



Submission to the Draft Interim Safety Report – phase 1 of the Independent review of domestic commercial vessel safety legislation and costs and charging – August 2022

The Australian Commercial Vessel Operators Association (ACVOA) members own and operate domestic commercial of class 1 (passenger) and class 2 (non-passenger), in varied locations the Australian coast and out to the exclusive economic zone limit. A number of members also operate regulated Australian vessels on international voyages as well as around the Australian coast. This provides ACVOA with the perspective of operations within both the Navigation Act and the National Law Act, experiencing the advantages and challenges of each system, along with the difficult articulation between these systems for the Australian domestic fleet. This submission responds to the findings and recommendations of the draft report and has involved wide consultation with both members and discussion with other industry groups.

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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 regulatory model that is flexible and able to adapt to innovation and emerging technologies by:

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

ACVOA opposes the inclusion of a need for higher-risk operations to become subject to the Navigation Act. The report provides no definition of 'higher risk', nor basis for the Navigation Act better managing or lowering these perceived risks. This recommendation does not give consideration to any risk controls, implemented to lower the risk of an operation.

Any domestic commercial vessel becoming subject to the Navigation Act, would be a disproportionate imposition on an operator. Any risk reduction that may be identified, can be better managed for DCVs under the National Law Act.

- The Navigation Act, in implementing Australia's obligations as an International Maritime Organisation (IMO) member State, was written for ships predominantly on international voyages and operating outside the exclusive economic zone. It was not intended for domestic commercial vessels.
- The Navigation Act does not provide for opting out of requirements that are not appropriate, proportionate or applicable to a domestic commercial vessel.
- The National Law Act was written for domestic commercial vessels.
- The National Law Act is only applicable to Australia, meaning amendments and the evolution of this Act and associated regulations, are undertaken through Commonwealth processes, within a timeframe only subject to internal influences.
- Marine order 504, under the National Law Act, requires risks assessment and procedures for risk elimination or minimisation to be included in a safety management system, as a prerequisite for issue of a certificate of operation.
- The National Law Act allows for regulations to be made that apply to a certain type of vessel, should additional requirements be identified for some vessels, the seafarers that work on them, or the term 'higher risk' be defined.

The remainder of the risk-based framework proposed in the draft report is supported, in the suggestion of proportionate requirements for different parts of the DCV fleet.

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

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

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

ACVOA submits that any change to grandfathering provisions should be risk based. Therefore, the risk should be understood in practice, rather than assumed to exist just because a vessel operates under grandfathered provisions. The recommendation reads that a risk exists because grandfathering provisions exist.

To manage risks associated with the grandfathering system, first the level of compliance to a standard must be identified. This appears to be the key challenge for the safety regulator under grandfathering arrangements.

The second phase is to manage the risk of non-compliance. How risk management may then be achieved will be dependent on the level of compliance and risk identified.

Notwithstanding these comments:

- Baseline standards for design and construction are supported, as is a survey or inspection for vessels under grandfathered provisions, to determine the extent of (non) compliance to a baseline standard.
- For vessels with grandfathered survey requirements, a survey or inspection is supported to establish the level of compliance with applicable legislation.
- Where grandfathering provisions exist, the specifics of these provisions should be included on the survey certificate for clarity.

Building in time frames for remediation is seen to be premature, given the extent of non-compliance and risk is yet to be determined.

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

Recommendation 3: AMSA should:

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

A stronger approach is encouraged by the Commonwealth, in taking the lead on maritime safety duties. Despite the recommended review of MOUs, there is still likely to be discrepancies between state/territories that will do little to aid the understanding of the operator or seafarer. Given the inability of states/territories to reach agreement on many matters, this does not seem a reliable method to improve the current system. AMSA as the lead on maritime WHS would provide the prospect of national consistency.

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;
- undermines the effectiveness of AMSA as the safety regulator of domestic commercial vessels.

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

In bringing in a change to offences and penalties, consideration should be given to the limit of the deterrent effect that arises when penalties are completely out of reach for an individual or operator.

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.

Recommendation 5: The National Law should be amended to:

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

The definition of owner needs improving under the National Law Act to ensure clarity for those that are an 'officer' with due diligence obligations. The additional point in definition of an owner under the Navigation Act better provides this clarity.

Finding 7: Expanding the ATSB's role to include DCV safety incidents would provide an independent review of systemic safety issues that would support enhanced safety outcomes.

Recommendation 6: The Australian Transport Safety Bureau should be funded by the Australian Government to undertake a no-blame investigation program sufficient to support the identification

of systemic safety issues. The Commonwealth Transport Minister should issue a statement of expectations regarding the ATSB's DCV function.

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

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

Recommendations on the ATSB and safety investigations should ensure that:

- no levy is required of DCVs for funding of investigations
- where a State safety investigator is engaged on behalf of the ATSB, that investigator must be an independent body rather than a safety regulator. The mandate a safety regulator follows for investigation is one of determining fault or whether a legal breach has occurred, the ATSB has safety outcomes at its foundation.

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 creating a 'White' card scheme; and
- develop simple and accessible guidelines for ease of compliance.

The promotion of the benefits of reporting needs to be considered alongside the timing of any change to increase in offences and penalties as recommended at Finding 5. Industry may find it counterintuitive to increase their incident reporting and see this as beneficial, at a time that increased offence and penalty provisions come into force.

Investigating the feasibility of a 'white' card scheme has no discernible benefits or safety enhancements. The General Purpose Hand (GPH) certificate of competency, under marine order 505, has a recognised training package covering generic skill sets. At certificate 1 level, this performs the function of universally recognised training.

A white card would not change an owner or operator's training obligations (to provide training and familiarisation and verify the competence and capacity of a person in their duties) under marine order 504, schedule 1. This obligation remains despite a seafarer's prior experience. The system as it stands provides seafarers with a level of transferrable skills without the need for an additional layer of qualification.

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 introducing (among other matters):

- a tiered accreditation scheme according to size and complexity of the vessel;

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

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

A review of the accredited marine surveyor system is supported, to ensure a considered and proportionate response is provided during surveys of different types of DCVs.

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

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

This recommendation is supported. With AMSA assuming service delivery for the national system in 2018, in addition to regulatory responsibility, the necessity for unanimous State/Territory approval of changes no longer exists.

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

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

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

The finding is supported, with definitions within the National Law requiring review, though a taskforce may not be the most resource efficient manner to achieve this outcome.

AMSA's novel vessel policy requires all novel vessels to be designed and constructed to classification society rules, which lie outside of the National Law. The National Law has the ability, through subordinate legislation, to manage new and emerging technologies. This mechanism needs to be further developed to adapt to evolving standards, which it is better able to do than Navigation Act.

The collaborative and consultative approach AMSA is taking with regard to small autonomous vessels is supported and is occurring without the need for a taskforce.
