review Panel) with a mix of safety, regulatory, financial and industry expertise.

As required by the terms of reference, Phase 1 of the Review is to consider whether Australia's legal framework regulating the safety of DCVs is fit for purpose. Phase 2 of the Review is to consider whether the regulatory framework for DCVs is being delivered efficiently and effectively, and options for future funding arrangements.

This Phase 1 Review Report, the culmination of Phase 1, has been developed by the Review Panel following consultation with government agencies, industry and unions. It sets out the 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 makes 12 recommendations identifying opportunities for reform and alternative approaches.

For Phase 1 of the Review, the Review Panel received stakeholder feedback to a [Phase 1 Consultation Aid](#) (published February 2022) and a [draft Phase 1 Interim Safety Report \(draft Phase 1 Report\)](#) (published August 2022). It met with stakeholders in online meetings and at town hall style discussions held across Australia. The Review Panel has had regard to the outcomes of stakeholder consultation. Based on stakeholder feedback, recommendations from the draft Phase 1 Report have been further developed and refined as appropriate.

The Review Panel has considered matters relating to the delivery costs for the National System and future funding options. Initial thinking from the Phase 2 process have been provided to the [Australian Transport Safety and Investigation Bodies Financial Sustainability Review](#) announced in the 2023-24 Budget, which will now take consideration of the delivery costs for the National System and future funding options.

## Findings and Recommendations

**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.

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**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.

**Recommendation 1:** The law should be amended to better reflect a risk-based and flexible regulatory model by:

- Retaining general safety duties on all parties that have a duty under the current law;
- Providing a head of power for AMSA to develop Model Codes of Practice in consultation with industry, and for the Model Codes of Practice to be admissible in court proceedings;
- Removing the universal requirement in the National Law for all DCV's to have Certificates of Survey and Operation and, rather, providing that vessels of a type or class specified in the regulations (or Marine Orders) be required to comply with relevant standards and/or hold a certificate or authorisation of a type determined by AMSA;
- Providing that a single Certificate of Safety may be issued covering all safety requirements;
- Providing AMSA with the ability to delegate the issuing of certificates to Recognised Organisations and accredited marine surveyors.
- Providing AMSA with the power to recognise certifications made under other jurisdictions or under the Navigation Act, where it is satisfied that the applied standards would effectively meet the requirements of the National System;
- Developing a long-term data strategy to build more rigorous risk-based models to inform regulatory strategies;
- Providing a regulation-making power to include further reporting requirements to support AMSA's long-term data strategy; and
- Enabling AMSA to use its standards making power to tailor requirements for vessels or operations that are novel or inherently hazardous.

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**Finding 3:** The current grandfathering arrangements and how the transitional standards framework is perceived to operate, act as a disincentive to safety improvements.

**Recommendation 2:** Safety improvements should be introduced to the current grandfathering arrangements in accordance with a phased risk-based program.

- DCVs that would be required to be surveyed under the risk-based regulatory regime proposed under Recommendation 1, and that are subject to grandfathered survey requirements, should undergo survey inspection to assess gaps and requirements to minimum design and construction standards and comply with baseline requirements for stability, fire safety and electrical safety.
  - 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, except where the vessel poses a major and imminent safety risk.
- 'Survey type' vessels that operate to grandfathered design and construction standards and that are within survey, should continue to meet the standard that applied to the vessel as at 30 June 2013 subject to also complying with baseline requirements for stability, fire safety and electrical safety.
- Grandfathered crewing arrangements should be allowed to continue, subject to the vessel not changing its area of operation, nature of operation or being modified. AMSA should develop an evidence base on the incidence of serious injuries and fatalities associated with these arrangements, and it should draw any new evidence to the attention of the Australian Government.
- Grandfathered Certificates of Competency should be improved by:
  - Requiring the registration of Perpetual Certificates with AMSA. Upon registration, these certifications should be recognized by AMSA and reissued subject to Certificate holders being assessed against contemporary health and fitness standards and
  - Providing logbook evidence of a minimum number of hours applied each year. The minimum number of hours should be determined by AMSA in consultation with industry.
- The Australian Government should consider establishing a Safety Improvements Package with a suite of time limited incentives to assist with inspections and attaining appropriate standards, from a sustainable funding source.
- The Australian Government could consider funding arrangements from a sustainable funding source to assist state and territory governments to manage higher numbers of abandoned or derelict vessels due to changes in grandfathering, if this issue arises.

**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.

**Recommendation 3:** AMSA should:

- Review its Memoranda 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 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.

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

**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.

**Recommendation 5:** The National Law should be amended to:

- Explicitly refer to an officer's due diligence obligation to ensure that the owners of a DCV comply with their safety duties under the National Law;
  - Better align the definition of Owner with the concept of a Person Conducting a Business or Undertaking (PCBU) in WHS law and, specifically, to make clear that a business or undertaking that controls and manages a DCV has general safety duties under the National Law;
  - Allow scaling of infringement notice penalties;
  - 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.
- 

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

**Recommendation 6:** The ATSB should be funded by the Australian Government, and not through industry levies, to undertake a no-blame investigation program sufficient to support the identification of systemic safety issues across all Australian jurisdictions. The Commonwealth Transport Minister should issue a statement of expectations regarding the ATSB's DCV function.

**Recommendation 7:** Where a State has its own independent, no-blame safety investigator (currently New South Wales and Victoria) the ATSB may engage that investigator 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.

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**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.

**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 a verified skills database; 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.

**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:

- amending the regulation to provide the authorisation for the marine surveyor accreditation scheme;
- ensuring the detailed requirements of the scheme are laid out in marine orders or similar delegated instruments;

- ensuring the scheme has clear standards in relation to the accreditation and ongoing certification of marine surveyors;
- requiring AMSA to provide regular information and guidance to support the professional practice of accredited marine surveyors;
- a formal rulings program to provide greater certainty for surveyors and operators;
- a formal continuing professional development program;
- a tiered accreditation scheme according to size and complexity of the vessel;
- a regular random audit of surveyor approvals and subsequent standards applied;
- increasing the approval powers for accredited marine surveyors; and
- allowing 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.

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

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

**Recommendation 11:** The current requirement that changes to certain regulations be agreed to by all the States and the Territories be removed.

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

**Recommendation 12:** AMSA should build on its existing capability and establish an ongoing arrangement with relevant stakeholders to consider how to optimise and future-proof the National Law framework to regulate new and emerging technologies. This should include consideration of whether definitions in the National Law remain fit for purpose in the context of development, deployment and operation of new and emerging technologies. AMSA should report to Government on possible improvements as viable new technologies emerge.

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***The resourcing implications of the recommendations made in this Phase 1 Safety Report will require further consideration by Government.***

## What we have heard

### Early feedback

The Review Panel received 43 submissions including 11 confidential responses to the Phase 1 Consultation Aid that was released in February 2022. The Review Panel 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.

In response to the overarching question of ‘is Australia’s legal framework for the safety of DCVs fit for purpose?’, 61 percent of respondents to the Phase 1 Consultation Aid felt the system required reform, with a further 26 percent of respondents indicating that the system is not fit for purpose.

### Feedback on the draft version of this report

In August 2022, the Review Panel published a draft Phase 1 Report with draft findings and recommendations on whether the legislative framework for the safety of DCVs is fit for purpose. Thirty-six submissions were received in response, including nine confidential responses.

The national relaxation of COVID-19 restrictions enabled the Review Panel to conduct in-person meetings on the draft Phase 1 Report, and also to hear initial thoughts on Phase 2 of the Review. The Review Panel has conducted 12 town hall style meetings across Tasmania, Queensland, New South Wales, South Australia, Western Australia and the Northern Territory. A list of these engagements is at **Annexure 1**.

Consideration of responses and feedback has led to further refinement of this report and the recommendations, and greater discussion in the body of this report. Refinements include:

- More detail regarding the recommended ‘risk-based’ regulatory approach and how the proposed approach might work in practice;
- A clearer explanation and refinement of proposed changes to grandfathering arrangements;
- Greater clarity on proposed changes to the relationship between WHS law and the National Law; and
- Expanding the Review Panel’s thoughts on how AMSA could handle the development and application of new and emerging technologies in collaboration with industry.

A list of stakeholders who provided non-confidential submissions to both rounds of consultation can be found at **Annexure 2**, and all non-confidential submissions received are available on the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the department) website.

If you have any questions or concerns about this Phase 1 Report, please email: [dcvsafetyreview@infrastructure.gov.au](mailto:dcvsafetyreview@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). The Australian Maritime Safety Authority (AMSA) advises that as of April 2023 Australia's DCV fleet is made up of around 32,000 vessels, with an estimated 66,000 crew,<sup>1</sup> 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 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 aimed to ensure 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 positive 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.<sup>2</sup>

It has been some ten years since the commencement of the National Law, and more than four years since AMSA commenced full service delivery. A comprehensive review of the safety legislation for DCVs 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. Several 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 Australian 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 3**. The details of the Independent Review Panel (Review Panel) are at **Annexure 4**. The Review has been conducted in two phases, with Phase 1 focused on the extent to which the National Law meets safety objectives and whether the National Law framework is fit for purpose.

The Review Panel has considered matters relating to the delivery costs for the National System and future funding options. Initial thinking from the Phase 2 process have been provided to the [Australian Transport Safety and Investigation Bodies Financial Sustainability Review](#) announced in the 2023-24 Budget, which will now take consideration of the delivery costs for the National System and future funding options.

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

<sup>1</sup> This is an approximate figure based on the number of seafarers with Certificates of Competency in 2020.

<sup>2</sup> Section 3 of Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* ('National Law').

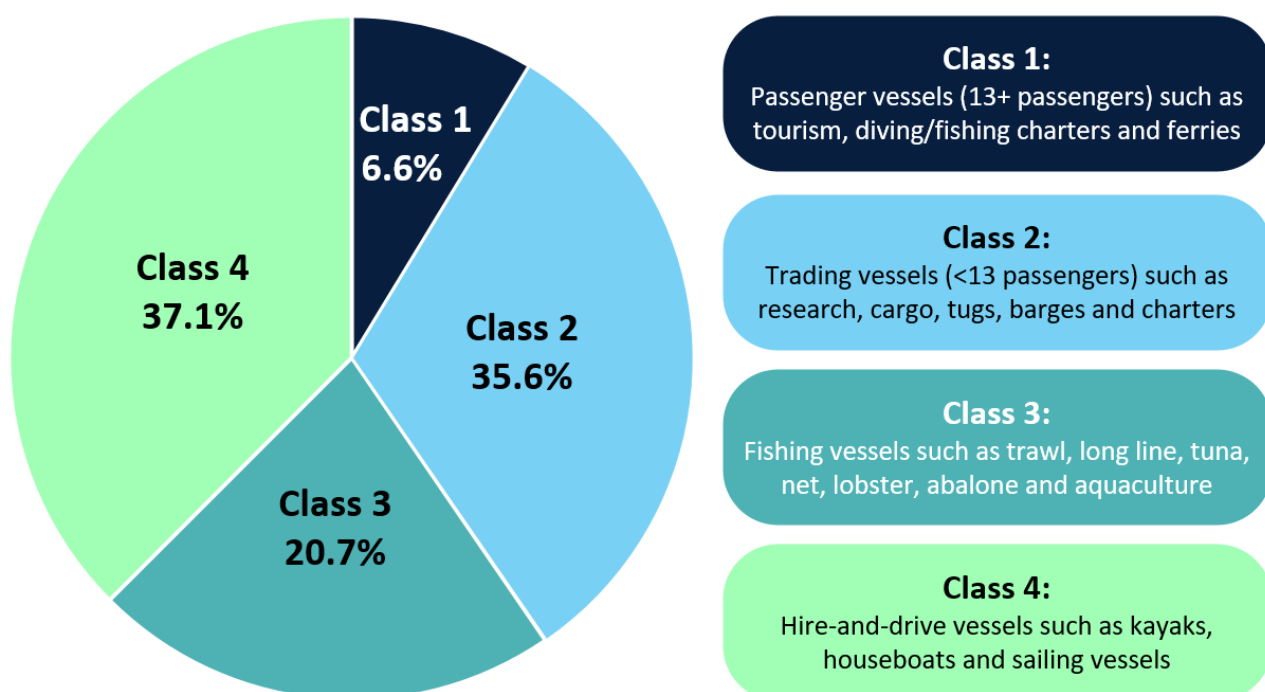
## Australian Maritime Sector—Domestic Commercial Vessels

DCVs are essential to Australia’s economy, supply chain and marine ecology. Typically, DCVs are vessels that undertake 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 the tourism, transport and fishing sectors.

Australia’s DCV fleet operates within Australia’s EEZ across a diverse range of operating environments, including inland waters,<sup>3</sup> inshore operations<sup>4</sup> and offshore.<sup>5</sup> 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 5**.

AMSA advises that as of April 2023 there are approximately 32,000 active DCVs. Of these, Class 4 includes approximately 9,000 human powered and sail vessels, which are primarily hire-and-drive and under 7.5m in length (such as kayaks).<sup>6</sup> The Figure below sets out the DCV fleet distribution by vessel class:

**Figure 1—Distribution of DCV fleet by vessel class<sup>7</sup>**



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.

<sup>3</sup> Inland waters mean non-tidal waters, National Standard for Commercial Vessels (‘NSCV’) Part B.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> Australian Maritime Safety Authority (‘AMSA’), [Domestic Commercial Vessel Annual Incident Report, January—December 2020](#).

<sup>7</sup> Ibid. This data includes human powered or sail vessels operating that are not uniquely identifiable.

Each month AMSA publishes a summary of very serious and serious incidents reported that involve DCVs. The reporting of incidents involving DCVs is published in an annual incident report by AMSA. The owners or Master of a DCV must report marine incidents to AMSA under the National Law.<sup>8</sup>

## 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,<sup>9</sup> the six states and the Northern Territory.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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).<sup>13</sup>

The COAG Intergovernmental-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.<sup>14</sup> The outcomes would be improved safety and decreased risk to the public, owners, operators and crew of DCVs, as well as reduced complexity and increased certainty regarding the requirements applying to design, construction, equipment, operation and qualification/crew certification of those vessels.<sup>15</sup>

The IGA formalised the agreement of all Australian governments to the operating arrangements for the National System.<sup>16</sup>

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.<sup>17</sup>

<sup>8</sup> Sections 88, 89 of the National Law.

<sup>9</sup> DCVs operating in the Australian Capital Territory prior to the commencement of the National System were regulated by AMSA under the *Navigation Act 1912* (Cth). These DCVs are now regulated under the National Law.

<sup>10</sup> Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (‘National Law Bill’), Replacement Explanatory Memorandum, Outline.

<sup>11</sup> [National Approach to Maritime Safety Regulation](#) (Regulatory Impact Statement, April 2009) page 6.

<sup>12</sup> [COAG Meeting Communique 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’.

<sup>13</sup> National Law Bill, Replacement Explanatory Memorandum, Outline.

<sup>14</sup> [Council of Australian Governments, Intergovernmental Agreement on Commercial Vessel Safety Reform](#) (‘IGA’), August 2011, Part 2.

<sup>15</sup> IGA, Part 2, paragraph 13(b).

<sup>16</sup> National Law Bill, Replacement Explanatory Memorandum, page 10.

<sup>17</sup> IGA, Schedule C, paragraph C2.

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.<sup>18</sup> All jurisdictions other than Western Australia have now done this.<sup>19</sup> The 2011 IGA was terminated effective from 21 August 2018. However, many of the IGA provisions still remain active in the National Law.

Under the National System for DCVs, states and territories remain responsible for certain regulatory functions that assist in ensuring the safety of commercial vessels. These include, for example:

- Speed limits, navigation aids and traffic management plans for prevention of collisions;
- Management of ports, harbours and moorings;
- Environmental management;
- Management of dangerous goods; and
- Actions of persons under the influence of alcohol or drugs.<sup>20</sup>

## 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.<sup>21</sup> In addition, regulations can provide that a specified thing, or a thing included in a specified class, is or is not a vessel.<sup>22</sup>

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 (RAVs),<sup>23</sup> defence vessels, foreign vessels, or vessels owned by community groups and primary and secondary schools.<sup>24</sup> However, 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.<sup>25</sup> 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

<sup>18</sup> 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.

<sup>19</sup> On 17 May 2023, Western Australia introduced the Marine Safety (Domestic Commercial Vessel National Law Application) Bill 2023 to support the application of the National Law in Western Australia. See [Progress of Bills \(parliament.wa.gov.au\)](https://www.parliament.wa.gov.au/ProgressofBills).

<sup>20</sup> Section 6 of the National Law Act.

<sup>21</sup> Sections 8(1) and 8(2) of the National Law.

<sup>22</sup> Section 8(3) of the National Law.

<sup>23</sup> Regulated Australian Vessels are dealt with under the *Navigation Act 2012* ('Navigation Act').

<sup>24</sup> Section 7 of the National Law.

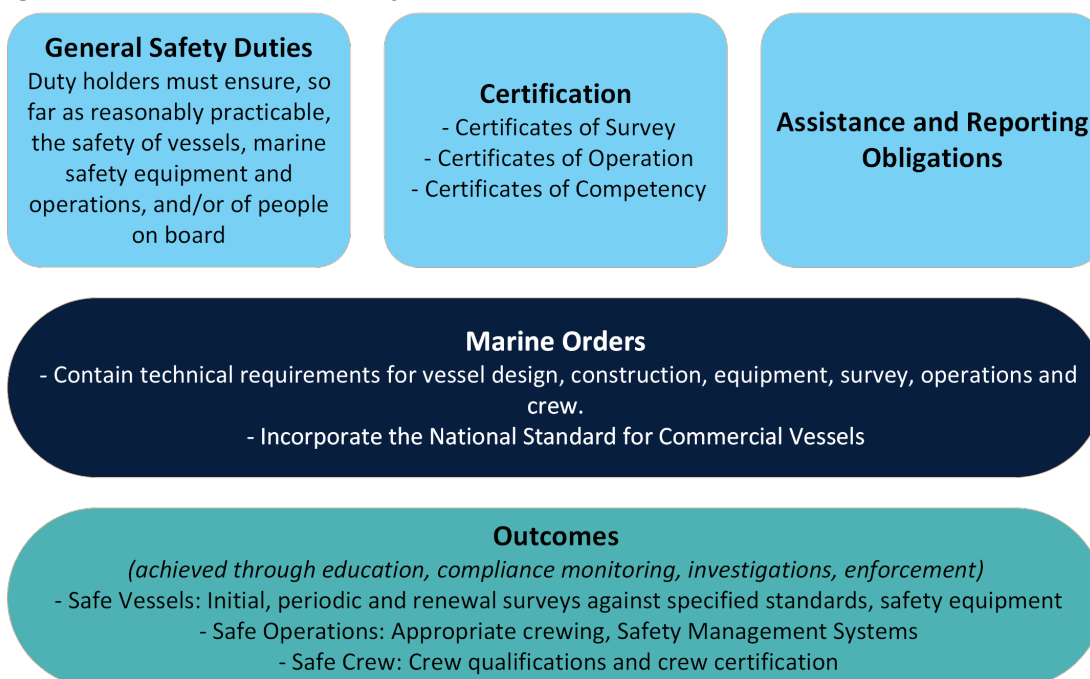
<sup>25</sup> Section 7(4) of the National Law.

significant power, any addition to this definition will be by unanimous agreement by all [Standing Council on Transport and Infrastructure] SCOTI Ministers.’<sup>26</sup>

## Safety elements

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

**Figure 2—Elements of DCV safety**



The general safety duties are set out in Part 3 of the National Law, and are intended to encourage the development, maintenance and continuous improvement of a safety culture by all parties in the DCV industry and thus minimise the risk of incidents involving death, injury or damage.<sup>27</sup>

Under the National Law the general safety duty holders include owners,<sup>28</sup> 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.<sup>29</sup>

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 owners 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

<sup>26</sup> 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.

<sup>27</sup> National Law Bill, Replacement Explanatory Memorandum, page 29.

<sup>28</sup> The definition of an owner includes a person with overall general control and management of a vessel, so includes ‘operators’ who may lease or otherwise gain access to operate the vessel.

<sup>29</sup> Sections 12, 14, 16, 19, 21, 23 and 24 of the National Law.

duty is also placed on the Master of a vessel to implement and comply with a safety management system.<sup>30</sup>

## 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 owners 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,<sup>31</sup> unless the vessel is exempted from the requirement,<sup>32</sup> or
- If a condition of the relevant certificate is breached.<sup>33</sup>

Certificates of Survey provide evidence that a vessel meets specified standards for design, construction, stability and safety equipment.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> They must also each be a fit and proper person.<sup>37</sup> 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).<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> 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.

<sup>30</sup> Section 16(2) of the National Law.

<sup>31</sup> See for instance, sections 43, 44, 53, 54 of the National Law.

<sup>32</sup> Section 143 of the National Law.

<sup>33</sup> See for instance sections 45, 46, 55, 56 of the National Law.

<sup>34</sup> The specified standards are defined in Marine Order 503— (Certificates of survey—national law) 2018.

<sup>35</sup> Section 48 (5) of the National Law.

<sup>36</sup> Marine Order 504 (Certificates of operation and operation requirements—national law) 2018.

<sup>37</sup> Section 74 of the National Law and section 5 of Marine Order 501— (Administration—national law) 2013.

<sup>38</sup> Sections 65, 66, 67 of the National Law.

<sup>39</sup> National Law Bill, Replacement Explanatory Memorandum, page 35.

<sup>40</sup> Section 35(1) of the National Law.

## Regulations

AMSA is able to make Marine Orders on most matters about which regulations can be made, except for the National Law provisions in subsections 7(4) and 7(5) (definition of DCV), 8(3a) (definition of vessel), 150(1) (fees) and 160(1)(a) (accreditation). These matters can only be dealt with in the regulations made by the Governor-General.<sup>41</sup>

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.<sup>42</sup> COAG Council is defined in section 6 as the council established by COAG that has responsibility for marine safety.<sup>43</sup>

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 lifesaving vessels within 2 nautical miles (nm) 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.<sup>44</sup> 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.'<sup>45</sup>

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.<sup>46</sup>

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

<sup>41</sup> Section 163(1) of the National Law.

<sup>42</sup> Sections 159(6) and 160(3) of the National Law.

<sup>43</sup> 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.

<sup>44</sup> Section 10 of the National Law.

<sup>45</sup> Section 3(d) of the National Law.

<sup>46</sup> Section 10 of the National Law.

AMSA has made the following Marine Orders under the National Law:<sup>47</sup>

- 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) 2022
- Marine Order 507—(Load line certificates—national law) 2018.

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).<sup>48</sup>

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; and
- Specifying nationally agreed standards to be adhered to for vessel design, construction and equipment for the issue of Certificates of Survey.

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 (Administration National Law) 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.<sup>49</sup> As of April 2023, AMSA has 27 general exemptions related to vessels, operations and qualifications in place under the National Law.<sup>50</sup> As at April 2023, AMSA has issued a total of 1,336 specific exemptions since AMSA assumed full service delivery responsibility for the National System on 1 July 2018.

<sup>47</sup> [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.

<sup>48</sup> Section 164 of the National Law.

<sup>49</sup> Section 143(6) of the National Law.

<sup>50</sup> [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.<sup>51</sup> A range of compliance and enforcement options are available to AMSA under the National Law including infringement notices,<sup>52</sup> improvement notices,<sup>53</sup> prohibition notices<sup>54</sup>, directions,<sup>55</sup> detention of vessels,<sup>56</sup> enforceable voluntary undertakings,<sup>57</sup> suspension or revocation of certificates,<sup>58</sup> prosecution and civil penalties.<sup>59</sup>

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<sup>51</sup> See Part 6 of the National Law.

<sup>52</sup> Section 138 of the National Law.

<sup>53</sup> Section 110 of the National Law.

<sup>54</sup> Section 111 of the National Law.

<sup>55</sup> Section 109 of the National Law.

<sup>56</sup> Section 101 of the National Law.

<sup>57</sup> Section 159(4) of the National Law.

<sup>58</sup> Sections 41, 42, 51, 52, 63 and 64 of the National Law.

<sup>59</sup> 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 has 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.<sup>60</sup> The Australian Government supported all recommendations from the report.<sup>61</sup> These recommendations are available at **Annexure 6**.

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 released the report of its inquiry into National Transport Regulatory Reform.<sup>62</sup> The Australian Government response to the inquiry was published on 21 October 2021.<sup>63</sup> 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 7**.

### 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.<sup>64</sup>

Of relevance to this Review, the Committee recommended that the Australian Government expand the jurisdiction of the 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 (RAVs) and DCVs, ensuring the Navigation Act provides the default standards for Australian commercial ships. These recommendations are available at **Annexure 8**.

<sup>60</sup> Senate Standing Committee on Rural and Regional Affairs and Transport Legislation, *Performance of the Australian Maritime Safety Authority* (Report, June 2020).

<sup>61</sup> Australian Government Response to the Senate Rural and Regional Affairs and Transport Legislation Committee Report: Performance of the Australian Maritime Safety Authority, May 2021.

<sup>62</sup> Productivity Commission, *National Transport Regulatory Reform* (Report, October 2020).

<sup>63</sup> Australian Government Response to the Productivity Commission Inquiry Report: National Transport Regulatory Reform, October 2021.

<sup>64</sup> Senate Standing Committee on Rural and Regional Affairs and Transport, *Policy, Regulatory, Taxation, Administrative and Funding Priorities for Australian Shipping* (Report, December 2020).

# 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 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 there is now greater consistency in marine safety standards across Australia, although some differences persist due to grandfathered arrangements from prior jurisdictional regimes. In theory, DCVs should now be safer as there should 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 Review Panel examined the data to see if safety outcomes have improved. In short, it found that the current legal framework has produced solid safety outcomes since coming into effect from 1 July 2013.

### Safety outcomes

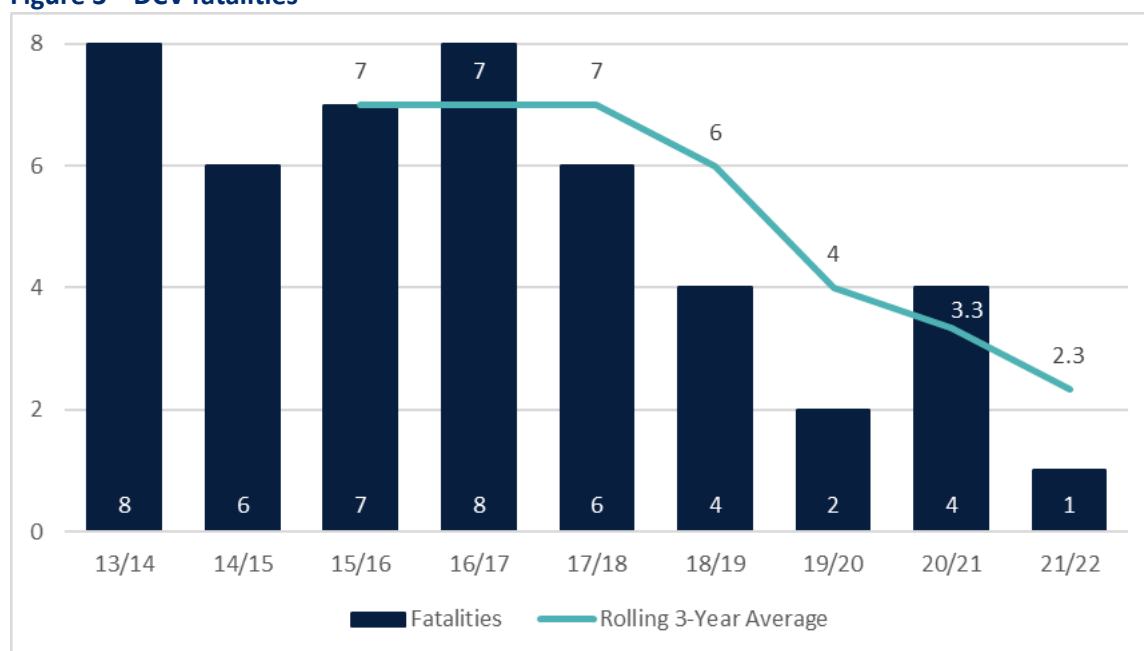
DCV fatalities have trended down since full service delivery responsibility transitioned to AMSA from 2018.

**Figure 3** shows the trend in the number of operational-related fatalities on DCVs by financial year since 1 July 2013,<sup>65</sup> with the three-year rolling average decreasing from 2016–2017 to 2021–2022. However, the numbers are from a low base, and for a relatively short period of time. In the light of this, the Review Panel remains moderately cautious about linking cause and effect.

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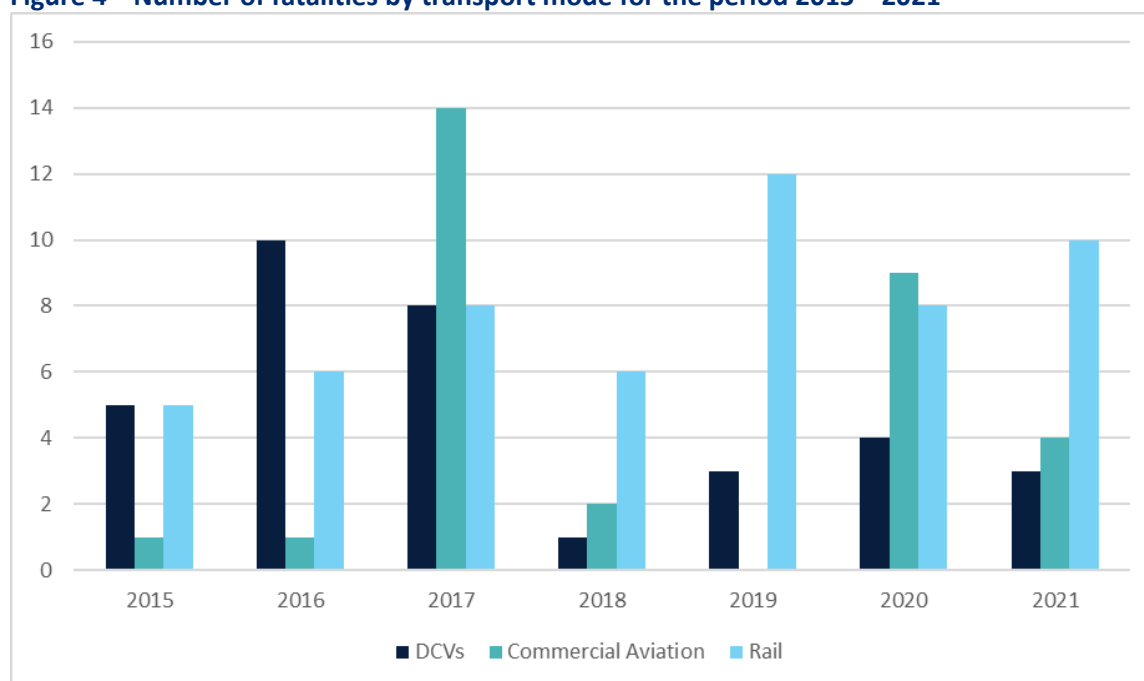
<sup>65</sup> Only fatalities that have occurred since July 2018 have been reported directly to AMSA. For data prior to July 2018, AMSA interrogated various data sources, including coronial records, to confirm that the reported number of operational related fatalities is correct.

Figure 3—DCV fatalities



### Comparison with other transport modes

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

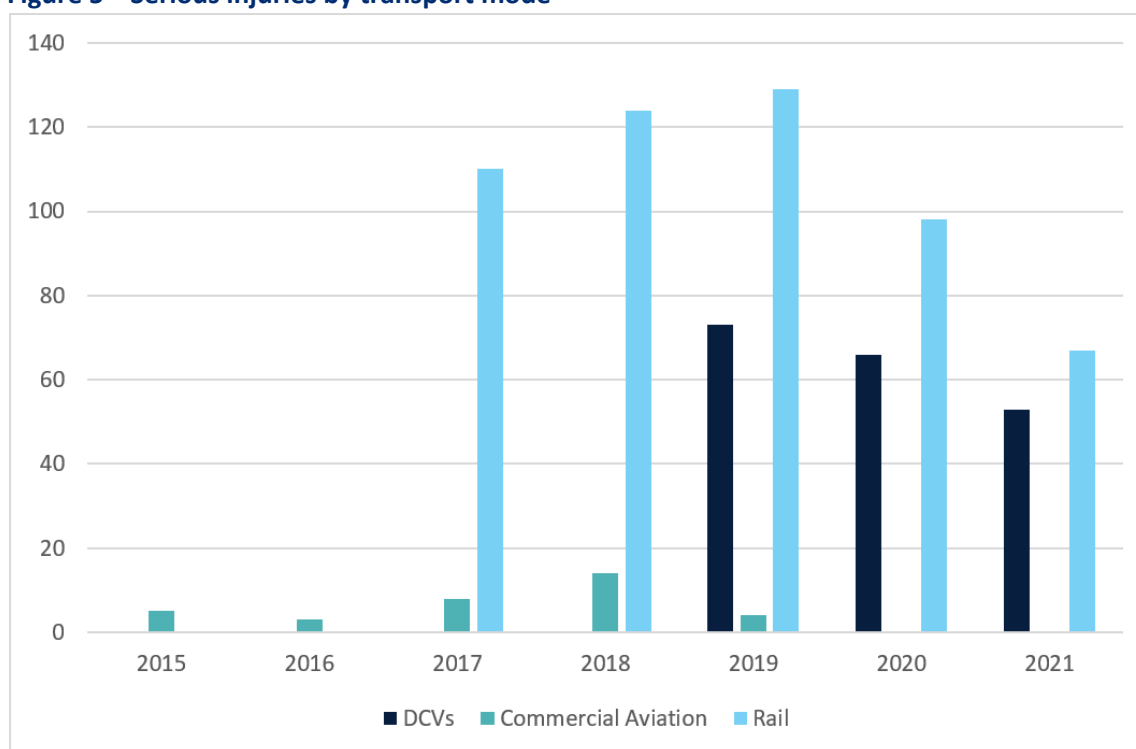
Figure 4—Number of fatalities by transport mode for the period 2015—2021<sup>66</sup>

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.

<sup>66</sup> DCV operational fatalities obtained from AMSA's incident reporting [Annual overview for marine incidents 2021](#) and [Domestic commercial vessel annual incident report, January—December 2020](#). Numbers include crew and passengers. Slight discrepancies with Figure 4 are due to the differences in reporting by financial year vs calendar year. Commercial aviation figures taken from [ATSB National Aviation Occurrence Database](#). Rail fatalities taken from ONRSR [Safety Data Key Occurrences March 2022 Report](#) and only include figures from 2015 to 2021. Excludes suspected suicides, suicide attempts or trespassing.

Since responsibility transitioned to AMSA in 2018, there has been a comparative decrease in serious injuries in the DCV sector (see **Figure 5**).

**Figure 5—Serious injuries by transport mode<sup>67</sup>**



The Review Panel considers that the data discussed above suggests there have been improvements in safety outcomes since the introduction of the National System. The Review Panel acknowledges that the data to support the analysis is limited in some respects. It 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 Review 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.

<sup>67</sup> DCV information obtained from AMSA's DCV annual incident report, January—December 2020 and Annual overview for marine incidents 2021. Commercial aviation figures obtained from ATSB Occurrence data by activity 2010 to 2019. It excludes training flights.

## Examples of AMSA reforms

|  |  |
|--|--|
|  <b>Sending a signal:<br/>Float-free emergency position-indicating radio beacons (EPIRBs)</b>   |  <b>In harmony:<br/>Transitioning to a national approach</b>  |
| <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>   |
|  <b>Simplifying without compromising:<br/>New equipment lists for small fishing vessel operators</b>  |  <b>Spotlight on safety:<br/>National Safe Boating Week</b>   |
| <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 200m 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 and 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.

Part of the complexity is driven by the very diverse nature of the DCV sector. The Review Panel acknowledges the difficulties inherent in bringing together a coherent regulatory framework in this environment, in particular one that had the legacy of varied and different state and territory practice. As many submissions argued, a sector as diverse as the DCV sector should not be subject to a 'one-size-fits-all' regulatory approach. Rather, the regulatory regime needs to reflect the risk posed by different industry segments and operators.

### What do we mean by 'risk'?

Risk should be viewed through a number of lenses in a risk-based regulatory scheme:<sup>68</sup>

- **High consequence/low frequency risks:** These are risks that rarely eventuate, but when they do have the potential to result in very significant consequences. In the safety context, this could mean multiple fatalities. For those vessels with a high inherent risk to safety,<sup>69</sup> a stricter set of safety standards should apply in order to reduce the likelihood of these events or to mitigate the consequences of such events should they occur. These standards are often monitored for compliance by an independent party (the regulator) through assurance regimes (e.g. surveys/inspections).<sup>70</sup>
- **Operational context:** The operational context in which a vessel is operating is a factor in determining the risk of an activity. A vessel that is fully compliant with design and construction standards and safety equipment can be high-risk if operated in an environment or in a manner for which it was not designed or intended. It is important to note that the regulatory oversight of many operational matters (such as compliance with speed, navigation markers etc.) is the responsibility of state and territory maritime authorities through their on-water surveillance of both recreational and commercial vessels.
- **Compliance history:** DCVs with a history of relatively poor safety performance should be subject to greater oversight than those with good performance. This could be in the form of more frequent

<sup>68</sup> In submissions to our draft Phase 1 Report, several stakeholders sought greater clarity about what the Review Panel means by high- and low-risk and how this is interpreted in the application of standards (such as the NSCV) or regulatory oversight (such as the frequency and scope of surveys and inspections). This section has been significantly re-drafted from consultation draft to address this.

<sup>69</sup> Inherent risk refers to the level of risk prior to the application of controls that reduce the likelihood of that risk eventuating. Where the inherent risk is significant, greater attention should be paid to the application and effectiveness of controls (including regulatory oversight).

<sup>70</sup> The frequency of surveys set out in Marine Order 503, which allocates vessels as high-, medium- or low-risk, seems to be a good example of basing the assessment on inherent risk.

surveys/inspections, more frequent or detailed reporting requirements or more prescriptive requirements. This both mitigates the safety risk posed by less safe operators and rewards good safety performance across the industry.

Taking these together, an operator conducting operations with an inherent high-risk of catastrophic consequences in the event of an accident may, in fact, be a low-risk operator because of the controls in place to prevent that occurrence (e.g. a large passenger-carrying ferry subject to high design and construction standards and more frequent survey). Conversely, a vessel which does not expose the public to a catastrophic risk of multiple fatalities may put an individual at great risk if operated inappropriately (e.g. a small ‘tinnie’ going out to open waters at night).

The categorisation of DCVs in the NSCV is based on the type of vessel and operational characteristics.<sup>71</sup> For clarity, the Review Panel does not equate the categories of vessels under the NSCV as a ranking of a particular vessel or operator’s residual safety risk.

The Review Panel is of the view that the National Law provides a solid frame for a risk-based regulatory scheme. However, it has identified opportunities to enhance the model to reduce unintended complexity and cost for both the industry and for AMSA.

## Data and risk modelling

Data is of critical importance to effective risk-based regulatory frameworks. Data can be used to:

- Better understand the risk profile of the industry;
- Inform participants in the industry about how they are performing against industry trends;
- Assist the regulator in targeting its compliance activities (e.g. safety awareness campaigns, surveys and inspections) on higher risk activities and on poorer performing participants; and
- Structure fees and levies in accordance with risk and performance.

The sources of data that can be used by a regulator broadly include:

- Incident and performance reports from industry; and
- Data generated from the regulator’s activities (e.g. non-conformances and other findings arising from surveys, audits and inspections).

Balanced against the benefits of collecting and analysing such data is the cost incurred by both industry and the regulator in doing so. The challenge is to get this balance right in the context of the risks that the regulator is aiming to manage.

Under the National Law, owners and masters of vessels are required to report marine safety incidents that involve:

- The death of a person; or
- Serious injury to a person; or
- The loss of a vessel; or
- The loss of a person from the vessel; or
- Significant damage to a vessel.<sup>72</sup>

The Review Panel notes that this range of incidents is relatively narrow compared to other transport modes which typically include specific types of incidents as well as ‘near hit’ incidents, i.e. where an incident occurred that did not result in death or injury, but had the potential to do so.

<sup>71</sup> See page 11, part B, NSCV. These are: Cat 1 Passenger vessel (13+ passengers); Cat 2 Non-passenger vessel (Up to 12 passengers); Cat 3 Fishing vessel; Cat 4 Hire-and-drive vessel used for recreational purposes only.

<sup>72</sup> Sections 88-89, *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*.

Similarly, the Review Panel is aware that AMSA uses its own regulatory data (such as outcomes from inspections) to analyse safety trends. However, again, the use of such data is relatively limited. This is understandable given the relatively short period of time that AMSA has had access to such data under a single national scheme.

During the Review Panel's consultations with industry, there was considerable support for a 'risk-based' approach to regulation which takes into account the diverse nature of operations across the DCV fleet and which 'rewards' good safety performance. The 'rewards' could include less regulatory oversight (e.g. less frequent audits, inspections and surveys) and tiered regulatory fees and charges based on both risk and performance.

The Review Panel is of the view that the current available range of data limits AMSA's ability to achieve this. However, acknowledging the cost to industry and AMSA, any expansion of the data set needs to be undertaken in a structured manner that aligns the benefits and the costs to get the optimal outcome for both industry and AMSA. The Review Panel therefore supports the development of a longer term DCV data strategy by AMSA, in close consultation with industry.

To facilitate the maturity of the data set over time, the Review Panel also supports the provision of a regulation-making power under sections 88 and 89 of the National Law to include other reporting requirements over time. This would facilitate improvements to the safety reporting regime, as set out in the data strategy, without having to amend the primary legislation.

Further recommendations to improve the collection of data and intelligence that will be available to AMSA are made under Findings 7 and 8 of this Report.

### **Current standards and certification requirements**

In part, the complexity of the National System is 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. These mandatory requirements include:

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

The obligation on all DCVs to have a Certificate of Survey and a Certificate of Operation 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, for example, a fleet of canoes operated by a tourism provider or other human and wind powered vessels under 7.5m. 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. The classes of vessels subject to these exemptions are referred to as 'non-survey' vessels for the purposes of the NSCV. The complex array of exemptions leads to unnecessary confusion and imposes an avoidable regulatory burden on those who have to interpret the operation of the National Law and Marine Orders to determine whether they need to comply with particular requirements, are exempt from requirements because of class exemptions or need to apply for an exemption. It also diverts AMSA's limited resources to unnecessary low-risk activity in assessing applications and administering exemptions. As a general principle, regulation by or through exemption is not good regulatory practice.

At the other end of the risk spectrum, there are DCVs that pose a higher risk that is not currently appropriately managed under the applicable NSCV standards. Examples of such vessels provided in submissions to the Review Panel included vessels that may carry dangerous goods or hazardous and noxious substances; harbour towage vessels that operate in close confines towing heavy merchant vessels; and vessels that have a similar risk profile to vessels operating under the Navigation Act, in that they operate further off-shore and in similar risk conditions to vessels regulated under the Navigation Act.

In its draft Phase 1 Report, the Review Panel had proposed that vessels that are identified as high-risk should be required to comply with the Navigation Act. Industry stakeholders felt that it was unclear how this would support better safety outcomes and noted that the proposal had implications in terms of survey obligations, risk mitigation strategies and crewing.

The Review Panel considers that the standards that apply to DCVs should be appropriately tailored to their risk profile. As discussed above, what constitutes 'high-risk' can vary. For instance, some vessels may pose a higher inherent risk to safety due to the nature of operations or the potential for catastrophic consequences if a risk eventuates. AMSA as the National Regulator will need to determine in consultation with all relevant stakeholders the risks posed by certain vessels and whether those are adequately managed under current standards and practices.

While the NSCV is appropriate for the risk profile of much of the DCV fleet, the Review Panel is of the view that AMSA should be able to apply bespoke, and flexible requirements to DCVs that are either:

- 'Novel' and not well suited to the NSCV standards, for example, uncrewed vessels; and/or
- By their nature particularly hazardous, and warrant more prescriptive standards than currently provided in the NSCV.

This would promote innovation in a field where Australia could emerge as a leader.

This could also include the application, where appropriate, of parts of Marine Orders that apply to vessels under the Navigation Act.

### **Power to issue certificates**

Under the current National Law, Recognised Organisations<sup>73</sup> and accredited marine surveyors can survey a vessel, but cannot issue Certificates of Survey or Operation for DCVs. This introduces delays and inefficiencies in the certification process. In the proposed review of the marine surveyor accreditation scheme (see Recommendation 10 of this Review Report) consideration should be given to enabling AMSA to delegate the power to issue certificates to Recognised Organisations and marine surveyors.

### **Recognition of certificates issued internationally or under the Navigation Act**

AMSA currently has limited flexibility to recognise safety certificates issued by the maritime authorities of other countries.

Consequently, AMSA must go through the process of satisfying itself that a vessel meets the relevant Australian standards, notwithstanding that the vessel may have been designed, constructed and surveyed overseas in accordance with a standard that meets the equivalent standards that apply in Australia.

Similarly, AMSA cannot recognise a safety certificate that it has itself issued to a ship under the Navigation Act when that same ship changes its operations to a domestic commercial purpose. AMSA can only do so through an administratively burdensome process of exemptions, which is costly to both industry and AMSA.

DCVs may also have their Australian certifications suspended or revoked if they take their vessel offshore, with a consequential requirement for that vessel to go through the certification process again on return.

The Review Panel is of the view that AMSA should have authority to recognise certifications made under other jurisdictions where it is satisfied that the other jurisdiction adopts standards that would effectively meet the requirements of the National System.

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<sup>73</sup> A Recognised Organisation means an organisation prescribed by the regulations under the *Navigation Act 2012*.

## 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 Productivity Commission concluded that approaches to regulation should take account of which party is best placed to understand and manage a particular 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.<sup>74</sup>

The Review Panel is of the view that a more contemporary approach to risk-based regulation in the National Law—one that ensures that regulatory requirements imposed are proportionate to the safety risk that they are seeking to address—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 Finding 11 and Recommendation 12.

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

In summary, the Review 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,<sup>75</sup> 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 parties best placed to understand and manage the particular 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.<sup>76</sup>
- **Guidance material and Codes of Practice:** AMSA should encourage compliance with general safety duties by publishing guidance material that demonstrates how duty holders may comply with these duties. AMSA should be given a head of power under the National Law to issue, where appropriate, Model Codes of Practice. While not law, Model Codes of Practice should be admissible in court proceedings as evidence of what is known about a particular hazard, risk or control. Model Codes of Practice can be used in the defence of an operator who is compliant with that code. Model Codes of Practice could be particularly beneficial for operational matters 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 can supplement and clarify the requirements of Model Codes of Practice or, where appropriate, stand on its own. Both should be developed in close consultation with industry,

<sup>74</sup> Productivity Commission: *National Transport Regulatory Reform* (Inquiry Report 2020) pages 4-5.

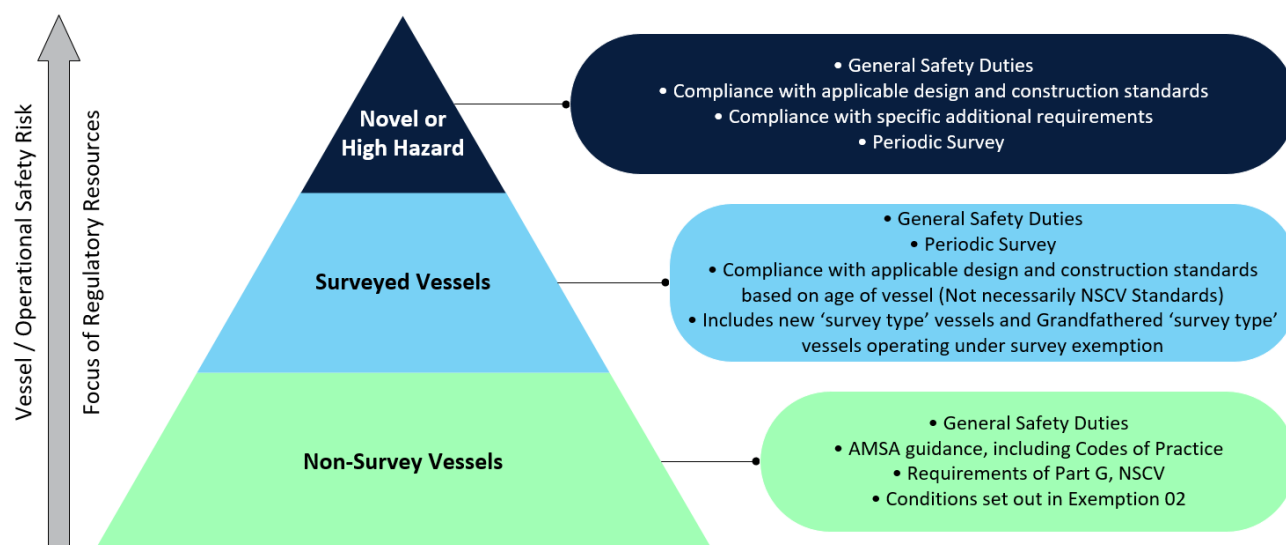
<sup>75</sup> The definition of an Owner of a vessel under the National Law includes someone who has overall general control and management of the vessel. Issues around the definition of Owner is discussed under Finding 6.

<sup>76</sup> 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 Findings 4, 5 and 6 of this Report.

including subject matter experts on the operations subject to the Code, to ensure they reflect good industry practice and explain clearly what may be reasonably practicable to achieve safety outcomes.

- **Requirement to hold Certificates of Survey or 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) be required to hold a Certificate or authorisation of a type to be determined by AMSA. The definition of the type and class of vessels that require survey should be based on the current definitions of those excluded from survey requirements under Schedule 1 of the *Marine Safety (Certificate of Survey) Exemption 2021* (EX02).
- **Single Safety Certificates:** The National Law should allow for AMSA to issue a single certificate that covers both survey and operations. Further, the National Law should enable AMSA to authorise Recognised Organisations and marine surveyors to issue Certificates.
- **Non-survey vessels:** Non-survey vessels should continue to be required to comply with Part G of the NSCV, which sets out minimum standards for vessel design and construction and for safety equipment to be carried on board. They should also be required to comply with the conditions currently set out in Schedule 1 of EX02. Applications for vessels under 12m for exemption from survey rely on a self-declaratory process. It is important that AMSA randomly audit or otherwise review these applications to ensure that the process is not abused resulting in compromised safety outcomes.
- **Exemptions:** AMSA should retain the ability to exempt specified persons or vessels, or classes of persons or vessels, from the application of particular standards of the National Law. It should also retain the option to introduce different standards which are 'deemed to comply' to existing standards. The 'deemed to comply' concept is particularly useful to encourage innovation and the adoption of new technologies.
- **Surveys, audits and inspections:** As is currently the case under Marine Order 503, the frequency of surveys by maritime surveyors or other audits/inspections by maritime safety inspectors should be based on risk. In the proposed review of the marine surveyor accreditation scheme (see Recommendation 10), AMSA should give consideration as to how to assess and consider operator performance in determining the frequency and scope of inspections and periodic surveys.
- **Application of additional or bespoke requirements:** AMSA should use its power to set standards under Marine Orders to tailor specific requirements to vessels or operations that are novel or pose very hazardous risks that cannot be mitigated sufficiently through application of the NSCV standards alone. This could take the form of a Marine Order for a particular type of vessel or operations, or additional conditions on an individual operator's Certificate of Survey/Operations, and/or requiring compliance with parts of Marine Orders made under the Navigation Act.

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

**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 relevant standards and certification processes;
- All vessels would be required to comply with any on-water rules applied by the relevant state or territory<sup>77</sup> (such as speed, compliance with navigational markers, traffic management plans, drugs and alcohol etc.). On-water surveillance of DCVs, as well as recreational vessels, by state and territory maritime authorities is a critical element in the regulatory framework for managing risks associated with DCVs and their operation.
- WHS laws in each state and territory would continue to apply. AMSA and WHS authorities would apply Memoranda 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); and
- DCVs will also need to comply with other regulatory requirements such as fisheries management, marine parks, and waterway access. It is important that the relevant regulators work together to ensure that the interactions of their requirements do not unnecessarily burden the DCV sector.

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 characteristics or risk profiles of vessels that are appropriate for regulation within each layer of the pyramid at **Figure 6**.

For example, small workboats and human powered vessels are likely to fall in the base (lower risk) tier of the risk-based pyramid. These vessels are currently exempt from certification and survey. Non-survey vessels 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, and any other requirements as appropriate, for human powered vessels imposed through the NSCV.

Vessels subject to grandfathered arrangements are not required to fully meet current NSCV standards however will be required to meet alternate baseline standards and be subject to periodic inspections and/or surveys. The implications for 'grandfathering' provisions are discussed further under Finding 3 in this Report.

<sup>77</sup> 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.

All new vessels will be required to meet NSCV standards, or equivalent international standards as described above in place at the time of their design/construction.

AMSA may apply additional or bespoke standards to vessels that are novel or pose very hazardous risks.

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.<sup>78</sup>

The Review Panel's view is that the simplification of certification requirements will, in part, help to manage the consequences of complex legislation and reduce the regulatory burden on operators. 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 particular risk category are able to navigate and understand compliance requirements under the National Law more easily, and have clarity on 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 into the Marine Orders on the unique identifier, Certificate of Survey and Certificate of Operation requirements.

**Recommendation 1:** The law should be amended to better reflect a risk-based and flexible regulatory model by:

- Retaining general safety duties on all parties that have a duty under the current law;
- Providing a head of power for AMSA to develop Model Codes of Practice in consultation with industry, and for the Model Codes of Practice to be admissible in court proceedings;
- Removing the universal requirement in the National Law for all DCV's to have Certificates of Survey and Operation and, rather, providing that vessels of a type or class specified in the Regulations (or Marine Orders) be required to comply with relevant standards and/or hold a certificate or authorisation of a type determined by AMSA.
- Providing that a single Certificate of Safety may be issued covering all safety requirements;
- Providing AMSA with the ability to delegate the issuing of certificates to Recognised Organisations and accredited marine surveyors.
- Providing AMSA with the power to recognise certifications made under other jurisdictions or under the Navigation Act, where it is satisfied that the applied standards would effectively meet the requirements of the National System;
- Developing a long-term data strategy to build more rigorous risk-based models to inform regulatory strategies;
- Providing a regulation-making power to include further reporting requirements to support AMSA's long-term data strategy; and
- Enabling AMSA to use its standards making power to tailor requirements for vessels or operations that are novel or inherently hazardous.

<sup>78</sup> 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

The current grandfathering arrangements, and how the transitional standards framework is perceived to operate, act as a disincentive to safety improvements.

In the draft Phase 1 Report, the Review Panel proposed the progressive withdrawal of grandfathering arrangements in the National Law to improve safety outcomes.

### Stakeholder feedback

Stakeholders responded to the draft proposal with a range of views and opinions. These can be summarised as follows:

- A number of stakeholders felt that just because a vessel does not meet today's standards does not mean that the vessel is inherently unsafe. These stakeholders considered that older vessels can be operated safely provided they are maintained to a safe standard. Changes should only be required if there is a safety issue identified after a proper assessment applied under a risk-based framework;
- A number of stakeholders acknowledged that some review or survey mechanism is necessary in relation to that portion of the DCV fleet that had not been surveyed in a long while;
- Stakeholders accepted that a baseline set of standards were necessary for grandfathered vessels to be assessed against, but there was a range of views on whether the current 'transitional standards' are an appropriate baseline;
- Some stakeholders noted that the transitional requirements disincentivise a move to modern safety standards as they are too stringent and cost prohibitive.
- The breadth of the proposal, and the impact it would have on parts of the DCV industry in terms of financial viability and mental health, were of concern to a number of stakeholders; and
- A majority of stakeholders supported some form of assistance to help manage the impact that the removal of grandfathering provisions would have on industry.

### Concept of grandfathering

The concept of grandfathering is not unique to the DCV sector. At a basic level, grandfathering works so that older products, vessels or vehicles can continue to meet the standards that applied at the time of their first certification, subject to that product, vessel or vehicle remaining safe over their lifetime. For example, road vehicles, whether they are newly manufactured in Australia or imported as new or second-hand vehicles, are required to comply with the relevant Australian Design Rules (ADRs) at the time of manufacture and supply to the Australian market. Older vehicles on Australian roads are generally required to continue to comply with the relevant ADRs as at the time of manufacture or supply, subject to the vehicle being roadworthy. Maintaining roadworthiness may require improvements to the vehicle to rectify ongoing wear and tear, for example replacement of tyres or braking, suspension and steering components. However, if the owner modifies elements of the vehicle covered by an ADR—for example, by installing a new engine—they may have to comply with the requirements of a newer ADR applicable to that component. Most older vehicles are also subject to some contemporary safety requirements, for example the fitting of seatbelts.

### Grandfathering in the National Law

Grandfathering was introduced at the time of the transition from state and territory systems to a harmonised National System to minimise the impact on the existing fleet, where possible, by preserving existing arrangements. This was necessary as regulatory requirements differed across Australian state and territory jurisdictions.

## Pre-National System jurisdictional arrangements

### Non-survey schemes

Under the National Law, only ‘survey type’ vessels—that is vessels that are equal to or greater than ( $\geq$ ) 12m, which operate offshore, 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. ‘Non-survey type’ vessels, that is vessels less than 12m, operating only in sheltered waters and not engaged in high-risk activities on the other hand are exempt from survey.<sup>79</sup>

Prior to the move to the National System, all states and territories, except Victoria, had legislated non-survey schemes in place. The non-survey schemes generally applied to small vessels operating in sheltered waters, which broadly equate to the ‘non-survey type’ vessels under the National Law. Queensland, however, was an exception. It did not require any vessel to hold a Certificate of Survey, and instead, from the early 1990s, maintained a certificate of registration scheme. ‘Survey type’ vessels such as passenger vessels and offshore fishing vessels operating in Queensland prior to 30 June 2013 were not required to hold a survey certificate, unlike the requirements applying to the same types of vessels operating in other jurisdictions.

### Vessel and design standards

A large proportion of ‘survey type’ vessels constructed between 1979 and 2008 were built to the USL Code. Vessels constructed before 1979 would have been built to ‘pre-USL Code’ standards while vessels constructed after 2008 have been built to the NSCV.

Prior to the introduction of the National Law, jurisdictions had local variations to the standards that applied to ‘survey type’ vessels to accommodate local conditions or remove gaps in the standards. For example, fishing vessels in Queensland were exempt from fixed fire-fighting equipment requirements. Also, Queensland provided considerable discretion to accredited surveyors to select and apply a suitable standard which resulted in vessels that were not built to either the USL Code or NSCV.

The standards for ‘non-survey type’ vessels also varied considerably. Jurisdictions often selected certain aspects of the USL Code and NSCV to apply to the smaller and lower risk vessels, and did not require the vessels to comply with the relevant standard in full. Recreational safety equipment requirements were sometimes applied to these vessels.

### 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.

Prior to the National Law, jurisdictions generally applied the USL Code or NSCV minimum crewing requirements, or specified crewing levels in their regulations. For a range of operations that now require a Certificate of Competency under Marine Order 504, operators could operate under a recreational boating licence. In addition, in some jurisdictions—particularly Tasmania and Queensland—single-handed (solo) operations were permitted for some larger vessels (i.e. vessels  $\geq 12$ m). Neither of these are now permitted for new vessels under Marine Order 504.

‘Appropriate crewing’ must now be determined by owners of DCVs as part of their general safety duties under the National Law. This applies to all vessels including vessels subject to grandfathered crewing arrangements.<sup>80</sup> However DCVs operating under grandfathered crewing arrangements need not comply with the minimum crewing requirements (where that is the appropriate crewing requirement), and can continue to operate with crewing requirements that applied to the vessel as of 30 June 2013.

<sup>79</sup> Marine Safety (Certificate of Survey) Exemption 2021 (EX02).

<sup>80</sup> Section 6, Schedule 1 Marine Order 504 (Certificates of operation and operation requirements—national law) 2018.

### Certificates of Competency

In New South Wales, 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 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.

### Key elements of grandfathering in the National Law

Consistent with the intent of the 2011 IGA, the National Law regulatory framework introduced:

- **Grandfathered survey exemptions** that allow a vessel which was exempt from survey on 30 June 2013 to continue to be exempt from the requirement to hold a Certificate of Survey and undergo regular survey. This is conditional on the vessel meeting specified standards (generally, the design, construction and equipment standards that applied to the vessel on 30 June 2013, plus current NSCV safety equipment and EPIRB requirements).
- **Grandfathered design and construction standards** that allow a vessel to continue to comply with the design, construction, and some equipment standards that applied to the vessel on 30 June 2013. These standards vary depending on when the vessel was constructed, the standard that applied to the vessel in the jurisdiction of operation, and any exemptions issued by the relevant marine safety agency. However, contemporary safety equipment and EPIRB requirements also apply.
- **Grandfathered minimum crewing requirements** that allow a vessel to continue to comply with the minimum crewing requirement that applied to the vessel on 30 June 2013, which may be less than the minimum crewing requirements that apply to a new vessel (that is, a vessel that came into operation after 30 June 2013, unless the owners/operator elect(s) to comply with the current national standard).
- **Grandfathered Crew Competency Certification** under which 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 (99-year) state and territory Certificates of Competency continue to be recognised.

A grandfathered vessel must not change operations, be modified, or change its geographic area of operation, if it is to continue to operate under grandfathered arrangements. If it does change operations or undergo modification, the vessel generally becomes a ‘transitional’ vessel and must meet the transitional vessel standards set out in Schedule 2 to Marine Order 503, or comply fully with the NSCV in force at the time of the change. Its compliance to those standards is verified through a survey process.

AMSA estimates that as of July 2022:

- Approximately 73 percent of the current fleet (approximately 16,477 existing vessels), operated prior to 1 July 2013 and may be subject to a grandfathered arrangement.
- Approximately 11,326 vessels are operating under grandfathered non-survey arrangements. Of these approximately 4,411 are ‘survey type’ vessels and most of these operate in Queensland. Changes to the grandfathered survey exemptions may also impact a small number of operators in other states—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.
- It is difficult to identify the exact number of vessels with grandfathered design and construction standards.

- Approximately 532 vessels constructed before 1979 that still operate as DCVs, are estimated to not have been built to either the USL Code or NSCV.
- Approximately 7,237 vessels were built between 1979 and 2007, and are therefore likely to have been built to the USL Code—particularly if they are a ‘survey type’ vessel. The USL Code which has been in place since the late 1970s, provides an acceptable standard where vessels continue to comply with it in full. However, some of these vessels would have been modified after 2007. Where these modifications were completed in compliance with the law and reviewed by an accredited marine surveyor, aspects of the vessel will be compliant with the NSCV. Where the modifications have gone unchecked, the vessel may no longer be compliant with the USL Code (or NSCV).
- Of the estimated 7,844 vessels built from 2008, those which are ‘survey type’ are likely to have been built to the NSCV. However, if modifications to the vessels have gone unchecked because the vessel is not subject to periodic surveys, the vessel (or aspects of the vessel) may no longer comply with the NSCV.
- In some jurisdictions, such as Victoria, the number of vessels operating under grandfathered crewing arrangements is low. However, in New South Wales, as many as 3,500 vessels may currently operate under a grandfathered crewing arrangement. The number of vessels with grandfathered single-handed crewing allowances is estimated to be low.

## Minimum safety standards

During consultation, the Review Panel heard that the key safety risks are in relation to vessel stability, fire safety and electrical safety.

### Vessel Stability

Stability issues have 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—either as an immediate consequence, or cumulatively over time—reduce the vessel’s stability.

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. Stability is particularly an issue for commercial fishing vessels because:

- 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.

### Fire Safety

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

Currently, as a consequence 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 has not caused 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.<sup>81</sup>

## Electrical Safety

Since the commencement of the National System, one fatality has been attributed by a coronial inquiry to 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 because of grandfathering arrangements. Although the Coroner found that the vessel, as a workplace, was required to comply with RCD requirements under WHS 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.<sup>82</sup>

## Safety implications

Grandfathering of existing state-based requirements was put in place to help facilitate a move to a National System. Given that the National System is now well established, the Review Panel considers, for reasons discussed below, that additional proportionate requirements can improve safety outcomes for grandfathered vessels and improve regulation of the sector.

Survey is an important safety assurance mechanism that ensures that vessels remain fit for purpose. Regular surveys ensure that vessels continue to comply with applicable standards, deficiencies and repairs can be identified and rectified, and that, overall, there is assurance that vessels remain fit for purpose. This is no different to road vehicles, rail, aircraft and heavy transport vehicles. Grandfathered survey exemptions mean that some older, higher risk vessels, including large passenger vessels, are not subject to this important safety risk mitigation measure. AMSA, in its safety regulatory role, has limited visibility of the condition of this part of the fleet.

Some vessels that were not built to either the USL Code or NSCV are still in operation. These vessels present a significant risk if they do not currently comply with at least minimum safety standards. Even where vessels have been built to the USL Code or the NSCV, modifications to the vessels may have gone unchecked because the vessel is not subject to periodic surveys. This means there is no assurance that deficiencies and repairs have been identified and rectified, and that the vessel overall, remains 'seaworthy' or fit for purpose.

In relation to Perpetual Certificates of Competency, AMSA has no ability to confirm holders of certificates are meeting basic requirements including medical, eyesight, first aid, and radio licence requirements, or to confirm demonstration of sea service where appropriate.

The community expects that all vessels boarded by individuals in Australia are safe, and that all necessary safety precautions are in place to at least minimise the consequences of, if not prevent, incidents at sea. Similarly, the community expects that all employees, in all industries, can access and work in a safe workplace. As a consequence of the current grandfathering arrangements, some vessels may not currently meet these expectations. Whether or not a vessel operates under grandfathered arrangements is often not obvious to people employed on or using the vessel.

<sup>81</sup> A recent example from the United States is the fire on an anchored dive vessel the *Conception* in which 34 people (passengers and crew) died. See 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).

<sup>82</sup> *Inquest into the death of Ryan Harry Donoghue* (Coroner's Court Darwin, Coroner Judge Greg Cavanagh, 3 June 2016), pages 34—37.

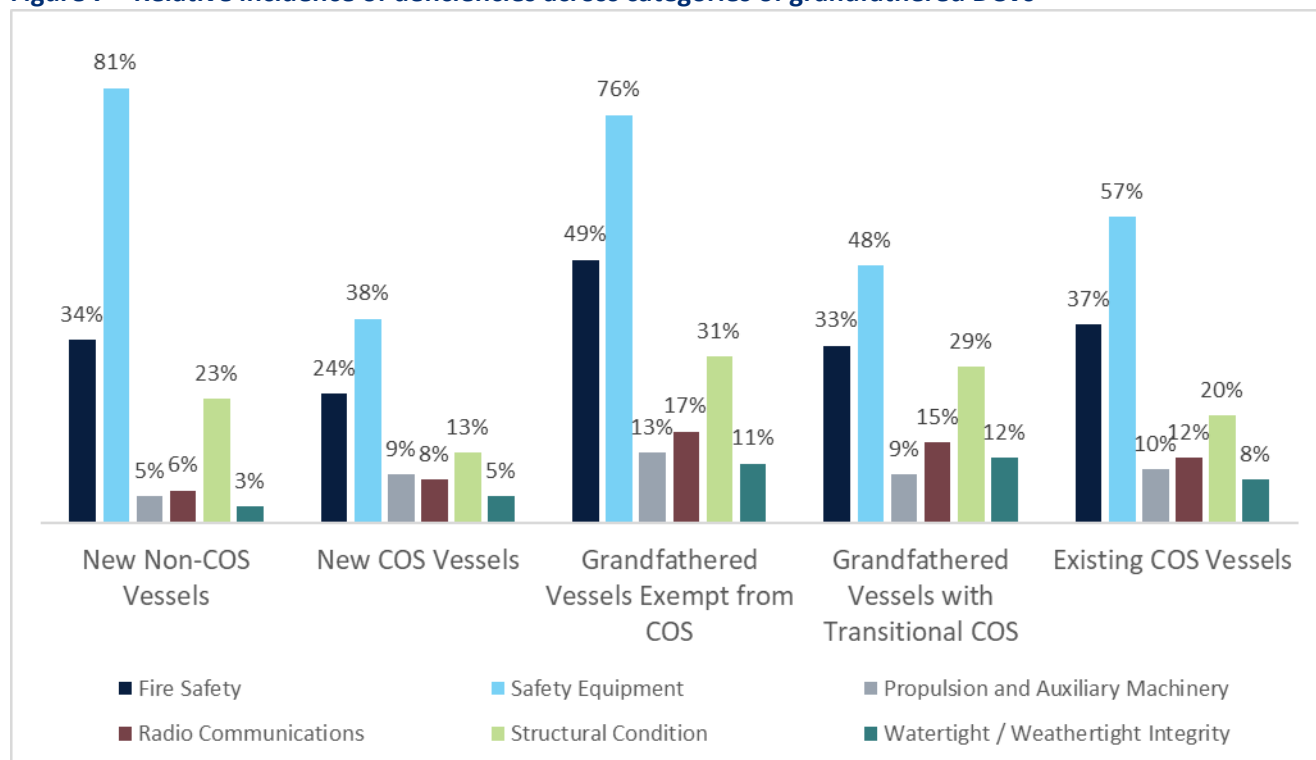
## Deficiency data obtained through vessel inspections

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 divided the data into the following categories:

- **New non-Certificate of Survey 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 Certificate of Survey 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 Certificate of Survey.** 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 percent of existing Exemption 02 vessels are 'survey type' vessels which have been grandfathered as 'survey exempt'.
- **Grandfathered vessels with transitional Certificate of Survey.** 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 Certificate of Survey vessels.** This includes 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.

**Figure 7—Relative incidence of deficiencies across categories of grandfathered DCVs<sup>83</sup>**

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.<sup>84</sup>

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<sup>85</sup> and the available data, the Review Panel believes the ongoing grandfathering of survey requirements poses an unacceptable safety risk. The Review Panel is of the view that the current grandfathering arrangements should be amended to ensure that all ‘survey-type’ vessels undergo periodic survey. The standards to which the surveys are made is discussed below under a risk-based, phased approach to amending grandfathering.

<sup>83</sup> ‘COS’ in Figure 7 refers to Certificate of Survey.

<sup>84</sup> 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.

<sup>85</sup> See for instance [Inquest into the death of Glenn Anthony Wilson](#) (Coroner’s Court of Queensland, Coroner Kevin Priestley, 24 May 2016), [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).

## Competitive advantage

Grandfathered 'survey exempt' vessels can be operated at a lower cost than new or grandfathered vessels that are in survey. Owners, operators and industry sectors subject to these arrangements have a competitive advantage, as their compliance costs are lower. This lowers the ability of new entrants to apply competitive pressure, to deliver better services, more choice and lower prices to consumers. These cost savings inflate the value of grandfathered vessels and create an incentive to extend a vessel's working life, therefore increasing the safety risks of the grandfathered arrangements over time as the vessels age. From a safety perspective, such an incentive is perverse. Similarly, vessels that operate under grandfathered arrangements that allow for the operation of vessels with lesser crew than required under contemporary standards have lower crewing costs compared to new operators.

## Good regulatory practice

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

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.

To maintain these blanket exemptions, AMSA needs to be satisfied the exemptions will not jeopardise safety as prescribed under section 143 of the National Law. Without some kind of survey or review of vessels, it is difficult to see how a regulator could satisfy itself of this requirement.

## Regional differences

The current grandfathering arrangements perpetuate regional disparity in the standards that apply to DCVs based on their location. For example, even where the national standards (USL Code then NSCV) were adopted prior to 30 June 2013, jurisdictions introduced local variations to the standards. Fishing vessels in Queensland for instance were exempt from fixed fire-fighting equipment requirements. In addition, in Queensland discretion was provided to the accredited surveyor to select and apply a suitable standard. This resulted in some vessels not being built to either the USL or NSCV standards. Grandfathering (through survey exemptions and/or grandfathered design and construction standards) has preserved these regional differences.

## Risk-based, phased approach to the withdrawal of certain grandfathered arrangements

Broadly speaking, the Review Panel agrees with stakeholder views that older vessels can be operated safely provided they are maintained to a safe standard, and that changes should only be required if there is a safety issue identified through a proper assessment under a risk-based framework.

To arrive at this improved regulatory position, the Review Panel proposes a risk-based phased approach to grandfathering over time, as follows:

- For safety assurance and safety risk management purposes, all 'survey type' vessels as specified by AMSA, that operate under a grandfathered survey exemption should be brought within survey through an "entry" or "gateway" survey. This survey should assess gaps in relation to the relevant design and construction standards that applied to the vessel as of 30 June 2013, as well as baseline

standards in relation to certain key safety risk areas. In the discussion further below the Review Panel considers the key risk areas that the baseline standards should address.

- In implementing the risk-based approach recommended by the Review Panel (at Recommendation 1), AMSA should determine the categories and classes of vessels that will be required to hold a Certificate of Survey (or Safety Certificate incorporating survey requirements). The requirement for a survey inspection would only apply to DCVs that would be required to be surveyed under the risk-based regulatory regime proposed under Recommendation 1.
- AMSA would retain the discretion to grant exemptions on a case-by-case or a class basis.<sup>86</sup> DCV owners should be able to demonstrate equivalent means for rectification, as well as have alternative ways to demonstrate compliance with survey requirements.
- The entry or gateway survey for 'survey type' vessels should occur over a two-to-five-year period, with higher risk vessels/operations given greater priority by AMSA for early inspection.
- Owners should be required to rectify inspection findings within two years of inspection. Provided the identified defects do not pose a major safety risk (for example a major risk to public or crew safety), the vessels should be allowed to continue to operate while inspection findings are rectified.
- However, if a vessel is found to be unsafe on inspection and the safety risk is found to be major and imminent, rectification will need to be carried out before the vessel can be operated again. Arrangements should be put in place to allow AMSA to delegate its power to issue prohibition and improvement notices to accredited marine surveyors to streamline the process (see further, Recommendation 10).
- 'Survey type' vessels that operate to grandfathered design and construction standards *and* that are within survey, should continue to meet the grandfathered standards (i.e. the standard that applied to the vessel as at 30 June 2013), subject to also meeting contemporary safety equipment and EPIRB requirements, and the appropriate baseline standards for three key elements (i.e. stability, fire safety and electrical safety). These are described below under 'Appropriate baseline standards'.
  - Where an uplift in key areas of safety risk (stability, fire safety and electrical safety) is warranted, the vessel owner should have the flexibility to work closely with marine surveyors to develop equivalent means of rectification or compliance that achieve the desired safety outcome in key areas of safety risk.
  - Individual fleet characteristics and the safety management/risk mitigation practices that they adopt should form part of the consideration of solutions that are developed to achieve the desired safety objectives.
- 'Non-survey type' vessels that operate under grandfathered design and construction standards (i.e. the standard that applied to the vessel as at 30 June 2013) will need to continue to comply with those standards.
- Grandfathered crewing arrangements should be allowed to continue, subject to the vessel not changing its area of operation, nature of operation or being modified. AMSA should develop an evidence base on the incidence of serious injuries and fatalities associated with these crewing arrangements, and it should draw any new evidence to the attention of the government.
- DCVs must be operated by a person who holds a Certificate of Competency for the duties they are performing as outlined in Marine Order 505. Arrangements for volunteer marine rescue operations would not be affected by this change.
  - Pathways enabling existing operators to obtain the requisite commercial qualifications should be developed by AMSA to support the transition. For example, this could include

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<sup>86</sup> In accordance with the criteria in section 143 of the National Law.

recognising prior experience as the basis for issuing a Certificate of Competency. Crew with relevant experience or competence should not be required to go through any retraining.

- Perpetual Certificates should require registration with AMSA. To preserve expertise in the industry, upon registration of Perpetual Certificates, AMSA should recognise the expertise of the Certificate holders' industry expertise, and should reissue certificates, subject to Certificate holders:
  - Being assessed against contemporary health and fitness standards; and
  - Providing logbook evidence of a minimum number of hours applied each year, with the minimum number of hours to be determined by AMSA in consultation with industry.
- Changes to grandfathering arrangements should be developed and implemented by AMSA in close consultation with industry and with state and territory jurisdictions.

### Appropriate baseline standards

In the draft Phase 1 Report, the Review Panel said that transitional vessel standards set out in Schedule 2 to Marine Order 503 were an appropriate baseline standard to apply to grandfathered vessels in the phased removal of grandfathering arrangements. Feedback from stakeholders indicated that there is confusion regarding how the transitional standards are applied.

Many accredited marine surveyors and vessel owners who the Review Panel spoke to during consultation believed that once the transitional arrangements were triggered, vessels operating under grandfathered survey arrangements, or grandfathered design and construction standards, would have to comply with all the elements of the transitional standards set out in Schedule 2 of Marine Order 503.

The confusion about the application of transitional standards is discussed further in the next section.

The Review Panel accepts that if grandfathered vessels have been operating safely in compliance with the standards applicable to them (USL or NSCV), and have not changed operations or made any structural modifications, then they should continue to be permitted to comply with these applicable standards. However, regulatory arrangements should, to the extent that is reasonably practical mitigate against the risk of capsizing, electrocution and fire.

The Review Panel now considers that grandfathering arrangements should be continued but additionally all grandfathered 'survey type' vessels<sup>87</sup> should be required to comply with:

- A fit for purpose stability standard: This could be the standard to which the vessel was built (i.e. the NSCV or the USL Code), with some minor amendments, to be determined by AMSA in consultation with industry. For example, as the average weight of a person has increased since the USL Code was developed, the NSCV person weight assumptions would need to be used in stability calculations for compliance with the USL Code. There is also a small number of vessels that pre-date the USL Code as well as some vessels that do not comply with either the USL or NSCV Code;
- A fit for purpose standard for a fixed fire detection and extinguishing system, with flexibility to adopt equivalent means of rectification or compliance that achieve the desired safety outcome, or the ability to operate under an exemption from AMSA; and
- The fitting of RCDs in accordance with the relevant contemporary AS/NZ standard.<sup>88</sup>

At the initial or gateway survey, the grandfathered vessels should demonstrate compliance with the relevant design and construction standard that applied to the vessel on 30 June 2013 as well as compliance with baseline standards in relation the three key elements (stability, fire safety and electrical safety). Provided a vessel does not undergo structural modification or any change in its area or nature of

<sup>87</sup> This includes grandfathered 'survey type' vessels operating under survey exemptions as well grandfathered 'survey type' vessels that are within survey but operating to grandfathered design and construction standards.

<sup>88</sup> Standards Australia & Standards New Zealand (2018) *Electrical installations (known as the Australian/New Zealand Wiring Rules)* (AS/NZS 3000:2018).

operation, it should be able to continue to operate in compliance with the baseline standard in relation to these key elements and the relevant design and construction standard. AMSA should determine the survey frequency for these vessels based on their risk profile.

The Review Panel notes that a small number of vessels are built to pre-USL standards. There are also some vessels that may not have been built to either the USL or the NSCV. AMSA should establish an alternative minimum standard for these vessels that requires periodic survey, and meeting certain stability, fire and electrical safety requirements. Due to the possible greater safety risks associated with these older vessels, it is appropriate that these are restricted from operating across state borders (unlike the other grandfathered vessels entering survey that meet the consistent baseline standards discussed above).

As is currently the case, all vessels should be required to meet contemporary safety equipment requirements like the carrying of EPIRBs and other safety equipment. These are relatively inexpensive upgrades which ensure better safety outcomes. AMSA should afford flexibility to vessel owners to demonstrate equivalent means of compliance that achieve similar safety outcomes in relation to any safety requirements that require structural upgrades, for example, the installation of handrails/gunwales of a certain height. This has proven to be a particular issue of concern to the fishing industry, where complex WHS issues are at play and may need to be traded off against each other.

### **Transitional standards are misunderstood**

Feedback provided to the Review Panel suggested that current arrangements that trigger compliance with the transitional standards where vessels undergo structural modifications, or change their operation or area of operation, create a disincentive for vessel owners to move out of grandfathered arrangements.

The Review Panel's consultations revealed that this is a misunderstanding in how the transitional standards apply once triggered. A large proportion of industry and accredited marine surveyors the Review Panel engaged with believe that even small changes can trigger transitional standards requirements in full. Some in the industry were of the view that, once triggered, a vessel would have to ultimately meet all of the current NSCV standards—a requirement that would be impossible for a substantial part of the fleet to meet.

This misunderstanding has disincentivised vessel owners from pursuing even small incremental changes that would improve vessel safety due to the uncertainty of what might be triggered by the change.

AMSA advises that:

- The transitional vessel standards have been designed to apply a baseline set of standards covering all areas of the vessel.
- When a vessel activates the legal trigger (see Schedule 1 of Marine Order 503), the vessel must comply with the transitional vessel standards. The transitional standards prescribe the contemporary standards for mitigating against the risk of capsizing, fire and electrocution, while permitting USL standards for other aspects of the vessel.
- In addition, the transitional standards set requirements for owners to comply with NSCV standards if they are making specific upgrades or modifications to their vessels or vessel operations. For example, ensuring that a new wheelhouse is designed to the contemporary standard. In these instances, the requirements will only apply to the aspect of the vessel affected by the change.
- Not all changes to a vessel require compliance to the transitional standards. Any like-for-like changes, such as replacement of fixtures or fittings, do not trigger the transitional vessel standards. However, AMSA requires compliance with the transitional standards where the vessel has had:
  - Changes to its operations;
  - Changes to its class that result in an increased risk profile;
  - Changes to its operational area that result in an increased risk profile; or
  - Modifications to the vessel (that are not like-for-like).

The misunderstanding within industry regarding the transitional vessel standards, including by accredited marine surveyors, suggests the need for an education campaign by AMSA to improve understanding of the transitional standards.

Stakeholder feedback indicates that the costs associated with compliance with the transitional standards and the complexity of the process also act as disincentives to making safety or operational enhancements to vessels.

For instance, if the vessel's original survey arrangements did not include stability documentation, then stakeholder feedback suggests that operators prefer not to re-enter survey arrangements due to the high cost of generating stability documents. Submissions suggested that a simplified stability test could be introduced creating benchmark documentation that could be accessed by marine surveyors and the crew. There were other useful suggestions, for example the creation of a simplified lightship check<sup>89</sup> and cheaper survey options (for example, 'in water' surveys). The Review Panel understands that, in its consultation with owners, operators and industry, AMSA does try to determine less expensive and practical mechanisms for determining compliance with the transitional standards.

The Review Panel encourages this work and observes that changes to AMSA's administrative arrangements could help reduce compliance costs and improve safety outcomes. For example, operators experience higher fees when vessels are surveyed out of schedule. Greater flexibility in allowing operators to bring their vessels in for survey earlier than required would reduce regulatory costs, allow businesses to better match the regulatory framework to their circumstances, and potentially improve compliance. AMSA should continue to work to minimise compliance costs for industry.

## Impact on industry

### Cost of modified grandfathered survey exemptions

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. There may be additional costs associated with undertaking remedial work where the applicable standard has not been met—for example if a vessel has been modified and this has detrimentally affected its stability, the costs of undertaking remedial work to ensure the vessel maintains stability may be significant. 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.

### Cost of modified grandfathered Certificate of Competency arrangements

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. AMSA should consider mechanisms to make this less costly. For example, where appropriate, AMSA should recognise prior learning or experience rather than requiring that an operator undertake a formal course of study or examination. Applicants for/holders of a Certificate of Competency should hold the relevant medical certificate and first aid certification. Obtaining and maintaining the currency of each of these will impose

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<sup>89</sup> Lightship verifications are undertaken to verify that a vessel's displacement and centre of gravity has not changed significantly since the vessel was put into service.

a cost (though access to a person holding first aid certification at all times is already required under Marine Order 504 for all grandfathered vessels).

The costs impact on holders of Perpetual Certificates of Competency would include the costs of being assessed against contemporary health and fitness standards and any costs of future renewal of certificates.

### **Derelict and abandoned vessels**

Government stakeholders were concerned that there should be proper consideration of end-of-life vessel disposal, as changes in current grandfathering arrangements may result in DCVs being retired from service and abandoned or repurposed as recreational vessels. The Review Panel agrees that there is a cost to dealing with derelict or abandoned or end-of-life vessels to ensure that they do not end up causing environmental damage in Australian waterways, including through enforcement and prosecution of owners of the vessels. Under the National Law,<sup>90</sup> removing obstructions (including abandoned, sinking and derelict vessels) from navigable waters is a state or territory responsibility.

The changes that the Review Panel has recommended to grandfathered arrangements are a proportionate response that should minimise the risk of high numbers of derelict and abandoned vessels. However, the cost of interventions for removal of derelict or abandoned vessels will likely have to be borne by state and territory government authorities who manage waterways in the first instance. The Review Panel considers that the Australian Government should consult with state and territory governments on how best to address this issue if it arises, including the attribution of costs to manage it.

### **Safety Improvements Package**

The Review Panel is of the view that the Australian Government should consider supporting the changes to grandfathered arrangements that are proposed in this Report by establishing a time limited Safety Improvements Package that is funded from the Budget. The objectives of the Safety Improvements Package would be to ease the impacts of the proposed changes on industry and ensure that the overall goal of improving safety is supported.

The Review Panel's view is that the Safety Improvements Package should be available to the wider DCV fleet to make safety upgrades (not just grandfathered vessels), as an incentive to improve safety and to minimise inequity between vessels that have already upgraded and those that have not. The assistance could be provided by subsidisation or through a co-contribution approach, including through a grants program or a tax incentives scheme that is time limited. The method and quantum of assistance provided through the Safety Improvements Package would need to be determined by Australian Government.

The Review Panel heard views, particularly from regional and rural stakeholders, that access to infrastructure, such as slipways, was a substantial compliance barrier. In part this was the financial cost of accessing slipways, but the greatest cost driver was having vessels out of commission, and unproductive, whilst steaming to slipway facilities. This was particularly a problem in areas such as the Torres Strait, where the closest slipway facility was in Cairns. From a safety perspective, this impacts on the costs of keeping vessels in good order in parts of the country where fishing offers a means of employment and where boats are an important part of transport, but where living expenses are already high and incomes low.

The Review Panel suggests that the Australian Government could consider subsidised slipway facilities, or other solutions (as specified above, such as 'in water' survey solutions). For a small infrastructure outlay, government could have a very positive impact on the livelihoods and safety of those who rely on the sea for income and movement.

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<sup>90</sup> Section 6(2)(b)(ix) of the National Law.

Beyond hard infrastructure, the Review Panel also heard that in some circumstances it was difficult or prohibitively expensive for small operators to acquire basic safety gear. In remote and regional parts of Australia, the costs of EPIRBs, life jackets and other basic safety gear could be relatively high, not least because of higher freight costs. As part of a Safety Improvements Package, the government could consider a scheme to subsidise the costs of basic safety equipment, where the local costs of acquiring that equipment is substantially higher than the national price, and there is limited ability of local businesses to absorb those costs.

The impacts of the proposed changes to grandfathered arrangements and the proposed Safety Improvements Package will require further consideration by Government.

**Recommendation 2:** Safety improvements should be introduced to the current grandfathering arrangements in accordance with a phased risk-based program.

- DCVs that would be required to be surveyed under the risk-based regulatory regime proposed under Recommendation 1, and that are subject to grandfathered survey requirements, should undergo survey inspection to assess gaps and requirements to minimum design and construction standards and comply with baseline requirements for stability, fire safety and electrical safety.
  - 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, except where the vessel poses a major and imminent safety risk.
- ‘Survey type’ vessels that operate to grandfathered design and construction standards and that are within survey, should continue to meet the standard that applied to the vessel as at 30 June 2013 subject to also complying with baseline requirements for stability, fire safety and electrical safety.
- Grandfathered crewing arrangements should be allowed to continue, subject to the vessel not changing its area of operation, nature of operation or being modified. AMSA should develop an evidence base on the incidence of serious injuries and fatalities associated with these arrangements, and it should draw any new evidence to the attention of the Australian Government.
- Grandfathered Certificates of Competency should be improved by:
  - Requiring the registration of Perpetual Certificates with AMSA. Upon registration, these certifications should be recognised by AMSA and reissued subject to Certificate holders being assessed against contemporary health and fitness standards; and
  - Providing logbook evidence of a minimum number of hours applied each year. The minimum number of hours should be determined by AMSA in consultation with industry.
- The Australian Government should consider establishing a Safety Improvements Package with a suite of time limited incentives to assist with inspections and attaining appropriate standards, from a sustainable funding source.
- The Australian Government could consider funding arrangements from a sustainable funding source to assist state and territory governments to manage higher numbers of abandoned or derelict vessels due to changes in grandfathering, if this issue arises.

## Finding 4

There is a high level of confusion within the industry about the relationship between marine safety law and WHS 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.<sup>91</sup> 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 for a DCV 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. the role of AMSA in the maritime industry).

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

The benefits of having a common set of standards and employee and worker rights in relation to safety across all industry sectors has been broadly accepted in Australia for many years. Our practice nationally, and across all states and territories has been to ensure that obligations in WHS law are met by duty holders in all industries (including, for example, 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 the particular WHS authorities in various jurisdictions, 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,<sup>92</sup> 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, owners of a DCV must, as a Person Conducting a Business or Undertaking (PCBU), ensure, so far as is reasonably practicable, the safety of their workers and others put at risk by their 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.

<sup>91</sup> 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’.

<sup>92</sup> Issues in relation to the definition of ‘Owner’ are discussed under Finding 6.

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 relevant 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.

### 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. Initial inquiries indicate the incident is related to failures in the safety of the vessel, its equipment and operations. 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'.<sup>93</sup> This exclusion has led some to argue that WHS is a different concept to 'marine safety'. In particular, some have argued that WHS relates to worker or employee safety, while marine safety refers to the safety of vessels.

The Review Panel does not agree with this view. The reforms to the WHS law over 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 Review 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 domestic, commercial, 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 primary safety duty under 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.

<sup>93</sup> Section 6(2)(b)(xxi) of the National Law Act.

In its submission to the draft Phase 1 Report, AMSA argued that the scope of the general duties should be confined to design, construction, equipping maintenance, crewing and safe navigation of vessels (as opposed to safe operations). All other safety matters on board DCVs would then fall under WHS laws.

The Review Panel does not support this view.

AMSA sets many of the standards that go to the safe operation of DCVs and issues Certificates of Operation that deal with matters like on-board procedural controls and passenger numbers. The Review Panel believes that failures in these areas should be investigated and enforced by AMSA, which is better placed as an expert maritime industry regulator to enforce these activities than more generalist WHS authorities. Further, an incident with multiple root causes (e.g. a maintenance failure combined with a failure of on-board procedure) may require the attendance of both AMSA and the WHS authority to cover the range of matters for investigation. Rather than narrowing the potential for duplication, confusion and having ‘two masters’, the Review Panel is of the view that excluding ‘safe operations’ from the concept of maritime safety would increase this potential.

The Review Panel accepts that the distinction between a ‘maritime’ safety risk and a broader WHS risk is not easy to define with precision. To avoid duplication of effort and confusion within the industry, it is important that the MoUs between AMSA and WHS authorities set out in practical terms which regulator will take the lead where breaches of general safety duties are involved. This would help to give greater clarity around where a particular matter falls within the jurisdiction of AMSA (i.e. relates to the safety of a vessel, its equipment and operations).

The scenarios in the case study above are clear cut on which laws would apply, and which regulator is better placed to enforce the law. However, there are likely to be other examples and real-life instances where shades of grey are involved. Some examples provided 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 reprovisioning 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 precedents set by courts, these shades of grey need to be managed practically between AMSA and the WHS authorities. This is done currently through MoUs between AMSA and the respective WHS authorities in each state and territory. The Review Panel is of the view that these current MoUs could be enhanced by including a set of principles against which decisions about which regulator will take the lead on a particular matter can be assessed. In this process, consideration should be given to:

- Whether the matter falls within the scope of the National Law and/or the relevant 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 Review Panel’s view, these principles point to AMSA, generally, taking the lead on ‘on-water’ safety issues.

There needs to be a concerted effort to explain this relationship as clearly and simply as possible once these updated MoU arrangements are put in place, so that the regulated community and affected parties can understand their obligations and the focus of both AMSA and WHS authorities in the regulation of safety.

**Recommendation 3:** AMSA should:

- Review its Memoranda 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 DCVs.

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 prevented the two Bills from being fully aligned. As a result, while the formulation of the National Law duties is broadly consistent with the Model WHS Law, the offence and penalty provisions are not.

Table 1 provides one example of how the offences and penalties differ for a breach of the general safety duty of the owners of a vessel. Similar differences exist in the offences and penalties for other duty holders.<sup>94</sup>

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

The lack of alignment between the Model WHS Law and National Law means that AMSA has to meet a higher standard of proof to establish the most serious offences under the National Law, by establishing intent on the part of the duty holder. Where it is able to do so, the penalty for a breach under the

<sup>94</sup> For an offence committed on or after 1 July 2020, the value of a Commonwealth penalty unit was \$222.

National Law is significantly less than would apply if the offence was prosecuted and proven under the 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 five 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 address 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, however, have not entered into force because their commencement relies on the Minister being satisfied that each state and territory 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 Review 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 is required, to 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.

Further amendment may also be necessary to 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 reviewed to align with 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, or some new, alternative approach could significantly enhance the offences and penalties prescribed under the National Law, this Review identified several other gaps in the provisions of the National Law, which would require legislative change.

### 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 its 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 conduct of its business. This effectively 'lifts the corporate veil' and requires 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 Review 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 owners' 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 owners of a DCV complies with their safety duties under the National Law.

### Relationship between a PCBU and a DCV Owner

The National Law defines an 'Owner' of a vessel as including:

- A person who has a legal or beneficial interest in the vessel, other than as a mortgagee; and
- A person with overall general control and management of the vessel.

The law also provides that a person is not considered an Owner merely because he or she is the Master or Pilot of the vessel. That is, a Master of a vessel is not necessarily an Owner. They would only be an Owner if they had a legal interest in the vessel or had overall control and management of the vessel. This includes not only the handling of the vessel's operations, but its maintenance, decisions about where and when it is operated and so on.

Under the National Law, there may be multiple people or organisations who are 'Owners' of the same vessel. That is because the person(s) who has legal title over the vessel may not be the same person(s) who control and manage the vessel. Also, there may be different people who control and manage the vessel at different times.

Where there are multiple Owners under the National Law, each will have a duty to ensure, so far as is reasonably practicable, the safety of the vessel, the marine safety equipment on the vessel, as well as the operation of the vessel.

Each Owner's duty is qualified by what they can reasonably do to influence the safety of the vessel and its operations at any particular time.

So, for instance, a person who owns the title to a vessel may have far less influence over safety matters where they lease the vessel to another person than where they operate and maintain the vessel themselves. Similarly, it may not be reasonably practical for a person who operates the vessel during the week to ensure the safety of the vessel being operated by another party over the weekend.

In any situation where safety is compromised, the regulator can investigate all of the Owners to determine whether any of them breached their safety duty, considering what each could have reasonably done to ensure the safety of the vessel and its operations.

The rail legislative framework takes a different approach to defining the parties who hold duties under the Rail Safety National Law. The general safety duty applies to a 'Rail Transport Operator' (RTO). The RTO is defined as the person with effective control and management of either rolling stock or rail infrastructure. The focus of the duties and obligations under Rail Safety National Law is not on the party who owns the legal title to the rolling stock or infrastructure, but rather on the entity that is controlling and managing the business (i.e. the operator).

This is because it is the operator of the asset who is usually best placed to manage the risks associated with that asset.

By conflating the concept of the operator of an asset with the owner of the asset, there is a risk that the National Law is interpreted as taking a narrow view of the potential duty holders.

The Australian Maritime College noted that there is scope to broaden the definition of Owner within the National Law to ensure it captures all entities connected with the vessel's operations. Similarly, the Maritime Union of Australia argued that the definition of Owner should be better aligned with the definition of a PCBU under WHS law.

AMSA observed that the definition of an 'Owner' in the National Law that includes persons with overall control and management of the vessel is counter-intuitive, and not well understood within the industry.

### Scaling of infringement notice penalties

Infringement notice penalties under the National Law are higher than in other transport safety regimes. 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—\$1,149;<sup>95</sup> in rail safety, infringement notices are \$500—\$2,000; in WHS, they range from \$144—\$720 (in New South Wales and South Australia); 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.

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

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<sup>95</sup> National Heavy Vehicle Regulator, '[Penalties and infringements](#)', National Heavy Vehicle Regulator, 2021, accessed 18 May 2022.

barrier to safety inspectors issuing infringement notices. Another confidential submission reaffirmed that the National Law is currently inflexible in relation to infringement notices.

The Review Panel is of the view that the National Law should be amended so that infringement notice penalties can be up to, rather than equal to, one-fifth of the maximum penalty a court could impose. This will allow for penalties to be scaled by AMSA commensurate with the extent 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.<sup>96</sup> In the Review Panel's view, this is 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 has the advantage of being 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.<sup>97</sup>

## Unsafe or negligent navigation

Prior to the National Law, state and territory DCV 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 National Law captures 'unsafe navigation' if it is done by the Master of the vessel. Where the person operating the vessel is the hirer of the vessel for recreational purposes, any unsafe, reckless or negligent actions do 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 advised of cases where hirers of DCVs have operated in a dangerous manner which could have resulted in injury or death to others.

Submissions received during Phase 1 consultations raised concerns over the addition of a specific offence relating to negligent navigation. Submissions cited inconsistency between Commonwealth and state and territory laws, and an increased confusion about who is responsible for compliance and enforcement for breaches of good order and for prevention of collisions provisions. Section 6 of the National Law Act was cited as excluding the National Law from applying to state and territory law in relation to the following:

(viii) speed limits, navigation aids, traffic management plans, rules for prevention of collisions, no wash zones, the management of events on waterways, wrecks, salvage, passing dredges, towing objects, bar crossings and local knowledge requirements.

National regulation of DCVs is inherently intertwined with state and territory laws due to DCVs operating within these jurisdictions. The National Law is intended to apply to commercial vessels and operations.<sup>98</sup> While the Master of a vessel has a duty under the National Law to ensure the safety of the vessel and/or its operations, the hirer of that vessel for recreational use does not.<sup>99</sup> However, as state and territory legislation continues to include offences that would capture unsafe navigation by hirers of vessels for recreational purposes,<sup>100</sup> the Review Panel is not inclined to duplicate the offence into the National Law.

<sup>96</sup> National Law Bill, Replacement Explanatory Memorandum, page 72.

<sup>97</sup> Section 305(2) of the Navigation Act.

<sup>98</sup> National Law Bill, Replacement Explanatory Memorandum, page 24.

<sup>99</sup> See subsections 16(1) and 16(5) of the National Law.

<sup>100</sup> For example, Div. 1, section 13(1) *Marine Safety Act 1998* (NSW).

## 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 law, where the default limitation period is two years with allowances for other factors such as whether a coronial inquest is being held. The shorter National Law time limit may mean that the Commonwealth is unable to prosecute offences where time-consuming (often more complex) investigations are involved.

The Senate inquiry into the performance of AMSA considered this issue and recommended that the limitation period for bringing non-custodial charges be extended from 12 months to two years. This 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’.<sup>101</sup>

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

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.<sup>102</sup> 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 certainty and a more streamlined process (including for the Certificate holder/offender) could be achieved if courts had the power to suspend a person’s certification.

The Review Panel considers that the National Law can be further improved if it addresses the gaps identified by AMSA, the CDPP and other stakeholders. The result would be to enhance AMSA’s ability to take a graduated, risk-based approach to compliance and enforcement, which is highly desirable for a modern, better practice regulator that, as one of its roles, should promote improved industry practice.

**Recommendation 5:** The National Law should be amended to:

- Explicitly refer to an officer’s due diligence obligation to ensure that the owners of a DCV comply with their safety duties under the National Law;
- Better align the definition of Owner with the concept of a Person Conducting a Business or Undertaking (PCBU) in WHS law and, specifically, to make clear that a business or undertaking that controls and manages a DCV has general safety duties under the National Law;
- Allow scaling of infringement notice penalties;
- 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.

<sup>101</sup> Senate Standing Committee on Rural and Regional Affairs and Transport, *Performance of the Australian Maritime Safety Authority* (Report, June 2020), page 58.

<sup>102</sup> Section 72, National Law.

## Finding 7

Expanding the Australian Transport Safety Bureau (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. Its maritime jurisdiction is limited to civilian interstate and overseas shipping. The ATSB has conducted a small number of short duration DCV investigations demonstrating capability,<sup>103</sup> but it 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 this Review recommended that the ATSB should undertake a more substantial role in investigating maritime accidents. A summary of the ATSB's jurisdiction is as follows:

**Figure 8—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.<sup>104</sup> 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 any external interference in its role. The ATSB is able to identify systemic safety factors that other entities either cannot or do not consider, including within the relevant regulatory bodies. Many submissions to this Review argued that maritime

<sup>103</sup> Australian Transport Safety Bureau, [Safety Investigations and Reports](#), Australian Transport Safety Bureau, 2022.

<sup>104</sup> 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/>.

safety would be enhanced if AMSA's role as the regulator was supplemented by an expanded role for the ATSB as the independent no-blame investigator.

In other transport sectors, where the ATSB determines that 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 spanning ten years) to provide insights into current and future trends in transport safety.

In its submission, Seafood Industry Australia stated that a 'no-blame' approach to safety investigations is supported to improve and further enhance a safety culture.<sup>105</sup>

The Australian Maritime College stated in its submission:

The role of the... ATSB 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.<sup>106</sup>

Similarly, the Maritime Union of Australia recommended:

...that the ATSB's role and resources be expanded to encompass all maritime incidents, in Australia, including DCVs. 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.<sup>107</sup>

## Reporting

A concern repeatedly raised during this Review's consultations was that safety incidents are being under-reported due to a fear of possible enforcement action by AMSA. In its 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.<sup>108</sup>

<sup>105</sup> Seafood Industry Australia Submission, May 2022, page 13.

<sup>106</sup> Australian Maritime College Submission, March 2022, page 2.

<sup>107</sup> Maritime Union of Australia Submission (Attachment 3), July 2019, page 11.

<sup>108</sup> Maritime Industry Australia Limited Submission, March 2022, page 9.

The ATSB allows confidential reports to be submitted by telephone, email, fax, or post. Any person may report a reportable safety concern, whether they are a member of the marine industry or of the general public. Reportable safety concerns include (but are not limited to):<sup>109</sup>

- 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.

## Public benefit

Through its independent investigation function for the rail and aviation sectors, the ATSB has provided industries and their regulators with important insight into broader systemic issues which traditional 'compliance focused' regulators do not produce. The benefits of ATSB investigations, as well as broader ATSB trend analysis and the safety issues it raises, are not attributed directly to any single individual. The national reach of the ATSB and the interconnectedness of modern transport systems means that the benefit of safer transport systems is realised for all Australians.

The Review Panel notes that some submissions raised concern that the burden of increasing ATSB funding might fall on industry. For example, the 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 ATSB 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.<sup>110</sup>

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'.<sup>111</sup>

The Review Panel believes there is a demonstrable public interest in the ATSB adopting an independent investigation function for DCVs. The number of investigations that should be conducted to optimise the safety outcomes for the DCV industry is less clear. The funding required would, therefore, need to be determined between the Minister and the ATSB. Irrespective of the quantum agreed, the Review Panel is of the view that the service is a public good and, as such, the cost should be borne by government and not industry.

## State and territory 'no-blame' investigators

Both the New South Wales and Victorian Governments retain a capacity for independent 'no-blame' investigations through their respective Office of Transport Safety Investigations (OTSI) and the Chief Investigator Transport Safety (CITS).

OTSI and CITS do not have any jurisdiction in the aviation sector. ATSB is the sole accident investigator in aviation matters. OTSI and CITS do, however, have jurisdiction over certain maritime activities and rail operations. Under New South Wales 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 collaborate with the ATSB on rail investigations

<sup>109</sup> Australian Transport Safety Bureau, '[REPCON-Marine Confidential Reporting Scheme](#)', Australian Transport Safety Bureau, 7 March 2019, accessed 20 May 2022.

<sup>110</sup> Spencer Gulf & West Coast Prawn Fisherman's Association Inc. Submission, March 2022, page 2.

<sup>111</sup> Western Australian Fishing Industry Council Submission, March 2022, page 8.

under the national transport safety system. And each of them has 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. 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 New South Wales and Victoria for independent safety investigation for DCVs would need to be considered in any final scope for independent investigation and the institutional arrangements needed to support it.<sup>112</sup>

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

The Review Panel understands that for rail, New South Wales and Victoria fund directly the investigations by OTSI and CITS on behalf of ATSB. Other jurisdictions, with the exception of Queensland, fund the ATSB only when there is an agreement that ATSB should undertake an investigation in that jurisdiction. The Commonwealth does not contribute funding to the ATSB for rail investigations.

The Review Panel is concerned that the funding model for rail would not provide sufficient independence to the ATSB in relation to taking decisions to investigate DCV matters where there needs to be an agreement with the state or territory governments. Further, the lack of on-going base-line funding prevents ATSB from retaining a standing capability to undertake DCV investigations as required.

While it is outside the Review Panel's purview to advise state and territory governments in relation to the maritime or rail functions of their investigators, the Review Panel is of the view that a better model for DCV investigations would be for the Australian Government to fully fund the ATSB for a capability to undertake DCV investigations across all jurisdictions and to collate and analyse safety trends at a national level. The Commonwealth (either the department or ATSB) could then negotiate an agreement with New South Wales and Victoria setting out where ATSB may engage OTSI or CITS to undertake a DCV reinvestigation on its behalf. The agreement would set out the resourcing, funding, and standards for the undertaking 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 under the National Law and other regulatory obligations. Reports are triaged by AMSA and those that are relevant are escalated to the ATSB.

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<sup>112</sup> Office of Transport Safety Investigations Submission, March 2022, page 6.

A theme through the Review's consultations was concern that an expansion of the ATSB's role could lead to another layer of bureaucracy for operators, with an increased reporting overhead. As an example of this, Austral Fisheries noted the following:

...any initiative to expand the role of the ATSB to include DCV safety should not create another Master for vessel operators to serve, and should not lead to the creation of additional legislation applicable to DCVs that is administered by the ATSB.<sup>113</sup>

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.<sup>114</sup>

Stakeholder submissions have also called for improvements around incident reporting arrangements, such as a central reporting structure and streamlined reporting requirements and processes across jurisdictions through the use of consistent definitions and requirements. Sections 88 and 89 of the National Law place an obligation on the owners 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 have similar reporting requirements, which may also oblige PCBU in relation to a DCV to report a maritime safety incident twice.

**Recommendation 6:** The ATSB should be funded by the Australian Government, and not through industry levies, to undertake a no-blame investigation program sufficient to support the identification of systemic safety issues across all Australian jurisdictions. The Commonwealth Transport Minister should issue a statement of expectations regarding the ATSB's DCV function.

**Recommendation 7:** Where a State has its own independent, no-blame safety investigator (currently New South Wales and Victoria) the ATSB may engage that investigator 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.

<sup>113</sup> Austral Fisheries Submission, March 2022, page 5.

<sup>114</sup> 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.

In submissions to the Review Panel, 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, with this advice tailored to each state and territory'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) on roles, responsibilities and rights, as well on improving the industry's understanding of safety issues, would support and empower industry participants to meet their reporting obligations.<sup>115</sup> OTSI suggested a greater sharing of information with operators so they can learn from incidents and act on relevant safety improvements.<sup>116</sup>

The Review Panel has formed the view that the level of DCV-related incidents and accidents actually reported is substantially below the actual numbers of incidents and accidents actually occurring. This low level of reporting can be partially attributed to a concern in industry that authorities will follow-up reports with some regulatory action. Establishing a rapport with industry over the benefits of reporting is essential for the regulator if it is to overcome this perception. 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 its obligations to comply with requirements under the National Law. This could be assisted through a series of clear and accessible process guidelines and rulings. Any guidelines and advice on rulings could be framed around the tiers of the risk-based approach proposed in Findings 1 and 2. A new set of engagements around this improved and targeted flow of information would open up the opportunity for AMSA to work with industry bodies to develop programs and actions within and across the various maritime sectors to identify best practices and nurture safety leaders, both individuals and companies.

The safety culture of the industry is also limited by the mechanisms for maritime workers to port their skills, training and experiences between and across various maritime sectors, particularly the generic skill sets and underlying training that could be universally recognised. Better enabling maritime workers to transfer their existing competencies, experience and skills would help to address skilled labour shortage and employment challenges in the industry by facilitating movement between employers (including those outside of the DCV sector) and across the states and territories.

Comments received on the draft Phase 1 Report queried and, indeed, challenged the proposal to introduce a 'white card' for the maritime industry. Many respondents interpreted 'white card' to mean an additional entry qualification or requirement. This is not the intention of the Review Panel, and it is possible that the use of this term was confusing. The Review Panel has sought to clarify its intention by revising its recommendation as shown below. Otherwise, respondents were broadly supportive of AMSA increasing its efforts to foster a safety culture within the maritime industry.

With seasonality affecting a significant component of employment in the maritime industry—for example whale watching and prawn trawling, the Review Panel has formed the view that universal recognition of employees and contractors experience, skills, training and qualifications across sectors could be enabled

<sup>115</sup> Transport for NSW Submission, March 2022, pages 6-7.

<sup>116</sup> Office of Transport Safety Investigations Submission, March 2022, page 8.

by establishing a 'Maritime Industry Worker Database Program' and that the feasibility of this concept should be further investigated.

Presently the rail industry has a national competency and safety program for rail workers that provides for an electronic record of the health, education and competencies as they work across projects, move between employers and operate in different states and territories. The Review Panel is of the view that a similar arrangement for the domestic maritime industry is worthy of further consideration, in consultation with industry.

Such an arrangement could recognise prior learning, experience and training as well as ongoing completion of pre-sea safety training and potentially 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.

The Review Panel does not see this as an entry prerequisite, but rather as a means of incentivising the growing and recognition of a skills base that could assist and streamline on-boarding processes for employers. It would be accessible to and recognised between many maritime industry sectors, jurisdictions, and employers and would ultimately help the retention of qualified personnel within the industry as a whole. 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 important that the various associations and bodies within and across the DCV and broader maritime sector are engaged to help facilitate the design, uptake and ongoing maintenance of any arrangement that are established in partnership with AMSA. In investigating the feasibility of establishing this arrangement, existing systems, for example, the Universal Student Indicator (USI), should be assessed for suitability as a baseline data source.

**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 a verified skills database; 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.<sup>117</sup>

The marine surveyor accreditation scheme is a national scheme with accredited marine surveyors located in all the 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.<sup>118</sup>

The framework for marine surveyor accreditation is set out in the Regulations.<sup>119</sup> The scheme is administered by AMSA. The scheme has not been reviewed since its introduction in 2015.

In its previous submissions to the Review Panel, Maritime Survey Australia suggested that more focus is needed on the accreditation of surveyors rather than the 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 allow 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.

In the draft Phase 1 Report, the Review Panel recommended that the marine surveyor accreditation scheme be reviewed to ensure it is fit for purpose. It proposed that consideration be given to a range of matters, including greater approval powers for accredited surveyors, a tiered accreditation scheme, and training pathways. Stakeholders agreed and were largely supportive of the Review Panel's proposals, but requested additional information to clarify certain aspects. The Review Panel considers that the marine surveyor accreditation scheme is a significant safety assurance mechanism, and it is important that it stays up to date, and is kept flexible and fit for purpose.

### Tiered accreditation scheme

Submissions largely supported a tiered approach to marine surveyor accreditation, noting it may remove pressures on the system and support ongoing education and development of niche interdisciplinary skillsets. In a submission, the Australasian Institute of Marine Surveyors highlighted the importance of reviewing the scheme, noting that the average age of an accredited marine surveyor is increasing and the lack of entry, training and progression pathways. The Review Panel believes the implementation of a

<sup>117</sup> 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.

<sup>118</sup> Section 161 of the National Law.

<sup>119</sup> Part 3, Regulations. See also Marine Surveyors Manual—parts 1 and 2 ([amsa.gov.au](http://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](http://www.amsa.gov.au/vessels-operators/domestic-commercial-vessels/marine-surveyors-manual-parts-1-and-2).

tiered accreditation scheme will provide greater flexibility for marine surveyors. A tiered approach would provide:

- Surveyors accreditation for categories of survey based on vessel complexity;
- An entry pathway into the industry and progression pathways based on expansion of required skills and experience, including flexibility to move operations between the Navigation Act and National Law;
- Increased approval powers to surveyors as they move up the tiers, providing AMSA confidence in safety outcomes because of greater skills and experience.
- An effective framework to identify and audit higher risk surveys and surveyors; and
- Accreditation for specific training relevant to novel and emerging technologies.

## Increase approval powers

The approval powers of accredited marine surveyors should be linked to the tiered program, providing increased powers based on a surveyor's accreditation tier and in relation to the types of vessels or emerging technologies they work with. The tiered approval program should increase efficiency by providing greater autonomy to accredited marine surveyors to act independently, and sign off on surveys, as discussed earlier in this Report. Allowing marine surveyors increased approval powers will reduce the regulatory load on AMSA and will streamline workflow efficiency. In the discussion at Recommendation 1, the Review Panel has recommended that the National Law be amended to enable AMSA to delegate the issuing of Certificates to accredited marine surveyors. AMSA should delegate the issuing of Certificates to high performing or more experienced accredited marine surveyors. AMSA must ensure that its quality assurance process and business systems are appropriate to support the system of delegates it manages. In implementing the changes to grandfathering arrangements proposed at Recommendation 2 of this Report, it is important that the affected parts of the DCV sector are able to work with accredited marine surveyors to demonstrate equivalent means of compliance with relevant baseline standards.

## Formal rulings program

A formal rulings program will standardise practices between industry, marine surveyors and AMSA. Similar to the taxation rulings system,<sup>120</sup> the program could be a vital source of information to provide regulatory certainty and clarity to industry and operators, while also increasing consistency of advice between accredited surveyors and AMSA.

**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:

- Amending the regulation to provide the authorisation for the marine surveyor accreditation scheme;
- Ensuring the detailed requirements of the scheme are laid out in Marine Orders or similar delegated instruments;
- Ensuring the scheme has clear standards in relation to the accreditation and ongoing certification of marine surveyors.
- Requiring AMSA to provide regular information and guidance to support the professional practice of accredited marine surveyors;
- A formal rulings program to provide greater certainty for surveyors and operators;
- A formal continuing professional development program;
- A tiered accreditation scheme according to size and complexity of the vessel;
- A regular random audit of surveyor approvals and subsequent standards applied;
- Increasing the approval powers for accredited marine surveyors; and

<sup>120</sup> See for example [The Australian Taxation Office's Administration of Taxation Rulings \(ano.gov.au\)](http://www.ano.gov.au) pages 20-21.

- Allowing 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.

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

## Finding 10

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

In the draft Phase 1 Report, the Review Panel recommended that the current requirement that changes to certain regulations be unanimously agreed by the states and territories be removed. Industry stakeholders were largely supportive of the recommendation. State government stakeholders did not support the recommendation, citing that unilateral changes to the relevant regulation could potentially impact regulatory responsibilities of state and territory jurisdictions and/or create regulatory gaps.

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. The use of subordinate legislation is common in regulatory frameworks. Its use is often explained by pointing to 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 before they are made by the Governor-General.<sup>121</sup>

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. As explained in an earlier section of this report, the Review Panel, supports the appropriate use of exemptions, but not regulation by exemption.

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.’<sup>122</sup>

The National Law forms part of a cooperative scheme between the Commonwealth, the states and territories that provides a single national framework for ensuring the safe operation, design, construction and equipping of DCVs.<sup>123</sup> At the time of drafting the National Law, it was recognised that the Commonwealth’s constitutional reach regarding DCV regulation was limited. To address this limitation and allow for the creation of a National System and Commonwealth National Regulator, the states and territories at the time enacted legislation that ceded their relevant functions and powers to the Commonwealth in order to address any limits in its constitutional authority to regulate the DCV sector.

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 responsibility for the National System.

<sup>121</sup> See subsection 159(6) of the National Law.

<sup>122</sup> See for example Trusted Autonomous Systems submission, March 2022, page 5.

<sup>123</sup> Section 3 of the National Law.

With the states and territories having initial responsibility for delivery of services under 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 can be seen as a barrier to flexibility and responsiveness to innovation. As that responsibility has been transferred solely to the Commonwealth and AMSA, this requirement should be removed. However, to ensure that the National System continues to work effectively across all jurisdictions, the Australian Government will have to consider appropriate consultative arrangements with the states and territories to accommodate this change of arrangements.

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 Review Panel accepts that any changes to the Regulations made for the purposes of section 7(4) and (5) of the National Law should be made by the Commonwealth in a collegial manner in consultation with the relevant state and territory authorities. The Review 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. The arrangements should include two key principles to guide the exercise of power by the Minister:

1. The Minister should be mindful that any changes to the relevant regulations are not contrary to the overarching objectives of the National Law which is to provide for consistent national regulation of the DCV industry across Australia.
2. The Minister should be mindful that any changes to the relevant regulations do not create a regulatory gap.

**Recommendation 11:** The current requirement that changes to certain regulations be agreed to by all the states and the territories be removed.

## Finding 11

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

In previous submissions to the Review Panel, stakeholders 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.<sup>124</sup>

Submissions to the Review highlighted a number of issues in relation to autonomous vessels. These include 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.<sup>125</sup>

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.

Submissions to the draft Phase 1 Report were broadly supportive of efforts to future-proof the National Law framework. Some respondents saw AMSA as reactive to regulating emerging technologies rather than proactive. However, the responses highlighted that the word ‘taskforce’ used by the Review Panel in its draft Phase 1 Report implies a limited process, whereas the intention is to build on an already existing function within AMSA on an on-going basis. This recommendation has been revised below to clarify the Review Panel’s intent.

The Review 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 surveyor 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 Review 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.

<sup>124</sup> Trusted Autonomous Systems Submission, pages 12-13.

<sup>125</sup> Australian Institute of Marine Sciences Submission, March 2022; Trusted Autonomous Systems Submission, March 2022; Australian Association for Uncrewed Systems Submission, March 2022.

The Review Panel considers that the range of issues raised by submissions would be better addressed by an ongoing arrangement with industry led by AMSA (rather than a Taskforce which is, by its nature, temporary and aimed at achieving quick, shorter term goals). This could take the form of a permanent emerging technology consultation team within AMSA, or a working group including industry representatives, or an advisory panel, or some combination of these. Regardless of the form, it would not be evaluative. The intent is that AMSA should not only evaluate each new technology when and if an application for an exemption is made. This arrangement should be horizon scanning, looking for new technologies and making recommendations on how regulations could be changed to better accommodate new technologies and types of operations. This should include:

- How the regulatory framework can be future-proofed and optimised for new and emerging technologies (including vessels that use alternative fuels);
- 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.

This is not to imply that AMSA is not currently undertaking any of this work. The Review Panel considers that AMSA should build on their existing capability and more directly involve industry in the process. It is hoped that this would enable AMSA to better understand the current and potential issues, and to ensure that DCV owners/operators are able to take full advantage of advances in technology.

**Recommendation 12:** AMSA should build on its existing capability and establish an ongoing arrangement with relevant stakeholders to consider how to optimise and future-proof the National Law framework to regulate new and emerging technologies. This should include consideration of whether definitions in the National Law remain fit for purpose in the context of development, deployment and operation of new and emerging technologies. AMSA should report to government on possible improvements as viable new technologies emerge.

## Annexure 1—Stakeholder consultation engagements

### List of in-person stakeholder engagements

| State or Territory | City or Regional Area |
|--------------------|-----------------------|
| New South Wales    | Coffs Harbour*        |
|                    | Sydney                |
|                    | Newcastle             |
|                    | Wollongong*           |
| Northern Territory | Darwin                |
| Queensland         | Airlie Beach          |
|                    | Brisbane              |
|                    | Cairns                |
|                    | Townsville            |
|                    | Thursday Island       |
| South Australia    | Adelaide              |
|                    | Port Lincoln          |
| Tasmania           | Hobart                |
| Victoria           | Lakes Entrance*       |
|                    | Melbourne*            |
| Western Australia  | Albany*               |
|                    | Esperance*            |
|                    | Fremantle             |
|                    | Geraldton             |

\* Face-to-face meeting did not go ahead due to low registrations, with opportunities made available for an online replacement meeting with the Review Panel.

## Annexure 2—Stakeholder consultation responses

### Public submissions to the Consultation Aid

- 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.

### Public submissions to the draft Phase 1 Interim Safety Report

- Accurasea
- Australian Commercial Vessel Operators Association
- Australian Maritime Safety Authority
- Australasian Institute of Marine Surveyors
- Australian Institute of Marine Science
- Australian Southern Bluefin Tuna Industry Association
- Book My Boat
- Jim Newman
- Maritime Industry Australia Limited
- Maritime Survey Australia
- Maritime Union of Australia
- Nautilus Federation (AIMPE/AMOU)
- QLD Department of Transport and Main Roads

- Royal Institution of Naval Architects
- Seafood & Maritime Training
- Seafood Industry Australia
- South Australian Sardine Industry Association
- Spencer Gulf & West Coast Prawn Fishermen's Association
- Svitzer/SMIT
- Michael Ferguson MP, Deputy Premier of Tasmania, Minister for Infrastructure and Transport
- Transport for NSW
- Trusted Autonomous Systems
- Tasmanian Seafood Industry Council
- Tuna Australia
- Western Australian Department of Transport Maritime
- Western Australian Fishing Industry Council

In addition to the above, one anonymous and eight confidential responses were provided.

## Annexure 3—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 4—The Independent Review Panel

| Panel member  | Biography  |
|---|--|
| <b>Ms Carolyn Walsh</b><br>  | <p>Ms Carolyn Walsh is the Chair of the National Transport Commission and has extensive public service experience, including in the New South Wales 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> |
| <b>Mr John Harrison</b><br> | <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>   |

**Mr Lembit Suur**

In February 2023, Mr Lembit Suur was appointed to the Panel for the remainder of the Review.

Mr Lembit Suur has held a number of senior roles in the public sector including as First Assistant Secretary of the Department of Finance, working on national governance and Budget issues, and Secretary of the Commonwealth Remuneration Tribunal. He led development of the Public Governance, Performance and Accountability Act 2013, and the 2008-09 expenditure review taskforce for the national Budget. Since leaving the public sector, Mr Suur started his own governance practice and innovation consultancy.

Mr Suur's skills and experience in public financial management enabled him to provide an informed perspective on the delivery costs of the National System and charging options for effective and sustainable regulation for domestic commercial vessels.

Mr Suur's professional experience also includes Chair of the Civil Aviation Safety Authority's (CASA) Board Audit and Risk Committee, Chair of the National Recovery and Resilience Agency's Audit and Risk Committee, Chair of Organisation of Economic Cooperation and Development (OECD) Performance and Results Network, and serving on diplomatic postings in Mauritius and Moscow. He has led public management reform projects in Thailand, Indonesia and the Pacific.

**Mr Michael Carmody AO**  
**Lead Reviewer**

**(Resigned June 2022)**



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.

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.

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.

## Annexure 5—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  |
|---------------------------------------|--|
| <b>Class 1—Passenger vessels</b>      | 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  |
| <b>Class 2—Non-passenger vessels</b>  | 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. |
| <b>Class 3—Fishing vessels</b>        | Fishing vessels, such as trawl, long line, tuna, net, lobster, abalone and aquaculture.  |
| <b>Class 4—Hire-and-drive vessels</b> | Hire-and-drive and leisure vessels such as kayaks, houseboats, jet skis and sailing vessels.   |

Seven operational area categories are used:

| Category   | Details  |
|--|--|
| <b>A—Unlimited domestic operations</b>                             | 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>B Extended—Extended offshore operations</b>                     | For DCVs operating to the outer limits of the EEZ, beyond 200nm from the baseline of the Australian coastline.   |
| <b>B—Offshore operations</b>                                       | For DCVs operating up to 200nm of the coastline, but within the EEZ.   |
| <b>C—Restricted offshore operations</b>                            | For DCVs generally operating within 30nm of the Australian coastline.  |
| <b>C Restricted—Restricted offshore operations—specified areas</b> | For DCVs operating in sheltered waters and in specified lower risk C waters  |
| <b>D—Partially smooth water operations</b>                         | For DCVs operating in sheltered waters.  |
| <b>E—Smooth water operations</b>                                   | 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 6—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* 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* 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* 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 7—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 8—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.