ABN : 59 395 901 652
Ph : 0417 783395
PO Box 504N, Cairns North 4870
Queensland, Australia
Web Page : www.projectsglobal.net
Email : info@projectsglobal.net

The Secretariat
DCV Safety Review
GPO Box 594
Canberra ACT 2601

By email dcvsafetyreview@infrastructure.gov.au

24th March 2022

Independent Review of Domestic Commercial Safety Legislation and Costs and Charging Arrangements.

Please find following my responses to phase 1 of the referenced review

Kind regards

Steve Moon OAM
Managing Director

National Law Review

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

- **Supports safe vessel operations**

Whilst that may be the intent, the perception is that "it's all too hard" for many of the smaller operators who continue to operate the way they have always done. The transition has been "clunky" and there is a common belief that there is not enough small commercial vessel experience within the regulator. That sort of experience and the ability to communicate effectively with those smaller operators.

- **promotes a risk-based approach**

It does indeed but without proper explanation that can be understood. It seems to be driven more by fear of prosecution as opposed to managing risk

- **minimises burden**

It actually increases the burden on operators – the legislation is written in such a way that it contains too many references that can be misinterpreted or in some cases not even found. A more prescriptive approach to presenting legislation would be more appropriate. At present, three different experienced operators being asked the same question can come up with three different interpretations.

- **is flexible**

The legislation is NOT flexible. It is the regulator that has been flexible in the way that rules have been interpreted.

- **is simple and transparent**

It is anything but. It is complicated and open to misinterpretation. The drafting should be reconsidered to make it more fit for purpose.

- **supports effective compliance**

NO – Can be used as a tool against operators based on the regulators Vs the operator's interpretation. Even regulator staff (MSI's) have trouble understanding the rules. Two consective inspections by two different MSI's will produce different results.

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

No, it does not. Workplace Health and Safety regulations are a big cause for concern. Seacare id problematic and expensive. It is not the Domestic Commercial Vessels responsibility to prop up the failing international shipping sector.

Until such a time as grandfathered vessels no longer exist confusion will remain.

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

No, the term is open to too much misinterpretation. A simple adjustment that aligns with Certificates of Competencies would be to refer to DCV's as ''Near Coastal" vessels. Another suggestion is to separate fishing vessels from Near Coastal passenger vessels.

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

Most definitely **NOT**. Whilst it would be desirable to have one set of regulations for all there is no possible way that most Domestic Commercial Vessels could comply with the Conventions or regulations contained within the Navigation Act. I am certain the unions may have different ideas but notwithstanding their opinions the DCV sector has been identified by some, as a cash cow, Since the introduction of the National Law, DCV owners have been hounded by the likes of Seafarers Safety, Rehabilitation and Compensation Authority to become roped into to a national scheme. Not only is this expensive compared to Sate run schemes, it took a Federal Court decision (Samson Maritime Pty Ltd v Noel Aucote [2014] FCAFC 182) to have an exemption put in place to enable the DCV sector to continue on with State coverage.

Some Bills were introduced to the Parliament on 13 October 2016. These Bills (reforms) would have resolved the coverage issues that necessitate the exemptions for our industry. Despite the Department's efforts to test reform options and preview draft legislation through several years of consultation, the Bills package put before the Parliament was ultimately opposed by all Seacare Authority industry stakeholders. Recognising the futility of progressing with the Bills package in the absence of stakeholder support Minister Cash (at the time) requested the Department consult with Seacare Authority stakeholders with a view to reaching consensus on the critical areas of reform required to stabilise the scheme. This consultation process has been ongoing and consensus still has not been reached. We continue to exist on exemptions 6 years down the track!

One particular DCV operator in North Queensland is being charged the Marine Navigation Levy and any attempt to extend that to all commercial vessels will destroy an already struggling Marine Tourism Industry. The Regulator has been refusing to collect that levy from that operator until things get sorted out however there is a belief that the Department is seeking payment.

Currently, commercial shipping, where the vessel is longer than 24 metres, is required to pay the levy. Commercial shipping is where a vessel earns revenue by transporting cargo or paying passengers. The amount to pay is calculated according to the net tonnage of the vessel. There are few exemptions.

For the purposes of the definition of ***exempt ship*** in section 3 of the Act, the following are declared to be exempt ships:

(a) a ship belonging to the naval, military or air forces of Australia or a foreign country, not being a ship engaged in trade or carrying goods under freight or charter;

(b) a ship belonging to, or requisitioned or chartered by, the Commonwealth or the government of a foreign country that is engaged only in carrying members of, or goods intended for the use of, the naval, military or air forces of Australia or that country;

(c) a ship belonging to the Commonwealth or a State or Territory or a public authority of the Commonwealth or of a State or Territory, not being a ship engaged in trade or carrying goods under freight or charter;

(d) a ship only engaged in fishing or searching for, or taking, sedentary organisms within the meaning of the *Fisheries Management Act 1991*;

(e) a ship only engaged in attending upon a ship specified in paragraph (d);

(f) a ship wholly in ballast, other than a tug, arriving at a port for a purpose not involving the loading of cargo or taking on passengers;

(g) a pleasure craft;

(h) a ship that is less than 24 metres in tonnage length;

(i) a ship belonging to a religious missionary society;

(j) a ship engaged only in laying or repairing submarine cables;

(k) a hospital ship not engaged in trade or carrying goods under freight or charter;

(l) a sailing ship the tonnage of which is less than 500.

Most Marine Tourism vessels pass Navigation aids on a daily basis. **ALL** Domestic Commercial vessels should be exempt from this levy. Any fees being considered should be incorporated in the Cost Recovery plan moving forward.

Unfortunately, Australia lags behind the rest of the world when it comes to "Options for Domestic Commercial Vessels to Comply" with International Conventions – case in point is MARPOL and the discharge of sewage where pump out facilities simply do not exist and therefore there is no option to comply. The Maritime Labour Convention simply could not apply to Domestic Commercial Vessels, in fact there would have to be raft of exemptions for DCV's to actually comply with most International Conventions as listed.

- International Convention for Standards of Training, Certification and Watchkeeping for Seafarers (STCW)
- Maritime Labour Convention (MLC)
- International Convention on Load Lines (Load Lines)
- International Convention for the Safety of Life at Sea (SOLAS)
- Convention on the International Regulations for Preventing Collisions at Sea (COLREGS)
- International Convention for Safe Containers (CSC)
- International Convention on Tonnage Measurement of Ships
- International Convention for the Prevention of Pollution from Ships (MARPOL)
- Convention of Limitation of Liability for Maritime Claims
- International Convention on Salvage

- United Nations Convention on the Law of the Sea (UNCLOS)—only certain parts.

Having said, there is no reason that in many years to come as industry further develops that compliance may become possible but that is a very long way away and will require an enormous amount of work. Speaking as the Chair of the Maritime Industry Reference Committee I can advise that it has taken us nearly four years to simply incorporate the STCW requirements into the MAR Training package – and that is just one convention!

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

No it is not. It would be a correct assumption that the owner / owners may have very little or nothing to do with the operation of a vessel. It would be a very difficult task determine to whether any of them breached their safety duty, taking into account what each could have reasonably done to ensure the safety of the vessel and its operations. This especially so if the vessel is chartered long term by another entity.

Whilst the appointment of a Designated Person is well understood in international shipping, there would appear to be very little understanding in the Domestic Commercial Vessel sector. This needs to change. The Designated Person should be referred to in the same context as the owner.

The IMO determined the Designated Person has a key role in the development and implementation of the safety management system within a shipping company with a view to ensuring safety at sea, prevention of human injury or loss life, and avoidance of damage to the environment, in particular to the marine environment and to property. AMSA through the National Law should adopt the same understanding through the National Law. The Designated Person, most importantly, should be enabled to advise any issues direct to the regulator with fear or persecution should upper management choose to adequately deal with a situation. As per the IMO MSC-MEPC.7/Circ.6 ANNEX A Designated Person should have the experience to:

- present ISM matters to the highest level of management and gain sustained support for safety management system improvements;
- determine whether the safety management system elements meet the requirements of the ISM Code;
- determine the effectiveness of the safety management system within the Company and the ship by using established principles of internal audit and management review to ensure compliance with rules and regulations;
- assess the effectiveness of the safety management system in ensuring compliance with other rules and regulations which are not covered by statutory and classification surveys and enabling verification of compliance with these rules and regulations;
- assess whether the safe practices recommended by the Organisation, Administrations, classification societies, other international bodies and maritime industry organizations to promote a safety culture had been taken into account; and
- gather and analyse data from hazardous occurrences, hazardous situations, near misses, incidents and accidents and apply the lessons learnt to improve the safety management system within the Company and its ships

The Company should provide training courses covering qualification, training and experience and the appropriate procedures connected to compliance with the ISM Code including practical training and continuous updating. The Company should also provide documentary evidence that the Designated Person has the relevant qualification, training and experience to undertake the duties under the provisions of the ISM Code.

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

No blame safety investigations have been on the Departments and Regulators radar for some time. Investigations carried out by the ATSB are not intended to be the means to apportion blame or liability, in accordance with the Transport Safety Investigation Act 2003 (TSI Act) & Annex 13 to the Chicago Convention (as amended).

As mentioned in other areas of this submission, fear of prosecution is one of the main barriers to incident reporting – this culture needs to change. Having an independent multimodal agency to investigate, analyse and report on major marine incidents will instil greater confidence in stakeholders, knowing that they can have faith in an independent investigative system.

Having said that, it is understood that a ***no blame*** safety investigation, is only one part of a system. It will however remain free of any political interference and be impartial.

The ATSB understands Safety Management Systems be it in Maritime, Aviation or rail. The objective of investigating accidents and incidents is to prevent the occurrence of future accidents and not for the purposes of apportioning blame or liability. This does not mean however, that prosecutions will not occur following the report but that is not the role of the ATSB.

At a meeting of the National Safety Committee on December 3rd 2020 – the following item was tabled by the Department:

9.4 Improving safety through no-blame investigation

The Department advised this recommendation was generally supported in-principle, including by states and territories, noting details such as scope of the ATSB role and funding would have to be worked through.

Industry Comments: Several members expressed strong support for the ATSB investigating some DCV incidents, particularly where there is a clear benefit to industry (e.g., serious incidents). Views expressed also acknowledged 'no blame' investigation can help encourage incident reporting by operators (e.g., where an operator would prefer not to disclose certain detail to the regulator), which may assist with data collection.

The minutes of that meeting reflected the following:

1. *The Maritime Union of Australia (MUA) tabled a paper expressing their views on opportunities to reform domestic maritime legislation. Members thanked the MUA for the paper and advised further time is required to fully consider and discuss the proposed solutions contained in the paper. The following early observations were made:*
    a) *The Australian Institute of Marine and Power Engineers (AIMPE) noted:*

i. *the frameworks for International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) qualifications and near coastal qualifications are too complex and require harmonisation;*

ii. *the Navigation Act 2012 and the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (National Law) require harmonisation as they have been constructed as discrete pieces of legislation without regard for the other;*

iii. *industry supports the expansion of the role of the Australian Transport Safety Bureau (ATSB) to investigate domestic commercial vessel incidents on the basis that domestic commercial vessel (DCV) employees are equally entitled to a safe workplace and their international counterparts; and*

iv. *the current approach to amending sub-ordinate legislation is not addressing fundamental problems.*

b) Maritime Industry Australia Limited (MIAL) noted:

i. it would not be supportive of additional prescription or burdening industry with additional requirements;

ii. suggested MUA's paper may benefit from increasing the narrative around the diversity of operators in the DCV industry; and

iii. would support no blame investigations by the ATSB for DCVs

AMPTO:

i. Supported the intent to raise safety standards;

ii. Supported no blame investigations by ATSB and advised the members of the Marine Order 504 Industry Reference Group members have put together a paper on this topic; (Incident Reporting – refer Q11))

I am really not sure what else you wish us to do?

The ATSB seeks to contribute to maintaining and improving transport safety and public confidence through excellence in:

• independent investigation of transport accidents and other safety occurrences;

• safety data recording, analysis and research; and

• fostering safety awareness, knowledge and action.

(*Kym Bills, FSIA Executive Director ATSB 12 November 2008*)

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

What needs to be removed altogether is transitioning arrangements. It is a waste of time, money and resources. It is also very confusing for operators which makes many of them hesitant to progress down that path.

There is no evidence to suggest that a grandfathered vessel is less safe than a vessel constructed to current standards. What is missing, is the ability to maintain regular surveillance of grandfathered vessels. What I mean by that is that all grandfathered vessels should be simply issued a certificate of survey (they could be called Grandfathered or Existing Class vessels). At the end of the day, grandfathering arrangements should recognise **construction only**. By doing so, every Domestic Commercial vessel will have a certificate of survey.

Grandfathered / Existing vessels will still be required to meet all of the safety standards of the NSCV so they should be surveyed annually (an in-water survey only) to ensure those standards are being met. I believe all surveyors will be able to recognise what is USL and what is not – let's put some faith and trust in our accredited surveyors!

Should an Existing vessel make any changes to the recognised construction of that vessel then the Marine Order 503 trigger flow chart can be invoked. Once the operator has complied the vessel becomes recognised under current standards.

Question 8: Does the current framework provide clear and simple standards for operators to meet their safety requirements? If not, how could it be improved?

It may sound too simple but the framework needs to be more prescriptive with fewer references.

Question 9: Does the current framework provide an effective and practical range of compliance powers and enforcement tools for AMSA?

I am sure it does however a lack of understanding at inspector level is problematic.

Question 10: Are there specific safety initiatives that would substantially improve safety outcomes?

Yes. It is rumoured that liaison officers are about to become project officers. Please do not let this happen. We need more education and engagement at a lower level. We need education not prosecution! One needs to be aware of what type of vessels we are referring to and by that I mean the single handed mullet fisherman in Moreton Bay through to multi deck ferries.

Question 11: What can be done to improve safety incident reporting both for safety and Workplace Health and Safety purposes?

It's no secret that marine incidents within the domestic fleet are significantly underreported. With a fleet of about 31,000 vessels, there are approximately 850 reports submitted per year. By way of comparison, the 'big ship' fleet of about 5000 vessels consistently submits around 3500 incident reports per annum.

If our DCV fleet reported similarly, this would comparatively mean around 21,000 incidents would be reported each year!

It is well accepted that the international shipping industry in Australia has robust oversight from AMSA and is well placed to provide advice, learnings, & valid safety messages that arise from a range of inputs.

One of these inputs is the significant reporting culture that enables AMSA to provide relevant oversight and for the industry to receive guidance that results from genuine evidence-based learnings.

AMSA currently has a range of communications with industry, such as the safety awareness bulletins, work boats magazine and face to face contacts. Whilst good information is presented by these publications and face to face contact usually produces good outcomes, it is surmised that this is to some degree, ad hoc in nature.

While current interactions, face to face or through publications can result in positive outcomes, there is currently, insufficient input from industry overall to enable AMSA to deliver the positive safety culture and outcomes that could be realised for industry.

In all fairness to AMSA, based on the reporting culture that currently exists, excluding localized informal intelligence gathering by regions, it is hard to prepare communication messages, safety bulletins or other initiatives, without having evidence willingly offered, to support the required foundations.

Low reporting may mean low incidents, but this will be extremely unlikely and there are many of reasons operators may not report. The main confusion lies with Operators not understanding what is reportable, or they are too busy for what they see as 'minor' and are not engaged or don't feel engaged with industry.

A primary concern is a fear of retribution from reporting which primarily lies from the history under the State-based regime where Operators were often made responsible without the application of proper guidance in preventing future occurrence.

While many of us have a very good relationship with AMSA, there is still varying levels of anxiety about sharing information with AMSA with respect to incidents or hazards. There is to a degree, the sense that there are arguably many in the industry who have a cavalier attitude to reporting, and would rather not, if they 'don't have to.'

There is no encouragement to do so and maybe plenty of reasons to not.

AMSA's compliance strategy currently states there are six elements:

Element one: Simplify and explain the law

Element two: Educate the regulated community and assist it to comply with the law

Element three: Monitor compliance

Element four: Reward voluntary compliance

Element five: Deter non-compliance

Element six: Build compliance skills and capacity in our workforce

Colloquially, it seems elements 4 and 6 are the 'carrot' and elements 3 and 6 are the 'stick' for AMSA's compliance approach.

Industry generally and in particular Masters, are often scared AMSA will 'take their tickets away' for a moderate infraction of the COLREGS or an error that may conceivably be interpreted to be in conflict with Section 16 of the NL.

Owners may be concerned about liability of any kind or unwanted or perceived unnecessary oversight for what is concluded to be minor.

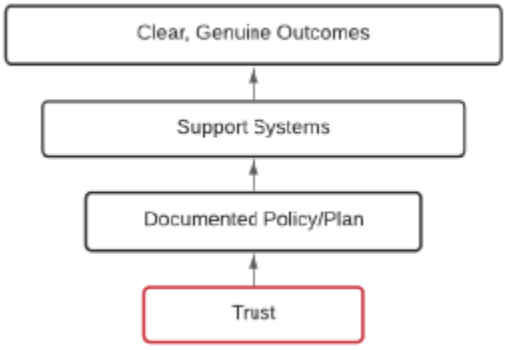
Industry can easily identify with the 'stick' and while there are many at AMSA who have tried tirelessly to work more so with industry for safety outcomes rather than as an enforcement body, there is still a long-standing view that AMSA is an ogre, to be avoided at all costs.

Adding to this, there is perhaps, scant evidence that there has been any genuine effort to deliver upon elements 4 or 6. I'm sure this can be argued, but it's not obvious, therefore a wider issue to be addressed. – married to this, the fear of prosecution is the number one barrier to greater reporting.

A strong reporting culture will result in greatly improved outcomes for our industry

A strong reporting culture will only come about if there are some fundamental changes in how the industry views AMSA, and how AMSA treats industry.

From a personal perspective, this is based upon 4 things, starting with a foundation and represented by the following simple graphic:



Industry must be able to trust that if we share information, in particular, advise you about our less serious incidents, these will not attract adverse compliance action where it is abundantly clear that we have or are in the process of identifying the cause(s) of an incident, are actively taking steps to develop and implement actions prevent recurrence.

We must also be able to clearly see evidence that what is promised by AMSA is delivered upon in a transparent manner.

This must include a documented approach towards consistency in the delivery of compliance by AMSA at the sharp end. From time to time for example, we see or hear of conflicting advice or directions from a marine safety officer and a senior surveyor on matters that have significant impact on an operation. Granted, errors can occur, however inconsistency must be reduced in order to help foster greater trust, not only between AMSA and industry, but within AMSA itself.

Increasing Trust between AMSA and Industry is the first step towards changing the reporting culture, the frequency and number of reports and is of fundamental importance, without which, all other discussion is void.

AMSA currently have the National Compliance Plan and Compliance Strategy. These need to actively seek measurable ways in which to 'reward' voluntary compliance and build upon the philosophy that increasing compliance skills is desirable.

This may include recognition, encouragement and mechanisms that support the submission of marine investigations where available, that help AMSA more intimately understand how incidents occurred and what is or has been done to prevent recurrence. Such submissions should be voluntary and restricted to less serious incidents, the nature of which AMSA could define to enable more rather than less visibility of how industry is managing incidents internally.

Such an initiative should provide comfort to the regulator that incidents are taken seriously and acted upon and should result in favourable regulatory oversight.

AMSA needs to consider some modifications in how it communicates with industry. DCV is still seen by many as the poor cousin to international shipping, and while those of us who communicate regularly with AMSA know there is a huge volume of work undertaken within AMSA, most industry participants have infrequent contact, except for survey, incidents and newsletters/safety alerts.

Consideration should be given to increasing industry engagement. This may be an increase to newsletters to once per month, for each industry segment. That is, Class 1, Class 2, Class 3 and Class 4 vessels. This would mean a safety learning or other comms for every week of the year.

While this may sound onerous, there are currently 800-900 incidents reported with enough data to at least provide 12 learnings per year, per industry segment. This may be as simple as incident review and learnings. – What happened, What the operator found, what action was taken as a result and a safety message from AMSA. Perhaps the members of the NSC have other useful input?

AMSA 19 – To help facilitate the safe reporting of investigations for less than serious incidents, a check box, indicating the (Unenforceable) intent of an owner or master to submit a report within a defined time frame, may, together with underpinning trust and documented plan, encourage industry participants to submit investigations to AMSA to (A) help AMSA understand what happened and what actions are being taken and (B) to reduce or eliminate the need for AMSA to investigate incidents where a submission has been made.

Guidance Notices – Reporting incidents and submitting investigations. The development of guidance notices would greatly assist industry in not just understanding, but why reporting (and) investigation submission helps the industry participant and the industry as a whole. It is also an opportunity to make statements and commitments that support the building of trusting relationships with our regulator.

Industry Engagement – Including through AMSA Connect, AMSA Surveyors, Inspectors, Liaison Officers, Safety and Management staff.

The following are some suggested outcomes that could be expected as a result of change:

- A clear expression by AMSA in the context of daily interactions which demonstrate a desire to engage with industry in a constructive manner.
- A clear shift in the attitude of industry over time regarding reporting
- A documented compliance strategy, plan or other document that fosters industry involvement that is genuinely rewarded. This includes AMSA's view/philosophy on reporting and incident investigations by industry, shared with regulator.
- A substantial Increase in reporting statistics
- Submission of incident investigations that result in improved data and safety messages from AMSA to industry and a reduction in the perception of unreasonable compliance action
- Increased relevant engagement with industry with safety messages and incident outcomes, peculiar to industry segments.
- A change to the form 'AMSA 19' to include at least a mechanism to express interest in submitting an internal investigation to AMSA to help understand incident cause, outcome and actions, and to assist with sharing learnings for the benefit of industry while not jeopardizing commercial in confidence information or fear a risk of prosecution
- The addition of clear guidance notices to support a better understanding of an encouragement to report based on the universal desire for industry to be safer and more efficient.