

Independent Review of Domestic Commercial Vessel Safety Legislation

CONSULTATION AID

Purpose

The Australian Government has commissioned an independent review to consider whether Australia's legal framework regulating the safety of domestic commercial vessels is fit for purpose.

The review is also to consider whether this regulatory framework is being delivered efficiently and effectively, and to consider options for future cost recovery arrangements.

The Terms of Reference for the Independent Review of Australia's Domestic Commercial Vessel Safety Legislation, and Costs and Charging Arrangements can be found [here](#).

The review will be conducted in two phases, with the first to focus on the National Law framework (Phase 1) and the second to consider national system delivery costs and future funding options (Phase 2).

This document has been prepared as an aid to assist you with making a submission in relation to Phase 1 of the review. You are welcome to provide your views on the consultation questions in this document and any other relevant views you have on whether Australia's legal framework regulating the safety of domestic commercial vessels is fit for purpose.

The Panel is seeking submissions by 30 March 2022. Please email submissions to dcvsafetyreview@infrastructure.gov.au.

The Panel will hold targeted consultation sessions during February and March 2022 and welcomes written submissions. Following public consultation, a draft Phase 1 Interim Report will be released for public comment by end April 2022. It is anticipated that a Phase 1 Interim Report will be developed by mid-June 2022.

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 criteria:

- **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

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- **support effective compliance** – the legal framework should provide an effective and practical range of compliance powers and enforcement tools for AMSA.

Without limiting your response, you might like to address some or all of the following matters. In addressing these matters, it would be helpful if you could have regard to the above criteria.

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?

The National Law provides the legislative framework for the certification, construction, equipment, design and operation of domestic commercial vessels (DCVs). Broadly speaking the National Law establishes: AMSA as the National Regulator; a system for certification; offences for non-compliance; general safety duties for individuals with a role in operating DCVs; and AMSA's compliance and enforcement activities.

The current Australian framework provides for international shipping to be regulated under the Navigation Act, and domestic commercial vessels to be regulated under the National Law. The National Law applies to any domestic commercial vessel capable of being used in navigation or designed to float in water, and covers a wide range of vessels including ferries and other passenger transport operations, fishing fleets as well as research vessels, aquaculture vessels, kayaks and smaller craft operating in coastal or near-coastal waters.

The Navigation Act applies to ships on international voyages and enables Commonwealth regulation of international ship and seafarer safety, shipping aspects of protecting the marine environment and the actions of seafarers in Australian waters. International conventions, including international maritime safety obligations, are given effect under the Navigation Act through Marine Orders. Certain (but not all) international safety standards contained in Marine Orders also apply to domestic commercial vessels regulated under the National Law.

Section 7 of the National Law also requires the application of state and territory workplace health and safety (WHS) obligations in addition to obligations imposed by AMSA's marine orders. Under the work/occupational health and safety acts administered by each WHS regulator, a 'workplace' is defined to include a vessel. For that reason, the WHS laws apply to DCVs and impose certain obligations on the operation of DCVs. Compliance with the National Law does not automatically mean that the operation of a DCV is compliant with WHS laws, and vice versa. The National Law also applies General Safety Duties on a number of duty holders.

In order to administer the National Law in accordance with arrangements agreed with states and territories at the time of transition, AMSA put in place a range of general exemptions for different types of vessels and operations, whilst also aiming to ensure an appropriate balance of risk and regulatory requirements. These general exemptions can be complex and difficult to understand, which may lead to increased compliance costs for industry. They are also time consuming and administratively burdensome for AMSA to manage.

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?

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

Under the current framework, an Australian commercial vessel which operates only within Australia's Exclusive Economic Zone (EEZ) will generally be a domestic commercial vessel (DCV) and will be subject to the National Law. Conversely, an Australian commercial vessel which operates outside Australia's EEZ, or intends operating outside the EEZ, will generally be a regulated Australian vessel (RAV) and subject to the Navigation Act. RAVs are not subject to the National Law.

Exceptions to this occur where:

- an Australian commercial vessel which operates only within Australia's EEZ will also be categorised as a RAV if it holds a Statutory Certificate issued under the Navigation Act - unless the certificate is a Pollution Certificate, International Tonnage Certificate or a Declaration of Maritime Labour Compliance (MLC); or
- an Australian commercial vessel which operates outside Australia's EEZ, or intends operating outside the EEZ issued with a declaration under section 19 of the Navigation Act will not be categorised as a RAV. Such vessels will be classified as DCVs.

Currently, a RAV can 'opt out' of the Navigation Act and become a DCV if it operates only within the EEZ, requests its Statutory Certificates (except the certificates identified above) be revoked and obtains a Certificate of Survey and a Certificate of Operation under the National Law. The vessel may remain in Class and may maintain its Pollution, International Tonnage and MLC statutory certificates as appropriate.

Equally, a DCV can 'opt in' to the Navigation Act and become a RAV by obtaining Statutory Certificates from an 'issuing body', which is a Recognised Organisation, or AMSA. The owner must apply to have the vessel's National Law Certificates of Survey and Operation cancelled or revoked.

Statutory Certificates' that do not result in a vessel being categorised as a RAV

Navigation Act s 15 (c)(ii) provides the definition of 'regulated Australian vessel'. It allows for the regulations to identify statutory certificates, the holding of which will not result, of themselves, in a vessel meeting the definition of a RAV. The statutory certificates issued under the Navigation Act that do not make a vessel a RAV are listed in Marine Order 31, s44 and are:

- i. Pollution Certificates (all certificates issued in accordance with MARPOL)
- ii. International Tonnage Certificates
- iii. Declarations of Maritime Labour Compliance (DMLC) parts I and II.

Why are these certificates excluded?

MARPOL - DCVs that trigger the cargo, size or other criteria for the application of the various Annexes of MARPOL must comply with MARPOL but are not required to hold certification (because they do not undertake international voyages). However some owners choose to obtain statutory MARPOL certification under the Navigation Act. A DCV can retain such certification without being categorised as a RAV.

Tonnage - Tonnage certificates are required for registration under the *Shipping Registration Act 1981*. They are also sometimes held or sought by DCV owners for delivery voyages from overseas. These certificates have no expiry and remain in effect for the life of a vessel. Holding these certificates do not cause a vessel to be categorised as a RAV.

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DMLC Part I and II - A similar situation applies for the declaration of maritime labour compliance. These are international requirements to which Australia is a party and the certificates can only be issued in accordance with the Navigation Act. A vessel owner may choose to obtain a Declaration of Maritime Labour Compliance under the Navigation Act and a DCV can retain that declaration and not be categorised as a RAV.

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

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

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

The Law also provides that a person is not considered an Owner merely because he or she is the master or pilot of the vessel.

This means that there may be multiple people or organisations who are “Owners” of the same vessel. That is because the person(s) who has legal title over the vessel may not be the same person(s) who control and manage the vessel. Also, there may be different people who control and manage the vessel at different times.

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

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

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

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

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?

The Australian Transport Safety Bureau (ATSB) is an independent Commonwealth Statutory agency that conducts independent “no-blame” investigations into safety occurrences in the maritime, aviation and rail transport sectors. These investigations are separate from any compliance investigations that may be undertaken by a regulator. ATSB investigations focus on identifying systemic safety issues that may be of relevance to the industry as a whole. The ATSB may look at the regulatory framework and the actions of the regulator as well as operators.

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ATSB's jurisdiction with respect to the maritime sector is limited, in general terms, to international and interstate shipping. It therefore excludes a significant segment of the DCV sector.

NSW and Victoria have also established independent transport investigators: the Office of Transport Safety Investigations (OTSI) in NSW, and the Chief Investigator Transport Safety (CITS) in Victoria. These agencies have jurisdiction to conduct investigations into safety occurrences in relation to passenger carrying ferries (in the case of NSW) and maritime safety incidents (in the case of Victoria). Other States and territories do not have independent accident investigators.

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?

The grandfathering of standards under the National Law has been raised as an issue of concern in recent senate and productivity commission inquiries. Grandfathering arrangements were agreed by the Commonwealth and state and territory governments at the time of transition to the National System for Domestic Commercial Vessel Safety (National System). This allowed existing commercial vessel operators to continue to operate in the same manner as they did before the National System came into effect.

A grandfathered vessel under the National Law is a vessel that held a survey certificate or was otherwise entitled to operate commercially in the 2 years prior to 1 July 2013 (an existing vessel). Grandfathering standards for domestic commercial vessels are broad in nature and not all grandfathered arrangements present a risk to safety. Generally speaking, the age of the vessel and location which it was operating on 30 June 2013, plus the extent of any modifications to the vessel (and whether these have been verified by a surveyor) will impact the risk or application of the grandfathered arrangement. Where an existing vessel makes certain changes to its operations, is modified or moves its geographic area of operation, the grandfathering arrangements for the vessel end.

There are four areas of grandfathering under the National Law, namely:

- grandfathering of design, construction and some equipment standards
- grandfathering of survey exemptions
- grandfathering of minimum crewing requirements, and
- grandfathering of crew competency requirements.

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?

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

A well-rounded compliance approach would include measures to promote and reward good compliance behaviour. What could be done to better achieve that?

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

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For example:

- Would the Vessel Monitoring System (VMS), currently a fishing compliance tool, if also used for safety monitoring substantially improve safety outcomes, and in what circumstances?
- Would mandating helmet wearing for crew on vessels where there is a serious risk of head injuries substantially improve safety outcomes?
- Would strengthening the current requirements around modifications and subsequent stability testing substantially improve safety outcomes?

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