Submission to the Productivity Commission

Inquiry into National Transport Regulatory Reform

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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.

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 provides a full suite of maritime knowledge and expertise for operators of both Regulated Australian Vessels and Domestic Commercial Vessels. This gives us a unique perspective.

MIAL's vision is for a strong, thriving and sustainable maritime enterprise in the region.

Executive Summary

MIAL welcomes the opportunity to make this submission into National Transport Regulatory Reform being conducted by the Productivity Commission. Although the inquiry is investigating the regulatory reforms for rail, heavy vehicles and commercial vessels, our submission will focus on the domestic commercial vessel industry.

In 2009 the Council of Australian Governments (COAG) agreed to create a national regulatory regime for maritime safety, with the intention of improving safety while reducing costs and regulatory burden. The Intergovernmental Agreement (IGA) signed in 2011 set out the objectives of COAG and confirmed that the Australian Maritime Safety Authority (AMSA) would be the national safety regulator for commercial vessels in Australia. Previously, AMSA only regulated international and Australian flagged ships under Port State and Flag State control.

In the context of Port State and Flag State control, AMSA is well known as a strict enforcer of the law, which, due the high commercial consequences of ship detention, has no doubt had a material impact on the quality of foreign ships that visit Australian ports. In 2018, AMSA detained 161 vessels for failing to meet their obligations.

MIAL supports a National System for our Domestic Commercial Vessel (DCV) fleet. Consistent national laws are necessary to ensure a higher degree of efficiency and safety for our maritime industry. However, there have been, and continue to be significant challenges with transition to National System arrangements which have resulted in legislation which is overly complex and lacking in clarity. MIAL recommends that AMSA, and/or the Department of Infrastructure and Regional Development and Cities be properly resourced to do so an extensive review of the legislation for the DCV industry.

MIAL welcomes the additional government funding allocated to support the National System transition, in recognition of the high value of the DCV sector to the Australian economy. We are also of the view that the unsustainable cross subsidisation that is occurring between sectors of the maritime industry, that is being exacerbated by further delays in agreement on cost recovery, must come to an end.

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1. Introduction

MIAL welcomes the opportunity to make this submission into National Transport Regulatory Reform being conducted by the Productivity Commission. As the national regulator for the Domestic Commercial Vessel (DCV) industry and international and Australian flagged ships, the Australian Maritime Safety Authority (AMSA) functions are wide and varied. As well as addressing questions raised in the issues paper, we will discuss traditional Port State and Flag State functions as well as some of the challenges of AMSA's transition to the regulator for the entire Australian commercial maritime industry.

1.1 Flag State and Port State Control – AMSA functions under the Navigation Act 2012

Traditionally, AMSA has been the regulator responsible for ensuring the ongoing safety of shipping and protection of the marine environment from ship sourced pollution within the Australian jurisdiction. This is done via Australian implementation of a range of international conventions which AMSA is responsible for ensuring compliance with.

Through its flag State control responsibilities, AMSA ensures Australian flagged ships meet the operational, survey and certification requirements as determined by international convention given effect through Australian legislation wherever these vessels are in the world. AMSA does the same for foreign flagged ships visiting Australian waters through its port State control obligations.

AMSA is also responsible for the maintenance of safe navigation in the Australian jurisdiction, preparedness and response activities in the event of maritime environment emergencies (jointly with the states and territories) and Australia's search and rescue activities.

It is important to note that AMSA is well known throughout the global shipping industry as having a zero-tolerance approach to non-compliance, and as a consequence, shipowners and charterers are very careful about the quality of the assets they send to Australian ports. AMSA's sophisticated vessel targeting regime and active participation in the Tokyo MOU, means that there is a high likelihood that substandard operators and poorly maintained or non-compliant ships will be detected and detained when in Australian waters. In 2018, AMSA detained 161 vessels for failing to meet their obligations.

A detention has very significant consequences for shipowners in the immediate timeframe, but also in terms of acquiring future charters.

While maintaining a strict approach to compliance and enforcement, AMSA also recognises the need to maintain productive working relationships with the shipping industry. From the MIAL perspective, AMSA and the industry both benefit from an open dialogue and it is certainly our impression that AMSA is well respected as a tough but fair regulator both locally and internationally.

1.2 Domestic Commercial Vessels – AMSA functions under the 'National Law'

As a result of a decision taken by Council of Australian Governments (COAG) in 2009, on 1 July 2013, AMSA became responsible for maritime safety regulation for Australia's domestic commercial vessel industry. Prior to this reform taking place, regulatory services to the domestic commercial vessel sector were delivered by the state/territory maritime safety authorities leading to vastly different and inconsistent requirements around the country.

This is given effect through the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 and is commonly known as the National System for Domestic Commercial Vessels (the National System). The rationale behind this decision was to ensure as far as possible, clarity and consistency in the identification and enforcement of maritime safety regulation, and to overcome some of the challenges for marine businesses in having to comply with differing obligations across state jurisdictions.

It is estimated that this change brought an additional 27,000 vessels under AMSA's jurisdiction – a highly diverse range of vessels and commercial operations that had been operating under 6 different survey and certification regimes. This number is an estimate, due to the historic differences between state/territory requirements for commercial vessel registration. Clearly, and not unexpectedly, the transitional issues have been considerable.

From 1 July 2013, service delivery of regulatory functions was performed by the states and territories on behalf of AMSA under delegated arrangements. Originally, it was stated that the on-going role of the state and territory maritime agencies in service delivery would be integral to the National System. However, a 2014 review of the National System reforms found that despite having AMSA as the national regulator, there were still inconsistencies in service delivery between the states and territories.

In November 2014, Commonwealth, state and territory transport ministers therefore agreed that AMSA would take over full service delivery on 1 July 2017. In November 2016, the Transport and Infrastructure Council extended this timeframe until 1 July 2018 for jurisdictions and industry to consult and fully prepare for the significant changes that would occur. This included full cost recovery for AMSA to provide regulatory services to the domestic commercial industry – in the same way as AMSA recovers the costs for exercising its traditional flag and port State control functions.

2. What have been the costs, or unintended consequences, of moving towards uniform national standards?

2.1 Cost Recovery and the costs to industry

All regulatory and compliance, navigational and pollution preparedness and response functions delivered by AMSA are fully cost recovered, either on a fee for service, or regulatory functions levy basis, by ships covered under the *Navigation Act 2012.*

It is also the intention of the Government, that the regulatory functions of the National System would move progressively towards full cost recovery in the long term. Several industry consultation processes have been conducted to determine the appropriate magnitude of the levy and fees for service, in order to give effect to this intention.

Respondents from the 2016 public consultation on cost recovery for services under the national system felt the initial decision of COAG promised a new system that would be simpler and cheaper. However, under the proposed cost recovery model, respondents believed the two levy options failed to deliver on this, and in fact delivered the opposite. In this context, it is important to note that historically, most states and territories heavily subsidised fees associated with the maritime industry and apart from Tasmania, were reluctant to move towards full cost recovery.

As a result of this consultation, and in recognition of the additional costs faced by some sectors of industry, who in some cases had never faced charges for these services, it was agreed that the first year

of cost recovery would be subsidised by the Commonwealth and state/territory Governments to allow for transition.

Following considerable political interference, and direct lobbying of the Deputy Prime Minister at the time, it was announced on 2 July 2018 that cost recovery would be further delayed (by three years), and the Australian Government would provide additional funding towards the National System. The delay would allow AMSA to better understand the actual cost of service delivery for a review to be conducted in 2020-21.

While MIAL welcomed the additional funding in recognition of the high value of the domestic commercial vessel sector to the Australian economy, we acknowledged that the 2020-21 review will again involve wide consultation, cause further uncertainty, and reignite debate around the cost to industry.

Furthermore, it is clear that there is considerable cross subsidisation of AMSA's activities occurring, i.e. funds collected from vessels operating under the *Navigation Act 2012* are being used to for AMSA operations under the National System. This is an unsustainable situation that is being exacerbated by further delays in agreement on cost recovery.

The Australian National Audit Office (ANAO) recently undertook an audit of the application of cost recovery principles by several Government agencies, including AMSA. The objective of the audit was to assess whether AMSA effectively apply the cost recovery principles of the Australian Government's cost recovery framework.

The report concluded that AMSA have significantly over-recovered costs in recent years, with no assurance that entity charges recover the efficient costs of their activities. It was reported the costs of some activities being consistently over-recovered and others consistently under-recovered.

It was also confirmed AMSA does not recover the full cost of its fee-based activities for the national system and is funding the shortfall from its levy-based revenue.

Recommendations from the report were that AMSA examine ways to reduce the cost of providing its fee-based services and seek a decision from government on how the cost of its fee-based services should be met if it cannot fully recover the cost of these services.

3. Should any inconsistencies in the current system be addressed? If so, what are these and how should they be addressed?

3.1 Complexity of the legislation governing the National System

The transitional arrangements that have been necessary to bring a hugely diverse range of vessel types, commercial operations and historical regulatory settings under the one umbrella, while allowing maritime businesses to continue to operate, have resulted in an extremely complex and often ambiguous regulatory landscape (see annex 1). AMSA's remit to interpret and enforce the legislation is made very difficult as a result.

Equally, industry has been challenged by the complexity involved in identifying and interpreting the applicable laws and regulations which can involve Acts of Parliament, Regulations, Legislative Instruments, historical uniformed codes and other material. Many of those operating DCV's, are sole proprietors or small to medium size businesses which means they may lack the time and resources to dedicate to gaining this understanding.

AMSA has to its credit undertaken a significant educational campaign to assist industry in understanding the changes in the lead up to the transition, although due to the broad geographical areas out of which many DVC's operate, this would have been challenging.

3.2 Diversity of domestic commercial vessels and operations

In contrast to vessels governed by the *Navigation Act 2012,* the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* legislates for a huge variety of vessels, including commercial fishing boats, construction barges, passenger ferries (of multiple capacities), water taxis, small tenders, harbour towage vessels, hire and drive boats and tourism operations to name just a few.

By way of example, some standards for a Sydney Harbour Ferry are the same for a small tinny used as a workboat in jetty construction, despite one being aimed at transporting the commuting public and the other being designed to work alongside port-based infrastructure with a small number of people on board.

To allow for this extreme variation in operation, minimal prescription and many exemptions (currently 41 in total) to legislation has been necessary, leading to ambiguity and lack of clarity in regulation.

3.3 Grandfathering

The legislation stipulates that all certification issued before 1 July 2013 (when AMSA assumed responsibility for the DCV sector) would be permitted to continue to operate under the same conditions imposed on that certificate, i.e. these vessels would be 'grandfathered'. Vessels that were grandfathered were defined as existing vessels and these arrangements apply indefinitely, unless a vessel is modified, changes its area of operations or changes the nature of its operations in ways that increase risk.

This has created an incentive for operators to hold on to older vessels with grandfathered status, rather than to upgrade to new, modern vessels subject to more stringent rules - a perverse outcome for a regime intended to improve safety across the board. Grandfathering also maintains the inconsistencies of the previous state and territory regimes that the National System was aiming to address.

Due to commitments made to industry prior to the commencement of the transition, there is little capacity for AMSA as the regulator to alter this approach.

3.4 Qualifications

Qualifications required for seafarers working on DCV's have been historically dictated by a number of sources, and in some cases, states and territories have incorporated specific conditions on certificates of competence. This has results in anomalous pre-existing certification for seafarers which may have specific conditions and allowances remaining following National System implementation. For example, some seafarer's certification issued by state marine agencies permitted work on vessels up to 600 nautical miles from shore.

The main sources for DCV seafarer qualifications are:

- The NSCV Part D
- Marine Order 505
- The USL Code

Post 2013, the instruments governing seafarer qualifications in the DCV sector were first reviewed in 2014, followed by further reviews in 2016 and 2018-19. In the latest review AMSA has developed a draft proposal, however due to the competing priorities of the Industry Reference Group, an AMSA

initiative to involve a wide variety of stakeholders including unions, fishing, tourism, construction and passenger ferries in the review of the legislation required for near coastal (DCV) qualifications, public consultation has been delayed indefinitely. Once again, this highlights the difficulty to legislate for such a diverse range of stakeholders with competing business needs.

Some stakeholders seek more stringent regulations and want prescriptive requirements, while others support the current risk-based philosophy. MIAL and its members are keen for public consultation to resolve this issue and are disappointed in the delay. Some operators are delaying building or purchasing new vessels until they know what qualifications they will require for their masters and crew.

3.5 Legacy issues from the state and territories

The transition of the DCV sector from state/territory regulation to the National System is clearly a challenging task, made more difficult by the variation in the quality, format and extent of historical data collected by the state/territory, needing to be acquired by AMSA. The data processing aspect of the transition of data has been hugely resource intensive as we understand it.

There are also major inefficiencies in information handling affecting industry because the states and territories still hold some historical records that, due to the removal of jurisdictional authority to provide information, require Freedom of Information requests to obtain.

While MIAL as an industry peak body has had limited visibility of the practicalities of these difficulties or any capacity to overcome them, we would certainly encourage cooperation between the state/NT marine agencies and AMSA to minimise the effects that these practical transition issues have on industry.

3.6 Seacare

All Australian workers are covered for compensation, rehabilitation, return to work and occupational health and safety regulatory schemes. The vast majority are covered by State (and Territory) based schemes while Commonwealth employees, Defence employees and a handful of very large organisations are covered by Commonwealth schemes.

Seafarers are covered by either a State (or territory) scheme or by the 'Seacare' scheme, depending on what vessel they are working on and what the vessel is doing. It captures some 33 employers and around 5,000 employees and is entirely underwritten by employers within the scheme. The industry in which the scheme operates is principally described as the blue water and offshore sectors, both of which have undergone several years of contraction recently.

The Seacare scheme was introduced in 1992 and has been the subject of numerous reviews. A full Federal Court decision in late 2014 decided coverage of the scheme far exceeded industry understanding, which exposed an already non-viable scheme to insurmountable risk. The precarious position of the Safety Net Fund also heightens uncertainty and will likely result in increased costs to employers.

MIAL and its members are at a loss to understand why the Government will not support the abolition of the scheme, particularly given seafaring employees are readily and easily capable of coverage by state and territory regimes. Members seek indemnity from government, as they do not expect they will be liable for funding the scheme and should not be penalised for the scheme not operating as designed.

4. Conclusion

In terms of MIAL's assessment of National regulatory reform of the domestic commercial vessel industry, our perspective is:

1. AMSA continues to provide a robust and transparent port and flag State control function critical to maintaining safety and security and the protection of the marine environment around Australian ports.

2. Transitional issues and the diversity of the DCV sector have resulted in legislation which is overly complex and lacking in clarity. It is now 6 years since the National Law has been in operation and no doubt a great deal has been learnt.

3. In order to create a regulatory regime that is fit for purpose and can achieve its objectives of increased consistency, safety and overall efficiency in the DCV sector, an entire rewrite of the National Law is necessary and AMSA, and/or the Department of Infrastructure and Regional Development and Cities must be properly resourced to do so.

4. The cross subsidisation that is occurring between sectors of the maritime industry must come to an end. AMSA must be clearly instructed and have in place proper governance arrangements to ensure that the promised Government funding for services to the DCV sector is being utilised for that purpose, rather than levies collected from Australian and foreign vessels covered by the Navigation Act 2012.

5. The Seacare scheme should be abolished and the employers and workers currently covered by it to revert to the clearer, more widely understood and more consistent State (and territory) scheme coverage, which already cover the vast majority of maritime works in Australia. There is no justification for an industry specific Work, Health and Safety Framework.

Annex 1

Figure 1: The National System Legislative Landscape