

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

OTSI Submission

About the Office of Transport Safety Investigations (OTSI)

OTSI is an independent NSW authority which contributes to the safe operation of bus, ferry and rail passenger and rail freight services in NSW by investigating safety incidents and accidents and transport safety risks, identifying system-wide safety issues, and sharing lessons with transport operators, regulators, and other stakeholders.

OTSI is empowered under the *Transport Administration Act 1988* to investigate rail, bus, and ferry accidents and incidents in accordance with the provisions of the *Passenger Transport Act 1990* and *Marine Safety Act 1998*. It also conducts rail investigations on behalf of the Australian Transport Safety Bureau (ATSB) under the *Transport Safety Investigation Act 2003* (Cth).

OTSI investigations are independent of regulatory, operator or other external entities. OTSI investigates using a 'no-blame' approach to understand why an occurrence took place and to identify safety factors that are associated with an accident and incident, to make recommendations or highlight actions that transport operators, regulators and government can take to prevent recurrence and improve safety.

Evidence obtained through an OTSI investigation cannot be used in any subsequent criminal or disciplinary action. However, a regulator can undertake its own investigation into an incident OTSI has investigated and coronial inquiries can obtain access to OTSI information.

OTSI does not investigate all transport safety incidents and accidents but focuses its resources on those investigations considered most likely to enhance bus, ferry, or rail safety.

Many accidents result from individual human or technical errors which do not involve safety systems so investigating these in detail may not be justified. In such cases, OTSI will not generally attend the scene, conduct an in-depth investigation, or produce an extensive report.

OTSI may request additional information from operators or review their investigation reports which may lead to several actions, such as the release of a Safety Advisory or Alert to raise industry awareness of safety issues and action.

OTSI investigators normally seek to obtain information cooperatively when investigating. However, where it is necessary to do so, OTSI investigators may exercise statutory powers to conduct interviews, enter premises and examine and retain physical and documentary evidence.

Independent Review Consultation Aid

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

To be fit for purpose the legal framework, including Marine Orders, needs to satisfy the following:

- **support safe vessel operations** – the framework should support safe behaviour, foster a safety culture across industry and encourage continuous improvement and adoption of best practice. The framework should support people to have and maintain the skills needed to safely design, construct, equip, crew and operate vessels;
- **promote a risk-based approach** – the framework should impose safety requirements proportionate to the risk of different operations;
- **minimise burden** – the framework should support safety outcomes in a manner that minimises regulatory and administrative burden for industry;
- **be flexible** – the framework should cater to the diversity of regulated businesses, individuals and vessels and accommodate innovation and changes in technology;
- **be simple and transparent** – the framework should be informed by wide consultation, be accessible and clear and support operators to understand and comply with safety requirements that apply to them; and
- **support effective compliance** – the legal framework should provide an effective and practical range of compliance powers and enforcement tools for AMSA.

OTSI Response

OTSI supports the principles outlined above as key aims of the legal framework for the safety of commercial vessels. OTSI suggests the inclusion of an additional principle to clarify that any such framework should fit within and complement the broader legal framework for work health and safety.

This would ensure that safety-specific sector legislation such as for commercial vessels follows the same legal tenets especially for key elements of the framework including safety duties, risk management and safety management systems. Taking this approach would build on the baseline work health and safety expectations and extend a layer of protection to ensure effective management and control of risks to public safety which commercial vessels present.

Historically, specialist regulators have been established where there are specific risks usually to public safety that warrant additional examination and oversight. In the transport sector, this has been done, for example, in aviation through CASA (Civil Aviation Safety Authority) and for maritime shipping through AMSA (Australian Maritime Safety Authority), both federal bodies, and at the state or more recently 'national'¹ level for rail safety (ONRSR), heavy vehicle safety (NHVR) and domestic commercial vessel safety (AMSA). State-based safety legislation continues to exist for point to point and other passenger safety. A national safety regulatory framework is under development by the National Transport Commission (NTC) on behalf of jurisdictions for automated vehicles.

¹ Currently national regulatory models in place for rail - the Office of the National Rail Safety Regulator (ONRSR)- and heavy vehicles - the National Heavy Vehicle Regulator (NHVR) - are neither state nor federal bodies but instead represent adopting jurisdictions a model developed and recommended by the Australian Parliamentary Counsels Committee.

Any legal framework for the safety of, in this instance, commercial vessels should therefore ensure consistency in approach to the key tenets of the work health and safety legislation including formulation of general safety duties and use of due diligence provisions for officers; identification and management of risks SFAIRP²; and the use and application of safety management systems including safety culture. This would ensure consistency in approach to regulating safety, especially where there are additional risks to public safety that warrant specialist regulators.

² SFAIRP – so far as is reasonably practicable

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?

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

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?

OTSI Response

The existing National Maritime Safety Law does not interact efficiently with work health and safety law with respect to the formulation of general safety duties and due diligence provisions. It also retains as a legacy, certain prescriptive requirements which militate against its effectiveness for risk-based management of risks to safety arising from commercial vessel operations.

General safety duties and due diligence provisions

It would be beneficial if the formulation of general safety duties and the application of due diligence provisions for officers were consistent across the legislation. This would make it easier and possibly more efficient for compliance by duty holders and regulators. It may also change the compliance focus from masters to operators who arguably have more management and control over vessel operations and the safety systems that manage them. The additional focus on operators may assist in shaping a safety culture driven across the full spectrum of domestic commercial vessel operations from front line operators at sea and on-water, while also increases the safety oversight of the operator / owner ashore managing the conduct of business operations.

In particular, the specific application of general safety duties on masters differs in formulation from other ‘worker’-type duties placing a greater emphasis on the role of masters in relation to safety. Notwithstanding the important role of masters, inadvertently however, this approach could arguably make it easier to seek compliance action against masters given their closer position ‘to the action’ (ie operations) than operators. However, in practice operators would have more control over the establishment and maintenance of broader risk management and safety management systems than a master who is generally employed by the operator.

By way of example, in 2020 OTSI undertook an investigation into the death of a female passenger on a Sydney harbour cruise. Ultimately, the passenger died from asphyxiation in an enclosed space (toilet) when she was overcome by fumes from a faulty sewage system involving a leaking valve and poor sewage tank emptying practices.

OTSI made recommendations for improvements to inspection standards for sewage systems in commercial vessels that carry passengers and to operators to improve their safety management systems in respect of induction, training and sewage tank emptying practices.

In the two years since release of the report, AMSA has prosecuted the Master and initiated an investigation into the owner, but this has not been concluded. The standards against which vessels are inspected remain unchanged. While there has been information and advice provided by the relevant state bodies (Transport for NSW and its Maritime division, formerly Roads and Maritime Services) to the industry in NSW, a coordinated response across agencies and at the national level to this serious safety issue has not eventuated.

Owners

General safety duties under the NMSL apply to several parties, the *owner* is defined as a person who has legal or beneficial interest in the vessel, other than as a mortgagee, **and** a person with the overall general control and management of the vessel. It would be helpful if there was separation between those who have a legal or beneficial interest in the vessel from those who have overall general control and management of the vessel. This would simplify the arrangements and make safety accountabilities clearer for vessel operators (not only pilots or masters) who have the greatest influence and control over the management of risks to safety through the systems they establish and maintain. Additional due diligence provisions along the lines of those in work health and safety law could also be introduced to align obligations of decision-makers in a company in particular the important role of masters.

Prescriptive requirements

AMSA manages the certification and surveying of commercial vessels to standards that it sets before they enter service. Currently, standards for vessel surveys are limited to some key areas with minimum requirements for compliance. These standards generally do not adopt a risk-based approach which would involve for example, making sure safety systems address the risks that a vessel is likely to face given its operating environment before entering into service.

This may be further compounded by the many grandfathering provisions which provide exemptions from the national law. A review of the ongoing applicability of these provisions is supported with a view to making the law (especially operating standards under it) more attuned to a risk-based approach for the management of risks to safety arising from a vessel's operating environment.

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?

OTSI Response

As noted in the consultation aid and at the beginning of this submission, OTSI was established in 2004 to investigate safety incidents and accidents for rail passenger and freight services as well as for bus and ferry passenger services. The primary purpose of which is to identify system-wide safety issues and actions that could prevent reoccurrence, and to share lessons with transport operators, regulators, and other stakeholders including policy makers to secure safety improvements.

Under the legislation, OTSI's remit is defined to include domestic commercial vessels that carry 8 or more passengers for a fare. The rationale for this remit is to ensure OTSI focuses its attention on those incidents and accidents most likely to give rise to risks to public safety and for where a systems safety approach to the management of risk is likely to be most effective. This approach was designed to promote public confidence in the safety of the transport network and as a complement to the then Independent Transport Safety Regulator in NSW which together provided a comprehensive safety regulatory framework for transport.

It is a matter for governments to decide the institutional arrangements to support independent safety investigation should that function be extended to cover some or all domestic commercial vessel operations.

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.

Once this remit is clear, the value of independent safety investigation could then be properly considered. In doing so however there are several points to consider. First, it would be prudent to define the scope of any change in remit to where the greatest safety benefit may be gained and to where the introduction of additional regulation is warranted. For example, where there are risks to passenger or public safety. Secondly, as NSW already has a comprehensive framework in place for independent investigation for these types of risks whereas other jurisdictions do not. It may be appropriate to focus on introducing independent investigation for domestic commercial vessels in these other jurisdictions leaving established agencies such as OTSI to continue their work. Finally, existing arrangements in NSW and Victoria for independent safety investigation for domestic commercial vessels would need to be considered in any final scope for independent investigation and the institutional arrangements needed to support it.

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

OTSI Response

OTSI has identified the induction and training of casual crew as a safety risk in domestic commercial vessel operations. Specific safety initiatives could be addressed through annual safety summits and/or sector-specific workshops. For example;

Casual crew

The DCV sector attracts seasonal crew in all vessel positions ranging from master to deckhand and other crew. As a result, many crew members irrespective of the position they hold are often employed as casual crew. Given this, it is essential that they are properly inducted and have the relevant competencies to safely operate the vessel to which they are assigned including in the machinery on board and in emergency response. There is a clear need to emphasise responsibility for these requirements to owners, so they ensure their casual crew can operate the vessel safely.

Annual refresher training

Workshops based on agreed minimum standards could be conducted for casual crew on specific vessel operation and handling skills for particular vessels to improve safe operations. This may provide a level of assurance of the ongoing competence of casual crew. These should stretch beyond 'person-overboard' or flare drills and focus on operations for specific vessel classes or types. An appropriate body such as AMSA (supported by TfNSW and OTSI in NSW) could coordinate with relevant groups to support smaller operators who may struggle to provide such training workshops.

Annual audit of commercial training providers

An opportunity exists to further refine an audit schedule by national and state regulators on commercial training providers to ensure the correct standard of training and assessment is conducted by those approved to deliver national standard training packages. This would support adherence to sector training standards and help reduce any sub-standard training delivery by training providers.

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

OTSI Response

In collaboration, OTSI, the Port Authority of NSW, TfNSW Maritime, TfNSW Centre for Maritime Safety and AMSA have been working to identify ways to improve incident reporting for maritime safety notification. Some of the lessons from this work cover:

Streamlined reporting using consistent definitions and terminology

Safety notification reporting is recognised as an integral and important element of managing risks to safety. However, reporting requirements differ across OTSI, TfNSW, AMSA and the Port Authority of NSW, and there are requirements on both masters and operators to report incidents and to different parties, which can act as a disincentive to reporting. The reporting process for industry must be simple, easy to understand and readily accessible.

It would be useful for the Review to suggest further work to streamline notification requirements across jurisdictions for the sharing of such information where appropriate to reduce the reporting burden on domestic commercial vessel operators.

Single source of truth

A single 'source of truth' for DCV occurrences would greatly enhance the ability of the multiple agencies with safety responsibilities to effectively identify trends and emerging issues and act to address them.

In NSW, OTSI, TfNSW, AMSA and the Port Authority of NSW are working collaboratively to identify if one source of notifications may be used for all parties despite differences in reporting requirements. The outcome has been a data sharing agreement enabling access to notifications which can then be used by the respective parties.

Awareness and understanding of reporting

OTSI supports increased education on the benefits of reporting from a safety perspective. For example, greater sharing of information with operators of lessons so they can learn from reported occurrences which could lead to safety improvements. This approach may be a more effective means of encouraging greater reporting by operators by informing the sector of the 'how and why' incident reporting needs to be timely and accurate.

Enhanced triaging

OTSI supports a greater emphasis by regulators and investigative bodies on examining occurrences that did not result in an incident or an accident but had the potential to result in injury or damage. This type of approach could provide more opportunities to identify and share safety lessons and improvements with operators thereby supporting a just reporting culture not a punitive one.