

SENATE INQUIRY

into the performance of the

AUSTRALIAN MARITIME SAFETY AUTHORITY

The Rural and Regional Affairs and Transport Legislation Committee has the power, under Senate Standing Order 25(2)(a) to inquire into and report on estimates of expenditure which, by extension, gives the Committee the capacity to examine the performance of any agency. Consequently, the current inquiry does not have specific terms of reference.

This submission respectfully seeks to draw the attention of Honourable Senators to the following matters in relation to the performance of AMSA:

Part 1: The general regulatory philosophy of AMSA and how it has evolved;

Part 2: The relationship between AMSA's educative and enforcement functions;

Part 3: The selection of matters for prosecution by AMSA;

Part 4: The nature of investigations conducted by AMSA.

Part 5: The articulation of powers between AMSA and other agencies;

About us

Pacific Maritime Lawyers¹ is a boutique maritime law firm² based in Brisbane, but with Directors in Northern NSW, the Sunshine Coast, and Gladstone. Our Principal, Captain John Kavanagh, is a Master Mariner in addition to his status as a legal practitioner. All three of our directors (John Kavanagh, Anthony Stanton and Anthony Marinac) have served or are serving in the Australian Defence Force, have spent time in operational seagoing positions, and have also worked in the Civilian Public Service. Dr Marinac is a former Director, Research in the Department of the Senate. We are almost uniquely experienced in the operational, policy and legal issues arising from regulating marine safety in Australia, and we understand the challenges of public administration, particularly in regulating a marine industry that is diverse in nature, widely distributed geographically, and of varying sophistication and commercial viability.

AMSA's job is not an easy one.

In general, our clients tend to be small businesses and mariners who have come to the attention of regulators, or who are involved in disputes that sometimes involve

¹ <https://www.pacificmaritimelawyers.com.au/>

² Listed in Doyles' Guide as a recommended shipping & maritime law firm:

<https://doylesguide.com/leading-admiralty-shipping-maritime-law-firms-australia-2019/>

non-compliance with standards. As a result, in the context of any single matter, we tend to be on the other side of AMSA and its partner maritime agencies in the States. As former investigators and regulators ourselves, we completely understand the challenges of effective regulation, and we respect both the rule of law, and our public service colleagues.

We also have a role in assisting our clients to achieve legislative compliance, so as to conduct successful maritime operations that protect seafarers, property, vessels, and the maritime environment. So whilst we are often on the other side of AMSA, we also share some of the same objectives within the context of acting in our client's best interests.

In our view, a safe marine business is a profitable marine business.

While we often oppose AMSA on a day to day basis, we firmly believe that the regulatory work undertaken by AMSA is crucial. A strongly-performing, well-resourced AMSA is to the benefit of the entire Australian community, and particularly the maritime community.

It is inevitable that this submission, which focuses on areas for improvement, will appear overly critical of AMSA. AMSA also does much that is good. We therefore wish to commence our submission by acknowledging the importance of the agency and its operations, and that the challenges it now faces are not all of its own making. The transition from state-based marine safety regulation of Domestic Commercial Vessels to Commonwealth-based marine safety regulation was always going to be a difficult one, and we are supportive of AMSA making the necessary changes to shoulder that responsibility. Having said that, we are concerned that the changes required have yet to be made, and we write to draw the Senate's attention to some of the issues that we see as both compelling and urgent.

As a firm, we acknowledge the traditional custodians of the waters in and around Australia, and the lands which abut them.

Part 1: The general regulatory philosophy of AMSA

Under s.2A of the *Australian Maritime Safety Authority Act 1990* (AMSA Act), AMSA is required, relevantly, to promote maritime safety; to protect the marine environment from pollution and other damage, and to promote the efficient provision of services by the Authority.

AMSA sets out its regulatory philosophy in its "Statement of Regulatory Approach", the most recent of which was released in 2018. That document will no doubt be available to the Committee, but a copy is at [Annexure A](#) in any event. This sets out a range of principles which AMSA has chosen for itself, and against which it may therefore validly be tested.

A lay reader, upon reading these principles, would assume that AMSA's key approaches would focus on co-operation to achieve compliance. The principles

speak of being “consultative and collaborative” and being “non-prescriptive” and taking a “risk-based and proportionate approach” while balancing flexibility with the need to maintain standards.

Put simply, these standards amount, in our experience, to sheer bureaucratic nonsense.

In our experience, AMSA's approach to any difficult situation is based not upon consultation, collaboration, or proportionality, but upon the following three stumbling blocks:

1. Difficulties in assessing true culpability;
2. Unfounded targeting of enforcement efforts;
3. Obstinate legal stance.

1. Culpability

Assessing the level of culpability, and the attribution of that culpability to the correct party in any particular circumstance is, in our view, an absolutely fundamental obligation and responsibility of a Regulator.

It appears to us that the process for assessing ‘culpability’ by AMSA, at least in the regulation of DCVs, is immature at best and lacks rigour. If the regulator cannot discern the ‘baddies’ (the industry participants who are reckless, irresponsible and just plain dangerous) from the rest of the industry (who may be non-compliant due to ignorance or unintended omission, rather than deliberate non-compliant behaviour), then it cannot apply any of the regulatory principles it espouses, such as the “risk-based and proportionate approach”. To put it simply, it appears to us that AMSA has no idea what is “bad”, nor who the “baddies” are, in the DCV industry. Consequently, in our experience, AMSA gets that decision wrong more often than not.

This is further reflected when AMSA's investigatory methods and decisions are considered. This is explained in Part 4 of this submission.

2. Targeting of Enforcement Efforts

Secondly, once AMSA thinks that a circumstance or party is “bad”, then AMSA will focus additional regulatory attention on that party or issue with a laser-like focus, and demonstrate a complete lack of the principles of flexibility or cooperation espoused in the aforementioned regulatory statement.

In these circumstances it is usually not possible to say that AMSA is wrong, per se, in the use of its powers; however it is clear to us that “discretion and flexibility” is applied differently depending on who is seeking it. We have seen cases where mariners, through no fault of their own, have been identified by AMSA as ‘bad’, and who have then attracted a level of attention out of all proportion to their actual risk.

We have also seen circumstances where larger commercial enterprises are knowingly undertaking unsafe work practices. Such contraventions have been brought to the attention of AMSA but no enforcement measures have been undertaken.

Biases clearly seem to exist: recreational vessels that have not caused harm or injury are being pursued and persecuted, and commercial vessels that have caused injury and remain unsafe are allowed to continue to operate unhindered.

3. Obstinate Legal Stance

Third, AMSA, having taken a position in a dispute, tend in our experience to be reluctant to back away from that position, even when it is clear that they are in error.

We recognise that even the most expert administrators will on occasion fall into error. We are all human. This is inevitable, and is not a reflection of AMSA as a whole. However, when we are dealing with other agencies, there is usually a sensible means by which we can bring faulty decisions to the agency's attention and have those decisions reconsidered, such as by mechanisms of review or alternative means of communication, even by informal meeting.

In the case of AMSA, we have had the General Counsel inform us of his view that decisions, having been made by an AMSA officer, could not be reversed, and that there was no point whatsoever even discussing it. This was, of course, wrong in law and frustrating in practice, but more importantly it was reflective of AMSA's approach, which in our experience has been to dig their heels in and give no ground, rather than exploring sensible means of resolution (and, beyond that, *creative* means of dispute resolution or of achieving regulatory compliance are barely even worth suggesting).

Conclusion

If AMSA's regulatory philosophy genuinely aligned with its statement of regulatory intent, we would have a superior regulator, and also superior safety on the water. In case it were not abundantly clear, our experience of AMSA's regulatory approach with respect to DCVs is highly bureaucratic, fixed in its views, conservative and risk-averse.

In sum, the AMSA principles of "consultative and collaborative" and being "non-prescriptive" and taking a "risk-based and proportionate approach" are not applied in practice, and both the maritime industry and the regulatory outcome suffer as a consequence.

Part 2: The relationship between AMSA's educative and enforcement functions

One of the methods which AMSA can potentially use in order to enhance safety at sea is to educate mariners, both in terms of their responsibilities at law, but also in terms of maritime best practice. This could, in an ideal world, be done in a no-fault environment where operators with a problem could approach AMSA for assistance.

At present, largely for the reasons outlined above, we would caution any client whose compliance was even slightly questionable, against taking their issue to AMSA, for fear that the response would be prescriptive and bureaucratic, rather than educative.

Referring again to s 2A of the AMSA Act and the objective *to promote the efficient provision of services by the Authority*, the well known idiom can be repeated that prevention is better than a cure. The most efficient enforcement mechanism is to educate such that laws are not contravened and enforcement is not required at all.

Safety Management Systems are the perfect example.

Safety Management Systems (SMS) aboard domestic commercial vessels are absolutely crucial documents. The mere development of the SMS forces owners and operators to think systematically about risk, safety and how to mitigate the hazards of their vessel and how it is operated. Internationally, the use of SMS grew, and eventually became mandatory, following the investigations into the sinking of the ferry *Herald of Free Enterprise* which sank off Zeebrugge in Belgium in 1987, with 193 fatalities. The investigations found that the sinking was more a failure in **systems** than a failure of individual personnel.

In our submission, as a result, the SMS should be the centrepiece of a **conversation** – between owners, Masters, crew and regulators of a vessel, AMSA. This is the ideal opportunity for AMSA to participate in improving safety aboard that vessel, including the prevention of pollution. The SMS provides for drills and procedures, the use of equipment, the management of safety, the safety of life and prevention of pollution. In the international context, it is widely understood that an SMS is not intended to be an inflexible rule book that must be slavishly followed, but rather as a breathing and organic document that provides guidance, systems and procedures for marine professionals to discharge their responsibilities safely.

The SMS provides systems that should prevent and militate against disaster, but should not become a strait-jacket that prevents the crew from responding to the situation that they face in a particular incident. Most of all, the SMS should not replace the fundamental duty of the Master of a vessel to do everything within their power to ensure the safety of all those aboard, and of other mariners in other vessels, and of the marine environment. The systematic thinking of the SMS supports, rather than replacing, this duty. This seems simple enough.

AMSA, however, provides very limited support for the development of an SMS. There are a set of guidelines on the website, and a set of templates, but little more. As a result, AMSA misses a golden opportunity to engage with vessel owners and Masters

at the very point at which they are systematically thinking about safety! If vessel Masters and owners had the opportunity to consult with AMSA in relation to their SMS, then not only would superior SMS result, but AMSA would be able to make a direct and immediate contribution to safety.

In Australian law, the importance of an SMS is reflected in the Domestic Commercial Vessel National Law.³ Section 16 of that law places a duty upon the Master of a Domestic Commercial Vessel (DCV) to ensure the safety of the vessel. Section 17 places a similar duty upon the Master in relation to the safety of persons.

Section 16(2) states that a Master contravenes the duty in s.16 if the Master "... does not, so far as reasonably practicable, implement and comply with the safety management system for the vessel ..."

A sensible reading of these provisions, together, would be exactly that which predominates in the international community: that the Master always has the responsibility for the vessel, for the lives on board, and for the environment; and that the SMS provides a system to support this, so it should be complied with – but that ultimately, the greater duty is to safety.

AMSA, in *Nixon v Grose*⁴, refused to see the law that way. In that case, 42 persons were aboard the charter vessel *Spirit of 1770* when she caught fire between Lady Musgrave Island and Agnes Water. The vessel's captain, Dean Grose, was well aware of the SMS in the vessel, which required him to make a mayday call on the radio located in the wheelhouse. However he also had nearly 40 non-English speaking passengers aboard, and just three crew. And he had a mobile phone with reception. He diverted from the SMS and used the mobile phone to call for help while fighting the fire and safely evacuating everyone – every single person – from the vessel. He was, as is a matter of court record, the last person off the vessel (carrying an elderly Chinese lady who was unable to evacuate on her own).

In any sensible world, Mr Grose would have been acclaimed as a hero, alongside his crew. They responded to a disaster that was not of their making, professionally, calmly and successfully.

In AMSA's world, he was charged with criminal offences for using his mobile phone instead of staying in the wheelhouse (which was, in any event, soon choked with smoke and flames).

In our view, this case exhibits the very characteristics we describe above. An inability on the part of AMSA to recognise the level of culpability in the circumstances, an inflexible and bureaucratic approach to the investigation, the complete inability to see that the prosecution was misguided (once we pointed out

³ *Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth)*.

⁴ Magistrates Court of Queensland, unreported, 4 December 2018.

that it was doomed to fail), and failing to get to the root cause of the incident – the cause of the fire.⁵

Mr Grose was ultimately acquitted after AMSA & the CDPP took the matter all the way to trial (briefing Senior Counsel to appear in the Magistrates Court). AMSA were required to pay costs.

In our view, AMSA have lost the opportunity to have a positive, educative, safety-enhancing conversation with boat operators about the SMS aboard each boat, and instead have chosen to turn the SMS into a form of delegated legislation, with each word of the SMS to be legally construed. Such a thing could never possibly have been intended by the parliament.

Alternative Enforcement Mechanisms

AMSA have a suite of modern alternative regulatory mechanisms to achieve compliance, including civil penalties and enforceable undertakings. Such mechanisms were developed in other jurisdictions (such as Work Health and Safety) to allow regulators to achieve alternative pathways to compliance rather than the traditional 'carrot and stick' approach of the criminal law.

In our experience, we have yet to see any use by AMSA of these mechanisms, despite our suggesting these alternatives as being suitable in some situations. That is, when a party out of ignorance or inexperience fails to reach the appropriate standard of compliance, then an enforceable undertaking may be appropriate, as it clearly spells out the regulator's expectations and the consequences of non-compliance.

This is also an indication that AMSA's regulatory decision-making is lacking maturity, and that the traditional alternatives of 'prosecution or nothing' are all that is available.

Part 3: The selection of matters for prosecution by AMSA

We have noted above our concerns about the selection of matters for prosecution by AMSA. It may be unhelpful to dwell on specific instances such as the prosecution of Mr Grose or the sad death of Mr Mills. We see a more general, systemic issue within AMSA.

First, in our view, while the public interest in a matter is important to the decision to prosecute, it should not be the only consideration. In our view, the decision should be made on the basis of whether there is appropriate evidence to secure a conviction beyond reasonable doubt; whether the right person is being prosecuted

⁵ We refer the Committee to the attached short article that highlights these concerns, "DCV Safety Management Systems: Practical Guidelines or Rigid Edicts?" by Dr Anthony Marinac, Annexure B.

in relation to an incident; and whether another regulatory tool would be more effective than prosecution in relation to a matter. We briefly discuss each of these in turn.

1. Appropriate evidence: We suggest that it is important to distinguish between a *prima facie* case in a criminal matter, and a case where the evidence supports conviction beyond reasonable doubt. If a *prima facie* case is present, then the prosecution will only be successful if all of the evidence supports their case, **and** if the prosecution is able to overcome any proffered defences. In a case where there is evidence beyond reasonable doubt, the prosecution is in a sense bound to be successful (and a guilty plea will usually result).

In our view, AMSA should cease consideration of prosecution as a compliance option as soon as it is clear that reasonable doubt exists in relation to the defendant's guilt. It might well be that even in such a case, AMSA (through the CDPP) might be able to mount a successful prosecution or scare an innocent defendant into pleading guilty to avoid the risk of a heavy sentence. However there is also the strong possibility that such a prosecution will cost an innocent defendant many thousands of dollars, and at least a year of serious distress, and that in the end AMSA will fail and they will be acquitted.

It is not our submission that AMSA ought not to pursue contraventions on this basis. But AMSA ought to consider the use of alternative enforcement mechanisms. It is inefficient and unnecessary to put an innocent defendant through the cost and weight of a trial when sufficient evidence never existed.

2. Is the right person being prosecuted? In our experience, when an incident occurs, AMSA is less focused on the culpability of various parties than on the prospects of prosecution. In other words, AMSA would rather charge a person with minor involvement, with a minor offence to which they will plead guilty, than charge a more centrally-involved person with a more substantial offence which will be contested. Such an outcome leaves the truly culpable to go free, and contributes absolutely nothing to maritime safety.

3. Is prosecution the right instrument? In our view, prosecution should be the last resort, reserved for the most egregious conduct. Before a prosecution is undertaken, AMSA should be required to consider whether any other form of administrative action could reasonably achieve the same outcome more efficiently.

In other words, AMSA fail to take effective regulatory action in cases when they should, and take ineffective regulatory action in cases when they shouldn't. In our view, the AMSA regulatory investigation and decision-making process for DCVs lacks rigour and maturity, and the Senate Inquiry should closely examine that decision-making process.

Part 4: The nature of investigations conducted by AMSA

We believe that the weakest link of all in AMSA is the quality of its investigative processes.

Case Theory occurs when an investigator commences an investigation with a predetermined sense of the outcome (or forms one during the initial scoping of the investigation), and then collects evidence to support that view, rather than continuing to investigate from a neutral standpoint. We believe that AMSA investigators are routinely trapped by case theory in preparing prosecution briefs. It appears that almost immediately after an incident occurs, a theory is developed, and then during interviews, witnesses are badgered on those points; in addition, forensic examiners appear to be requested to pay particular attention to those parts of the scene which are relevant to the investigator's theory.

We are aware that many AMSA investigators are former police officers with considerable experience. We speculate that outside the rigour of the police service, standards of investigation may attenuate or that there is an absence in AMSA of the systems of review and supervision that are usual in police forces. In any event, AMSA investigators should be required to develop systems to overcome case theory in their investigations (even a process of peer review would assist).

Second, and more seriously, we have seen examples of witnesses being persuaded by AMSA to participate in interviews and make admissions, either by veiled threats of consequences (such as charges or increased penalties), or by outright lies (for instance the statement that the interview is merely routine, or that the purpose of the interview is to identify who is "really" to blame). We have not yet had the opportunity to test one of these interviews in a trial, but we look forward to the opportunity. In our view, many mariners would be on guard for their own interests if interviewed by police officers investigating a crime. They are less aware that AMSA, investigating an incident or a potential noncompliance, is in exactly the same role, and that the mariner has the same protections (and risks) as a criminal suspect or witness.

In our view as a matter of professionalism and fairness, AMSA investigators should ensure that interviewees are fully aware of their peril and their rights. Certainly, AMSA investigators should cease the practice of unfairly enticing persons to be interviewed.

Finally, it seems to us that there is a general lack of commercial marine experience in the DCV investigation and compliance area. It is difficult to make sound decisions on the issue of culpability if an investigator or supervisor has little to no experience of the industry that they are regulating.

We raise the case of Mr Grose to demonstrate that even when AMSA do investigate an incident and take action as a regulator, the essential issues of culpability and the role of the SMS have failed to be properly considered, resulting in a poor investigation and a poor regulatory outcome.

Part 5: The articulation of power between AMSA and other agencies.

The implementation of the DCV National Law was by any standards a major and complex undertaking. It was inevitable, and is no negative reflection upon AMSA, that there would be teething problems. In general, our view is that the system is developing, but we do wish to draw the Committee's attention to a number of areas where we have observed some difficulty, generally arising from the Commonwealth's constitutional limitations.

Categorisation of vessels

Australian-flagged vessels can generally be categorised as recreational vessels, domestic commercial vessels for operation in Australian Waters, and vessels suitable for international voyages.⁶ Each of these vessel types is subject to a different regulatory scheme (recreational vessels under state law, DCVs under the DCV National Law,⁷ and those suitable for international voyages under the *Navigation Act 2012* (Cth)). As a result, identifying the category of vessel is crucial to identifying the regulatory regime, but also to identifying the powers of AMSA and other agencies in respect of that vessel.

In practice, categorisation has proven more complicated than expected, because the chief distinction between the categories lies in the intentions of the owner or operator. For instance:

- It is not uncommon for vessels, particularly more expensive vessels, to be owned by companies, or to be owned by trusts with a company as the trustee. That company might, at the same time, be involved in non-maritime commercial activities. Notwithstanding that the vessel is owned by a commercial entity, it may have no purpose other than recreation. We have, however, seen instances in which AMSA has imputed commercial intentions simply because the vessel was owned by a company.
- A person might change their mind about their intentions for the vessel. For instance, consider a vessel purchased in the port of Eden by a company intending to conduct a whale watching business. The vessel is then sailed to Newcastle for refit, but during the refit it is determined that the vessel cannot economically be made suitable for commercial operations. The owners retain the vessel, and determine that they will use it locally as a recreational vessel. Four years later, they decide to hire appropriate crew and make a one-off trip to Port Vila before returning to Australia with no further intention of travelling overseas. The difficulty of categorising this vessel can immediately be seen. Its category – and therefore its statutory scheme and regulator – change with the changing intentions of the owner.

Pollution and jurisdictional rollback schemes

⁶ There are exemptions for some vessels such as naval vessels, but the exemptions are not presently relevant.

⁷ *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth).

Vessels travelling overseas or on international waters are required to be certified in relation to oil, sewage, garbage and air pollution prevention.⁸ The issue of these certificates is regulated, in Australia, by AMSA based on appropriate surveys of the vessel.

However, once a recreational ocean-going vessel enters state coastal waters, the Commonwealth regime ceases to apply if there is an appropriate state legislative scheme in place. While the jurisdictional question does not yet appear to have been tested in courts, it appears to us that AMSA has no powers to intercept or inspect an ocean-going recreational vessel once that vessel enters state waters, which leaves AMSA in the difficult position of needing to intercept the vessel while outside coastal waters.

Taken together, these jurisdictional boundaries continue to create confusion in industry, and generate considerable work for Maritime Lawyers such as ourselves. Despite being a great source of work for us, in our view, these jurisdictional problems can and should be actively managed by AMSA, to the benefit of industry and the community. In fact, this was a large part of the drive to create a single national marine safety regulator – to overcome the inefficiencies and costs associated with multiple jurisdictional boundaries for vessels.

Conclusion

In our view, AMSA is absolutely vital to safe, responsible, commercially-profitable marine activities and marine industries. However while AMSA has the capacity to be an asset to marine safety, it also has the potential to do considerable harm.

In our experience AMSA is unresponsive and bureaucratic, preferring to regulate from afar (Canberra is a long way from the sea) rather than to genuinely engage with mariners and the maritime industry; and preferring to punish non-compliance rather than assisting good-willed mariners to comply.

AMSA appear to have difficulty identifying who are the irresponsible mariners and ship-owners who ought to receive the bulk of their attention and effort; in our experience they form initial (often inaccurate) views about persons or vessels, and then cannot be persuaded from their error.

In our view, not only is AMSA a reluctant prosecutor, but when it does take that step, it is not getting the decisions right. Finally, it is also unsuccessful as a regulator, due to its apparent failure to use the many progressive regulatory tools available to support compliance by the marine community.

We are aware that the focus of the Senate Inquiry's interest is in the failure of AMSA to take meaningful regulatory action following the death of Mr Mills in WA. We have no insight into the matter beyond the publicly available documents, but it seems to

⁸ There are additional requirements for carriers of polluting goods as cargo.



us that AMSA's failure to take effective action in that case ought to be closely questioned.

We respectfully thank the Committee for the opportunity to make this submission, and we would be happy to make ourselves available to give evidence if that would further assist the Committee.

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