



CHIEF EXECUTIVE OFFICER

Ms Marie Boland
Independent Reviewer
2018 Model WHS Laws Review
Safe Work Australia
GPO Box 641
CANBERRA ACT 2601

Dear Ms Boland

Review of the model Work Health & Safety laws

Further to your letter dated 16 March, please find attached the submission from the Australian Maritime Safety Authority.

Yours sincerely



MICK KINLEY

13 April 2018

Att. (1)



Safe Work Australia Review of Model WHS Legislation

The Australian Maritime Safety Authority (AMSA) is the industry regulator for Australian registered ships and foreign shipping entering Australian waters. It discharges this function under a number of legislative instruments, most notably the *Navigation Act 2012 (Cth)*.

Since 1 July 2013 AMSA has been the National Regulator under the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (National Law Act), responsible for the safety of Domestic Commercial Vessels (DCVs).

DCVs include passenger vessels, tugs, barges and other cargo vessels, fishing vessels and “hire and drive” vessels, such as houseboats and small pleasure craft hired out to members of the public.

A vessel is a “workplace” under the model WHS laws.

The National Law Act applies to the exclusion of State or Territory Law *except* for laws that deal with workplace health and safety (s.6(2)(b)(xxi)) and s.7 of the Act is intended to avoid inconsistencies between the Act and workplace health and safety laws of the States and Territories.

The industry sector has approximately 26,000 vessels and approximately 70,000 operating certificate holders. Those certificate holders represent only a proportion of the persons employed on vessels. Total employee numbers are expected to be in excess of the number of certificate holders. Members of the public interact with DCVs as passengers or hirers of recreational vessels which they self-drive.

Currently the states and territory governments act as delegates for the administration of the National Law on behalf of AMSA. On 1 July 2018, AMSA will assume direct control for the implementation and administration of the legislative provisions governing DCVs.

Given the National Law has been in operation since 1 July 2013, AMSA has gained experience with its effect and has been involved in several coronial inquests where the question of crossover between maritime safety and work health and safety has been raised. AMSA has also become aware that many sectors of the domestic commercial vessel industry are unaware of the application of WHS legislation to their vessels as workplaces.

AMSA considers that the WHS laws should be consistently applied to domestic commercial vessels that are workplaces.

In making its submission, AMSA has responded to those questions from the review discussion paper which are considered relevant to its operations, predominantly in the DCV sector, and which are considered to be the areas which hold opportunity for potential improvement.

Question 1 - What are your views on the effectiveness of the three tiered approach – Model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?

AMSA considers that the system of legislation, regulation and codes provides a sensible and complementary stratification of instruction in the matter of compliance. In particular, the Codes of Practice are considered to form practical guidance for those smaller operations who may not have the wherewithal or resourcing to properly identify the actions they should take to ensure compliance. Given the number of small to medium business enterprises in the Australian economy, the codes are seen to represent a worthwhile bridging mechanism between legislation and practical 'on the ground' implementation.

Question 3 – Have you any comments on whether the model WHS Codes adequately support the model WHS Act?

The Australian DCV industry is very divergent in the nature and size of its operations. Many enterprises are small with few resources and limited management/administration capability. Further, it is apparent that many operators are largely unaware of the obligations they hold under WHS legislation, despite the model WHS legislation defining vessels as workplaces. The absence of any industry-specific WHS Codes may be contributing to this situation.

AMSA considers that development of WHS Codes for the maritime sector would provide explicit acknowledgement of applicability of WHS laws to the sector and the WHS risks that need to be managed in the sector.

Question 6 - Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in the legislation which has other purposes)?

The National Law Act has the object of ensuring the safe operation, design, construction and equipping of domestic commercial vessels. The Act applies to the exclusion of State or Territory Law *except* for laws that deal with workplace health and safety (s.6(2)(b)(xxi)). Section 7 of the Act is intended to avoid inconsistencies between the Act and workplace health and safety laws of the States and Territories.

However, the Act also includes "General Safety Duties" that require, among other things, that a vessel is "safe" and is operated "safely" and has a "safety management system". Clearly these requirements overlap with the requirements under the model WHS Act.

While AMSA is seeking to work cooperatively with the State and Territory WHS authorities to clarify safety obligations in the sector, future experience may indicate that amendments to the National Law or Model WHS laws are required to provide clarity of regulatory jurisdiction and obligations. Similarly, there should be scope to provide clarity to industry and simplify requirements under both laws if agreement can be reached that meeting safety obligations under one system is also accepted as meeting obligations under the other.

As an example of where there may be confusion of how the model WHS laws apply in the maritime context, consider Chapter 5 of the model WHS Regulations, 'Plant and structures'. The operation of Chapter 5 is reliant upon the definition of 'Plant' and there does not appear to be clarity on what parts of a vessel may represent plant, which are to be covered by WHS, as opposed to those items covered by standards applied under the National Law. Changes to the definition of plant may assist the various participants within the DCV industry to identify, understand and acquit their obligations.

Question 7 – Have you any comments on the extraterritorial operation of the WHS laws?

Jurisdictional clarity is a particular challenge to the maritime industry where vessels can traverse the nation's waters freely. It is quite common for DCVs to work in state waters out of the jurisdiction from where they are owned/managed and their parent business is registered or licences and workers compensation policies held.

In the event of an incident, an inability to clearly establish jurisdiction can create confusion and slow regulatory response and investigation.

The National Law provides clear jurisdiction for AMSA over commercial vessels while the model WHS legislation relies upon that part of the law (Division 4 Part 11) being appropriately defined by the jurisdiction.

It is understood from recent coronial investigations into fatalities in the sector that there may be room for improvement in this area. A uniform model clause which clarifies extraterritorial jurisdiction may assist to reduce any confusion as to responsibilities between jurisdictions.

AMSA is familiar with the extraterritorial application clause used in the South Australian WHS legislation and, from a maritime perspective, we would suggest that this form of wording provides clarity of jurisdiction.

Question 8 - Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?

There are at least two areas where the general public interacts with DCVs:

- Passengers carried on passenger vessels such as ferries and charter boats which are also workplaces.
- 'Hire and drive' vessels for the use by the public for recreational purposes. An example in the maritime context is a PCBU who might hire out outboard-powered boats or personal watercraft from a marina.

The National Law also provides for general safety duties that make it an offence to cause a risk to the safety of a vessel or a person which would include the members of the public in the above cases.

From AMSA's perspective as a regulator, clear understanding of whether WHS laws are also intended to protect members of the public in these cases may lead to reduced regulatory overlap and resulting confusion.