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

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## Phase 1 – The National Law Framework

Contact: Angela Gillham
Angela.gillham@mial.com.au

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# About MIAL

Maritime Industry Australia Ltd (MIAL) is the voice and advocate for the Australian maritime industry. MIAL is at the centre of industry transformation; coordinating and unifying the industry and providing a cohesive voice for change.

MIAL represents Australian companies which own or operate a diverse range of maritime assets from international and domestic trading ships; floating production storage and offloading units; cruise ships; offshore oil and gas support vessels; domestic towage and salvage tugs; scientific research vessels; dredges; workboats; construction and utility vessels and ferries. MIAL also represents the industries that support these maritime operators – finance, training, equipment, services, insurance and more. MIAL provides a full suite of maritime knowledge and expertise from local settings to global frameworks. This gives us a unique perspective.

We work with all levels of government, local and international stakeholders ensuring that the Australian maritime industry is heard. We provide leadership, advice and assistance to our members spanning topics that include workforce, environment, safety, operations, fiscal and industry structural policy.

MIAL's vision is for a prosperous Australia with strong sovereign maritime capability.

MIAL's overarching position concerning maritime policy in Australia is that we ought to have a sustainable, viable maritime industry. This activity can occur anywhere – coastal, offshore and international. This maritime activity should encompass anything – freight, tourism, passenger movement, port and harbour services, offshore oil and gas, construction, scientific/research, essential services, and government services.

MIAL is an advocate for a fiscal and regulatory regime that makes it attractive for shipping and maritime businesses to exist in Australia and affords those Australian businesses every opportunity to compete for work and participate in maritime activity worldwide.

# Executive Summary

MIAL acknowledges that the National Transport Regulatory Reform agenda created the incredibly difficult task of bringing seven different jurisdictions under the one regulatory umbrella. Clearly, many of the issues highlighted in this submission relate to the need to transition many thousands of industry participants from a range of existing regulatory settings to the National Law.

The industry being regulated is highly diverse and there is a strong need to balance the compliance burden, with assurances of safety. This has led to a highly complex and prescriptive regulatory environment, particularly with respect to the multiple pieces of subordinate legislation and standards that apply via the *Maritime Safety (Domestic Commercial Vessels) National Law Act 2012*.

While the National Law expressly does not apply to WHS matters where a state or territory law exists to cover those matters, applicable standards under the National Law often dictate in a prescriptive manner what constitutes a safe operation. This creates a difficult framework within which to operate and from the perspective of the domestic commercial vessel operator, there exists a conflict between the two frameworks that can be difficult to reconcile.

An overarching theme to this submission is the need for the regulatory regime to support a risk-based approach that allows operators to tailor their safety management to their specific operating environment. However, with the diversity of operational scale, size of business and inherent risk within the domestic commercial vessel industry, there is a clear capacity difference between operators with respect to their ability to implement effective safety management systems.

In reflection of this diversity in capacity, the review panel may wish to consider how a differential regime might work where operators that are below a certain threshold (vessel size/number of employees etc) could apply prescriptive compliance requirements to their operation, and those above the threshold, who have the required operational scale, could apply a risk-based approach to demonstrate safe operations.

Given the diversity of operations and locations of DCV activity, the supporting legislative framework must balance flexibility - providing for safe operations that are fit for purpose - with the certainty that enables businesses to have the confidence to plan and invest.

Grandfathering arrangements contribute to regulatory complexity and can create a strong disincentive for operators to invest in new vessels and major vessel upgrades. On the other hand, some of the prescriptive aspects of the National Law framework provide no demonstrable safety benefit. This submission seeks to ask what are the *genuine* and *perceived* safety risks that would be addressed by phasing out certain grandfathering arrangements, and promotes a data led approach to the review of grandfathering.

High levels of incident reporting can be an indicator of mature safety culture. In this submission MIAL makes some practical suggestions which may assist to increase incident reporting, while supporting the expanded remit of the ATSB and the use of no blame investigation as a useful tool to improve safety culture and overall industry safety outcomes.

This submission addresses relevant aspects of the consultation aid, as well as other issues identified by MIAL members in the context of the scope of the review. The submission also attempts to suggest changes to the legislative framework that will help to create a more flexible, streamlined and risk-based regime for vibrant and prosperous domestic commercial vessel industry.

# Introduction

Following recent inquiries by Senate Committees and the Productivity Commission into aspects of maritime safety regulation, the Government has committed to pursue a suite of improvements to the National System for Domestic Commercial Vessel Safety (National System) and the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (National Law).

There also remains a need to address the outstanding question of appropriate cost recovery from the domestic commercial vessel sector for government services. In addition to government budgetary contributions to the tune of $123.4 million up to the 2021/2022 FY, cross subsidisation of one sector of industry by another continues to occur and must be addressed.

To assist in identifying areas for improvement and changes to legislation required to give effect to these improvements, the government has established an Independent Review Panel. The scope of the review is very broad, described in the following way:

## 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.*

This submission addresses the questions raised in the consultation aid, where relevant, as well as other issues identified by MIAL members, and attempts to suggest changes to the legislative framework that will help to create a more flexible, streamlined and risk-based regime for vibrant and prosperous domestic commercial vessel industry.

# MIAL Submission

This submission provides the views of the MIAL membership with respect to each element of the scope of the review which is being used as a benchmark to assess performance of the regulatory framework.

## 1 Support Safe Vessel Operations

The Australian Maritime Safety Authority (AMSA) inherited an immense challenge when it took on the role as the single national regulator, and its achievements to date with respect to systems development, data collation, communication, industry relationship development and recruitment and scaling up to deliver an appropriate level of National System services are to be admired. However, for a multitude of reasons, the effectiveness of the National Law legislative framework in supporting safe vessel operations is patchy – this submission aims to shine a light on some of those reasons, while where possible, making high level suggestions as to potential alternative approaches.

The diversity of vessel types and operations, along with the need to balance compliance burden, ensuring unnecessary impacts on the commercial viability of domestic commercial vessel businesses is avoided, with the perceived need to improve safety across the industry has created a highly complex and prescriptive regulatory environment.

The overarching legislation the *Maritime Safety (Domestic Commercial Vessels) National Law Act 2012* (the National Law), is not in itself the problem. The issue lies with the multiple Marine Orders and National Standards for Commercial Vessels (NSCV) which are given effect via the National Law.

In addition to the information provided herein, MIAL recommends the Panel seek to understand the various domestic commercial vessel (DCV) regulatory regimes that exist overseas and determine what lessons might be learnt that could inform the recommendations of the review.

### *1.1 Legislative complexity*

At the advent of the single national jurisdiction, significant effort was expended to smooth the transition for industry and balance compliance cost with the imperative to create national consistency and improve vessel safety. To achieve this, the suite of legislation and regulation includes grandfathering arrangements and multiple exemptions overlaying prescriptive mandatory standards. This has led to a high degree of legislative complexity.

We note that in 2014, a 'streamlining review' was conducted to identify concerns held by a range of stakeholders as to the efficiency and effectiveness of the legislative framework and its ability to achieve its primary purpose of supporting safe vessel operations. This was followed by several stakeholder workshops and public consultation processes over four years, with a particular focus on survey requirements.

Many useful changes were implemented as a result, but with an absence of sectoral experience and consistent safety performance data, many of the decisions made with respect to balancing risk with operational advantages, were taken with an abundance of caution. With the passing of time, and increased availability of useful, real world and consistent data, some of those regulatory decisions taken at that time should be reflected upon and reviewed.

It is critical that operators have detailed knowledge and understanding of the risks of their activities and the effective risk mitigation measures - these will differ from operation to operation. The complexity of

the legislative framework has the potential to detract from the ability of an operator to focus on the important and unique aspects of their activities that create risk.

Removal of prescription and increasing the emphasis on enterprise specific risk management, would assist in reducing legislative complexity and allow operators to better tailor their approach, leading to more effective and relevant safety management.

### 1.1.1 Interaction with other Commonwealth and State and Territory frameworks

MIAL members have identified some issues with the interaction between commonwealth and state and territory frameworks.

#### *1.1.1.1 Work health and safety legislation*

One of the features of state and territory-based work health and safety (WHS) legislation, particularly where the commonwealth model laws have been implemented, is the clear identification of duty holders as well as the requirement for those duty holders to take steps as far as reasonably practicable to eliminate or minimise risks to health and safety.

This legislation applies to businesses throughout a state; from micro businesses to those with the most sophisticated safety management practices in the world. The legislation does not purport to determine what may or may not be reasonably practicable for a business but requires the person conducting the business or undertaking to assess those steps to minimise or eliminate risks, and take them, as far as reasonably practicable.

While the National Law expressly does not apply to WHS matters where a state or territory law exists to cover those matters, applicable standards under the National Law often dictate in a prescriptive manner what constitutes a safe operation. This creates a difficult framework within which to operate and from the perspective of the DCV operator, there exists a conflict between the two frameworks that can be difficult to reconcile.

MIAL members have identified issues specific to the interaction between the National Law and state and territory based WHS regimes, which is discussed in *1.2 Workplace health and safety* below.

#### *1.1.1.2 Transitioning between class requirement and NSCV*

Domestic commercial vessel operators who need to move vessels between and Australian port and an international port can find it difficult to reconcile class requirements with NSCV.

Also, difficulties arise when DCV's travelling overseas must comply with MARPOL requirements and the success of doing so very much depends on the port State's compliance approach.

## *1.2 Workplace health and safety*

As outlined above, state and territory WHS regimes work on the basis of applying a general duty to provide a safe workplace through the identification of duty holders, safety risks and the application of reasonably practicable measures to mitigate identified risk. These regimes prescribe the outcome, not the means by which the operator should achieve the outcomes.

Anecdotally, it seems that within in some sectors of the DCV industry there is limited knowledge of the relevant state and territory workplace health and safety obligations that exist alongside the prescriptive requirements of the National Law. In other words, compliance with the letter of the National Law, does not negate the general duty to provide a safe workplace.

The review panel may wish to consider how better alignment between the National Law and the state and territory WHS regimes might improve overall safety.

While it is clear to MIAL members that the two legislative regimes in each jurisdiction operate in parallel, many have expressed concern about lack of clarity about which regulator (state/NT or commonwealth) is responsible for investigating incidents, which has, at times led to confusion between the regulators themselves.

This review provides an important opportunity to clearly article how and where the responsibility for WHS lies.

### *1.3 Improving safety culture*

Incident reporting and open and transparent no blame investigations are not only useful in ensuring safety learnings are promulgated throughout industry to avoid similar incidents in the future, but such investigations are also critical to instilling positive safety culture within an industry.

#### 1.3.1 Expanding the Australian Transport Safety Bureau's role to include DCV safety

ATSB investigations, are highly regarded within the broader shipping industry and the findings of such investigations, alongside incident reporting, can be powerful tools in identifying patterns and guiding resources towards key areas for safety education campaigns.

Other transport modes, such a rail, that are the subject of investigations by state-based authorities (NSW Office of Transport Safety Investigations and the Victorian Chief Investigator for Transport Safety) are able to coexist alongside ATSB in those states.

Given the national framework for maritime safety regulation, instigating a national approach to incident investigations makes sense and, assuming the ATSB would be properly resourced to do so without an unreasonable cost imposed upon industry, MIAL would support expanding the ATSB's role to include DCV safety.

#### 1.3.2 Incident reporting

AMSA have made it clear that there is an ongoing issue with incident reporting within the DCV industry. While recognising the importance of data collection for a modern, efficiency and dynamic regulatory framework, many DCV operators are concerned about the use of incident reports by the regulator to directly target regulatory inspections. The pattern that then emerges, perceived or otherwise, is one whereby those companies that have developed a mature reporting culture are increasingly targeted for additional regulatory intervention, and those who never report incidents stay under the radar.

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.

More industry engagement and better coordination between industry and the national regulator in relation to the findings of internal investigations that avoid unnecessary compliance action that might create a disincentive for future reporting, may assist to improve overall reporting culture.

Additionally, MIAL members suggest all reporting requirements, including the forms used and information sought are better aligned to avoid confusion and unnecessary administrative burden.

## 2 Promote a risk-based approach

Given the diversity in vessels and operating conditions, ensuring businesses can adopt a risk-based approach and tailor their safety management to their specific operating environment is the only effective way to regulate this industry and will certainly achieve better safety outcomes.

The national regulator aligns itself with this philosophy, however the National Law regulatory framework raises many barriers to the effective implementation of risk-based approach to safety management, in the form of prescriptive requirements. Some of the impacts of prescriptive requirements are described under 4. Flexibility.

Coinciding with the diversity of operational scale, size of business and inherent risk within the DCV industry, there is a clear capacity difference between operators with respect to their ability to implement effective safety management systems.

It may be that some operators would benefit from a prescriptive approach, which would guide them through the specifics of what they need to do to ensure they have identified important safety risks and what they can do to mitigate those risks and ensure the general safety duty is met.

However, there is a large cohort with the scale and sophistication of operation for whom regulatory prescription provides no safety benefit but acts to stifle innovation and operational efficiency.

In accommodating the needs of such operations, the regulator is able to provide specific exemptions, however, approval for equivalent solutions to prescriptive requirements can be difficult to achieve, and this process this does not provide the regulatory certainty business needs to have the confidence to invest in modern assets. These themes are further explored in *4.1 Grandfathering arrangements and exemptions.*

MIAL suggests the review panel consider how a differential regime might apply where operators that are below a certain threshold (vessel size/number of employees etc) could apply prescriptive compliance requirements to their operation, and those above the threshold, who have the required operational scale, could apply a risk-based approach to demonstrate safe operations.

Under the risk-based scenario, there could be key principles that need to be addressed specific to each operation, including:

- Demonstrate adequate crew competencies and safety training;
- Demonstrate adequate maintenance standards;
- Demonstrate adequate lifesaving appliances and adequate fire protection systems;
- Vessel construction should be demonstrated to be sound and fit for purpose.

For the businesses that would apply such a risk-based approach, there are strong business incentives to operate a sound and safe maritime business.

The Review Panel may wish to look at regulation within the aviation sector which takes a risk-based approach to aspects following vessel construction across the aviation industry. By comparison, Australia's domestic maritime operations are very highly regulated by prescription.

## 3 Minimise burden

Some opportunities to minimise the compliance burden on industry have been identified and are further discussed throughout this submission. These include:

- Applying a risk-based approach to regulation as opposed to prescription;
- Aligning reporting and investigation requirements between the relevant state and territory WHS regimes and the commonwealth.

## 4 Flexibility

Given the diversity of operations and locations of DCV activity, the supporting legislative framework must balance flexibility - providing for safe operations that are fit for purpose - with the certainty that enables businesses to have the confidence to plan and invest.

### *4.1 Grandfathering arrangements and exemptions*

Grandfathering arrangements were put in place to deal with the range of acceptable standards, regulatory settings and general oversight of the commercial vessel sector that existed within the various state and territory regulatory frameworks prior to the single national jurisdiction. These arrangements were necessary to smooth the transition and avoid unreasonable compliance costs to industry that would likely have resulted in many DCV business no longer being economically viable.

It is true that grandfathering arrangements can create a strong disincentive for operators to invest in new vessels and major vessel upgrades which would ultimately lead to a modernised DCV fleet. On the other hand, the prescriptive nature of some aspects of the National Law framework – with some applications of the requirements providing no demonstrable safety benefit – will require some level of grandfathering to continue.

The question remains, what are the *genuine* and what are the *perceived* safety risks that would be addressed by phasing out certain grandfathering arrangements? This question can only be answered by the collation and analysis of incident data that looks at what types of grandfathered vessels and their operations are represented in the statistics.

The review panel may wish to consider an approach whereby the highest risk grandfathered vessels are identified, and a tailored approach is developed for those vessels to augment safety in either an operational or structural sense.

MIAL members are of the view that most grandfathered arrangements do not represent an unreasonable safety risk, however as stated above, we would strongly support a data driven approach to better understanding this.

Prescriptive, and in some cases, arbitrary ‘lines in the sand’, particularly with respect to vessel length and engine power that are enshrined in regulation can stifle innovation and restrict the ability to apply ship design ideas that meet the niche requirements and increase operational and business efficiency.

This is a major issue for industry and ultimately, this can limit the ability of operators to take advantage of a new business opportunities and have a dampening effect on Australia’s overall maritime activity.

While there are a range of specific exemptions that could be applied for in consultation with AMSA, these are difficult to obtain, and equally difficult for business to justify investment decisions that are based on the possibility of receiving an exemption at some future time.

### *4.2 Vessel length and engine power*

Issues related to engine power are exacerbated by the fact that marine engines are growing increasingly complex, and with the switch to renewable and low emissions technology, are likely to look rather different in the medium to long term.

Importantly, the complexity of modern engines dictates that all servicing required to keep an engine properly maintained must be completed by specialist maintenance technicians. Notwithstanding the need for redundancy in times of emergency, in many circumstances, the traditional role of the ship's engineer in the domestic commercial vessel industry has significantly reduced in scope.

The interplay between vessel length and engine power in the current legislative framework has a fixed impact on the engineer qualifications required, often resulting in the need to employ crew of higher than necessary skills and experience. This has an upwards pressure on employment costs, which is compounded by the current skills crisis being faced by the maritime industry and the general lack of access to training facilities and opportunities in some areas of the country. It is important to note that many of these high qualifications are very hard to come by, and unnecessary in many of the operations for which they are required by law.

Technology that assists in the safe operation of vessels is ever advancing. In particular the advances in autonomous vessel technology have been considerable, and these advances are likely to continue to the point where the traditional composition of on-board marine crew is no longer considered the safest and most effective deployment of resources. The National law needs to be able to accommodate these advancements, by allowing, subject to the conduct of appropriate risk assessments, operators to judge the most appropriate operational crewing practices for their vessels. This combined with the development of training for emerging jobs, will see a change in the skills required in the industry and where and how work is performed.

A regime that supports a risk-based approach, that allows operators to recruit the people they need, considering the unique circumstances and risks of their operations is the most efficient and effective way to regulate the DCV industry.

## 5 Simplicity and transparency

AMSA continues to work toward increasing consistency in compliance and enforcement activities and the application of the National Law around the country, and a great deal has been achieved in this regard. It is critically important for the national regulator to continue this work to improve industry confidence in, and support for, the regulatory framework.

Implementation of the National Law is supported by the *Marine Safety (Domestic Commercial Vessel) National Law Regulations 2013*, which refers to Marine Orders 500 series. Marine Orders in turn refers to various sections of the National Standards for Commercial Vessels (Part B to G), which are frequently revised. In some circumstances, the Universal Shipping Laws (USL) Code can also apply.

The National Law is anything but simple and while it is clearly no easy task, anything that can be done to simplify the National Law would be a welcome development.

## 6 Support effective compliance

The diversity of operators, owners, and crew across Australia's DCV sector is such that there is a vast difference in the need for support from one end of the spectrum to the other.

Larger businesses, with greater capacity to manage operational compliance issues, focus on improving safety culture and safety outcomes and absorb or pass on the cost of doing so, value strong working relationships and effective consultation with the regulator and seek to ensure the regulator has confidence that they understand and can manage their own safety risks.

At the other end of the spectrum there is significantly less capacity to absorb or pass on the cost and burden of regulation and understand and manage their safety risks, and as such, these operators have a greater need for compliance support.

The challenge is in prescribing regulation that is fit for purpose for operators at either end of the spectrum. An increased focus on enterprise or operational specific risk assessment and mitigation, with appropriate and effective resources dedicated to providing support for those who need it, is recommended. AMSA have done significant and highly valued work in this area, which should continue.

Additionally, as outlined above in *2. Promote a risk-based approach*, MIAL suggests the review panel consider how a differential regime might apply that addresses the differing needs of these diverse businesses.