



Australian Government  
Australian Maritime Safety Authority

Court Reference: 2010/4736

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Dear Ms Doherty,

***Investigation into the death of Leigh Trevor Davies***

Thank you for your letter of 30 September 2015 to Mr Mick Kinley, Chief Executive Officer, Australian Maritime Safety Authority (AMSA), regarding the findings of Judge Ian Gray (Coroner Gray) inquest findings into the drowning death of Mr Leigh Trevor Davies on 12 December 2010 when the vessel *The Ultimate* capsized in Port Phillip Bay. Mr Kinley has asked me to respond on his behalf. I apologise for the delay in responding.

I have considered a copy of the inquest findings and the resulting three recommendations to Marine Safety Victoria (MSV) and AMSA where applicable, which I have summarised as follows:

- **Recommendation 1:** That the definition of the Port Phillip Heads area be widened and expanded.
- **Recommendation 2:** That MSV and/or AMSA as the National Regulator implement a voyage-specific safety plan requirement for all commercial vessels/voyager within the expanded Port Phillip Heads area.



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- Recommendation 3: That MSV make a declaration that the expanded Port Phillip Heads area as waters for which commercial vessel masters/coxswains are required to hold a Local Knowledge Certificate.

## **Background**

AMSA is the National Regulator in the National System for Domestic Commercial Vessel Safety (the National System), which provides a regulatory framework for the regulation of 'domestic commercial vessels' (DCVs) through the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) and associated regulatory instruments. These are available at: <https://www.comlaw.gov.au/Details/C2012A00121>. The National Law is supported by the *Marine Safety (Domestic Commercial Vessel) National Law 2012 Protocol* (the Enforcement Protocol), which is available at: [https://www.amsa.gov.au/forms-and-publications/Publications/AMSA340-CEP-National\\_Law.pdf](https://www.amsa.gov.au/forms-and-publications/Publications/AMSA340-CEP-National_Law.pdf)

Currently, State and Territory marine safety agencies (including Transport Safety Victoria (TSV) of which MSV is part) perform functions and exercise powers as delegates of AMSA. It is estimated that there are approximately 32,000 DCVs in operation.

## **Response to recommendations**

I have considered the findings made by Coroner Gray and provide the following in response to the recommendations made.

### Recommendation 1

I note the following recommendations made by Coroner Gray:

1. *I recommend that the inshore boundary of Port Phillip Heads be as proposed by Dr Provis. I attach a map (Map 3), setting out the alternative lines which would mark the boundary to the north and east of the current imaginary line running between Point Lonsdale and Point Nepean.*

*The inshore boundary should be an imaginary line between Shortland Bluff and Observatory Point; alternatively it could be an imagery line between Shortland Bluff, Popes Eye and then onto Observatory Point. A further alternative could be from Shortland Bluff to the Monash Light (although this would be a more complicated solution).*

AMSA's functions and powers are set out in sections 6 and 10 of the *Australian Maritime Safety Authority Act 1990* (Cth). Redefining the geographic boundaries of a particular area for the purposes of State or Territory law is not a power that AMSA can exercise under its enabling legislation.

AMSA notes that, following recommendation 1 being made, TSV sought an expansion to the area defined as Port Phillip Heads under the *Marine Safety Regulations 2012* (Vic). Further information

on the expansion is available at: <http://transportsafety.vic.gov.au/maritime-safety/newsroom/new-definition-of-port-phillip-heads>

Accordingly, AMSA considers that the requirements of this recommendation have been implemented.

### Recommendation 2

I also note the following further recommendation:

2. *I recommend that the Director, Marine Safety Victoria and/or Australian Maritime Safety Authority (AMSA) as the National Regulator, implement a voyage specific safety plan requirement for all commercial vessels/voyagers within the expanded Port Phillip Heads area.*

AMSA's view is the current regulatory framework provided by the National Law and associated legislative instruments achieve the desired outcome of this recommendation. The general safety duties imposed by the National Law, together with the requirements imposed through an operator's certificate of operation, require vessel owners and masters to turn their mind to *all* potential risks associated with *every voyage*. This includes an assessment of local conditions, risks and local knowledge requirements for each and every voyage.

Subject to some exceptions, section 7 of Schedule 1 of the National Law Act (the National Law) defines 'domestic commercial vessel' as a vessel that is for use in connection with a commercial, governmental or research activity. If a vessel is a DCV, a number of obligations follow, including:

- general safety duties apply to persons in relation to DCVs;
- the requirement for the owner of a DCV owner to implement and maintain a safety management system (SMS), and for the master of a DCV to maintain and comply with a SMS, so far as reasonably practicable;
- the operation of the vessel must be authorised by a National Law certificate of operation;
- the vessel must be the subject of a National Law certificate of survey; and
- the vessel must be crewed by persons holding a National Law certificate of competency.

### ***General safety duties***

The general safety duties are set out in Part 3 of the National Law. In summary, these provisions require that each person that performs function and duties in relation to a DCV and its operations do all that is reasonably practicable to ensure that reasonable care is taken for the safety of the vessel, the operation of the vessel and people on board the vessel, as well as the safe design and construction of the vessel.

The general safety duties apply to a number of duty holders, including:

- owners of DCVs;

- persons who designs, commissions, constructs, manufactures, supplies, maintains, repairs or modifies DCVs;
- masters of DCVs;
- DCV crew; and
- passengers on DCVs.

Relevantly, subsection 12(1) of the National Law requires that the owner of a DCV to ensure, so far as reasonably practicable, the safety of the vessel, marine safety equipment that relates to the vessel, and the operation of the vessel generally. The owner of the vessel will contravene subsection 12(1) if the owner does not:

- provide and maintain the vessel so that it is, so far as reasonably practicable, safe;
- implement and maintain an SMS that ensures that the vessel and the operations of the vessel are, so far as reasonably practicable, safe; and
- provide such information, instruction, training and supervision to people on board the vessel that is necessary to ensure their safety.

Section 16(1) of the National Law places a corresponding obligation on the master of a DCV, requiring that s/he, so far as reasonably practicable, ensure the safety of the vessel, marine safety equipment that relates to the vessel, and the operation of the vessel generally. The master of the vessel will contravene subsection 16(1) if, among other things, s/he:

- does not implement and comply with the SMS that ensures that the vessel and the operations of the vessel are, so far as reasonably practicable, safe;
- operate a vessel or cause or allow the vessel to be operated and the vessel is unsafe; and
- when carrying out duties as a master or doing anything in relation to the vessel - interfere with or misuse anything provided on the vessel in the interests of the safety of the vessel.

Further, section 17(1) of the National Law requires the master of a DCV to take reasonable care for their own safety and the safety of persons who may be affected by their actions when carrying out duties as a master of the vessel.

#### *Determining what is 'reasonably practicable'*

In determining what is 'reasonably practicable' in a particular instance, section 27 of the National Law requires that the relevant duty holder takes into account and weighs up all relevant factors, including:

- the likelihood of the hazard or risk concerned eventuating; and
- the degree of harm that might result from the hazard or risk concerned eventuating; and
- what the person concerned knows, or ought reasonably to know, about:
  - the hazard or the risk concerned; and
  - ways of eliminating or minimising the hazard or risk concerned; and

- the availability and suitability of ways to eliminate or minimise the hazard or risk concerned; and
- after assessing the extent of the hazard or risk concerned and the available ways of eliminating or minimising the hazard or risk concerned, the cost associated with available ways of eliminating or minimising the hazard or risk concerned, including whether the cost is grossly disproportionate to the hazard or risk concerned.

The concept of doing ‘what is reasonably practicable to ensure safety’—as it is applied under the National Law—is a very well established one which is applied in a number of legislative frameworks including section 18 the model Work Health and Safety (WHS) Act currently operating in most jurisdictions. What is ‘reasonably practicable’ is determined objectively. This means that a duty-holder must meet the standard of behaviour expected of a reasonable person in the duty holder’s position and who is required to comply with the same duty.

There are two elements to what is ‘reasonably practicable’. A duty holder must:

- consider what can be done—that is, what is possible in the circumstances for ensuring safety; and
- consider whether it is reasonable, in the circumstances to do all that is possible. This means that what can be done should be done unless it is reasonable in the circumstances for the duty holder to do something less.

### ***Safety management systems***

An SMS is a system used by the owner and master to proactively identify and manage risks associated with their specific operation or operations. As noted at paragraph 61 of the findings, a range of factors should be considered as part of the risk assessment process.

The National Law imposes the following duties in relation to SMS:

- for the owner—the duty to implement and maintain a safety management system that ensures the vessel and the operations of the vessel are, so far as reasonably practicable, safe (section 12(2)(b)); and
- for the master—the duty to implement and comply with the safety management system for the vessel and the vessel operation, so far as is reasonably practicable (section 16(2)).

The SMS is a critical feature of ensuring, so far as reasonably practicable, the safety of the vessel and its operations.

Marine Safety Inspectors (MSIs) appointed under the National Law can monitor whether an adequate SMS is in place, being maintained and being complied with, as part of random or targeted inspections of an operation or vessels under the monitoring and enforcement powers of the National Law. Depending on the nature of the specific operation, this could involve, among other things:

- asking to see evidence that an SMS has been implemented and maintained, including asking to inspect any documents evidencing the implementation and maintenance of an SMS;
- confirming that an SMS includes evidence of a relevant risk assessment;
- confirming that an SMS identifies control measures that adequately mitigate identified risks;
- confirming that the number and qualifications of crew on board are consistent with the requirements of the SMS; and
- confirming that an SMS includes a maintenance schedule for the vessel and its equipment, which is being complied with.

### ***Certificate of operation***

The National Law requires that the operation of a DCV be authorised by a National Law certificate of operation. A certificate of operation provides permission to conduct a specific operation using a DCV and identifies any conditions (including those imposed by regulation, or on the initiative of the National Regulator) attached to allowing that particular operation. A certificate may be issued for the operation of single or multiple DCVs, and will identify the vessels' operating class(es) and operational area(s), any restrictions on the DCVs geographic area of operation, as well as crewing requirements.

Subsection 48(1) of the National Law requires that the National Regulator must issue a certificate of operation for one or more DCVs if:

- an application for the certificate has been made under section 47;
- the National Regulator is satisfied that the applicant has demonstrated appropriate competence and capacity in relation to the safe operation of the vessel; and
- the National Regulator is satisfied that the criteria prescribed by the regulations are met in relation to the issue of the certificate.

The criteria prescribed under subsection 48(1)(c) are set out in section 10 of *Marine Order 504 (Certificates of operation – national law) 2013* (MO 504).

### ***Competence and capacity in relation to the safe operation of a vessel***

Whether the applicant has demonstrated appropriate competence and capacity in relation to the safe operation of the vessel will be a matter for the National Regulator or its delegate to consider in the circumstances relevant to each application. Accordingly, it is open to the National Regulator or its delegate to request further information from an applicant under section 71 of the National Law in order to be satisfied that the applicant has demonstrated appropriate competence and capacity. The kinds of matters about which the National Regulator or its delegate may seek information to be satisfied for the purposes of subsection 48(1)(b) could include:

- whether the applicant has complied with, or is capable of complying with, the safety rules that will apply to the proposed operation;

- whether the applicant's organisation is suitable to ensure that the proposed operations can be conducted safely, having regard to the nature of the proposed operations;
- whether the applicant's organisation's chain of command is appropriate to ensure that the proposed operations can be conducted or carried out safely;
- whether the applicant's organisation has a sufficient number of suitably qualified and competent employees to conduct or carry out the proposed operations safely;
- whether key personnel in the applicant's organisation have appropriate experience in marine operations to conduct or to carry out the proposed operations safely;
- that the facilities of the applicant's organisation are sufficient to enable the proposed operations to be conducted or carried out safely; and
- that the applicant has a safety management system in place, as required under Part 3 of the National Law.

The matters that are relevant will depend on the nature of the operations for which the certificate is being sought.

As part of the application for a certificate of operation, the applicant must declare that they have identified, assessed and addressed the risks of the operation. The National Regulator or its delegate *may* be satisfied that this declaration is sufficient under subsection 48(1)(b). This will again be a matter for the National Regulator or its delegate to consider with respect to each application and may depend on:

- the specific nature of the proposed operation; and
- knowledge of the applicant and the proposed operation. For example, where the application relates to an existing operation, or to an applicant with a lengthy history in the industry, the prior safety history of the operation, including any safety incidents (or lack thereof) is a relevant consideration.

Once a certificate of operation has been issued and a vessel is operating, the National Regulator and its delegates and MSIs may undertake and exercise powers to verify an owner's or master's compliance with the SMS requirements of the National Law through a number of mechanisms in Part 6 of the National Law.

Whether or not the owner of a vessel implements and maintains an SMS after the issue of the certificate of operation will be relevant to a decision by the National Regulator to:

- vary a certificate of operation, including to impose a condition on a certificate, or to vary or revoke a condition (section 50);
- suspend a certificate of operation (section 51); and
- revoke a certificate of operation (section 52).

A decision by the National Regulator to vary, revoke or suspend a certificate of operation because of an owner's failure to implement and maintain an SMS may follow an incident investigation or compliance action taken under Part 6 of the National Law in accordance with the Enforcement Protocol. The National Regulator has other enforcement tools, including, for example, the power

to issue infringement notices. The National Regulator has already issued a number of infringement notices as a consequence of operator failures to comply with SMS requirements.

Relevantly, Safe Work Australia's *Interpretative Guideline—Model Work Health and Safety Act The Meaning of 'Reasonably Practicable'* provides the following in relation to obtaining knowledge about a hazard or risk:

*Knowledge about the hazard or risk*

*It is reasonably practicable for a duty-holder to:*

- *Proactively take steps to identify hazards within their business or undertaking before they cause an incident, injury or illness. This should be done before the activity is undertaken or the circumstances occur that result in the risk.*
- *Understand the nature and degree of any harm that an identified hazard may cause, how the harm could occur, and the likelihood of the harm occurring.*

*It is also reasonably practicable for a duty-holder to consider and understand, within the available state of knowledge, how the following may cause or increase hazards and risks:*

- *potential failure of plant, equipment, systems of work or safety measures*
- *human error or misuse, spontaneity, panic, fatigue or stress, and*
- *interaction between multiple hazards that may, together, cause different risks.*

Assessing the local conditions prior to each voyage is, in our view, something that is 'reasonably practicable' having regard to and weighing up factors set in section 27 of the National Law, and in particular, what *the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or minimising the risk.* For example, it may be the case that if, after assessing the local conditions, there is a risk to safety of persons or the vessel, the DCV owner or master may decide the only way to eliminate the risk to safety is to discontinue the operation.

Furthermore, the National Law does not require an SMS to be in writing, though DCV owners and masters may choose to record the SMS. This was designed to place a greater focus on owners and masters proactively and continuously identifying risks and managing risks applicable each time the vessel is in operation, and avoid the 'set and forget' mentality that can occur when mandating record keeping. For example, the *Getting Home Safely—Inquiry into Compliance with Work Health and Safety Requirements in the ACT's Construction Industry Report, November 2012*, at p 44, noted the following in relation to Safe Work Method Statements which, under the WHS laws, must be prepared when carrying out 'high risk construction work':

...

*Perhaps what the perceived issues surrounding SWMS actually represent is the inability of the local industry to see beyond the most basic of responses to demands for safer worksites. Whether this is due to an undue focus on profit margins, with safety seen as a*



*mere 'embuggerance', or whether the responsibility for this lies more broadly among all of the stakeholders, it nonetheless has become an obstacle to seeing the bigger picture.*

*Dr Long's model would suggest that this is not only a characteristic of an industry at the 'calculative' level of maturity, but an obstacle to progression to a 'proactive' level of maturity.*

*For this specific issue, the answer is to comprehensively debunk the SWMS myth. To do this alone, however, and not shift the focus from paperwork to work practices, from systems-based controls to behavioural and cognitive controls, will not achieve the safety outcomes we must all expect from the construction industry.*

*WorkSafe ACT should continue the work it has begun with the industry partners to clarify expectations regarding Safe Work Method Statements and to shift the emphasis from paperwork to safe work practices and from process to outcomes.*

...

The National Law imposes significant penalties for non-compliance with the general safety duties. Penalties and the possibility of imprisonment in the most serious cases are a key feature of achieving and maintaining a credible level of deterrence to complement other types of enforcement action available under the National Law.

Accordingly, AMSA's view is the current regulatory framework provided for under the National Law and associated legislative instruments achieve the desired outcome of this recommendation.

### Recommendation 3

The final recommendation made by Coroner Gray was:

3. *I recommend that the Director, Marine Safety Victoria make a declaration pursuant to section 81 of the Marine Safety Act 2010 (Vic), declaring the expanded Port Phillip Heads area as waters which commercial vessel masters/coxswains are required to hold a Local Knowledge Certificate. The declaration should specify that the Local Knowledge Certificate requirement apply to commercial vessels of all sizes, and specify training and assessment requirements to be fulfilled by vessel, masters/coxswains.*

However, as indicated at paragraph 57 of the Coroner Gray's finding, section 6(2) of the National Law Act provides that section 6(1) does not apply to a law of a State or Territory so far as the law deals with, among other things:

- the management of ports, harbours and moorings;
- designation of waters, including designated water by reference to the vessels that are or are not permitted to operate in those waters;

- regulation or prohibition of the operation of specific vessels or classes of vessels in specified areas;
- bar crossings and local knowledge requirements; and
- requirements for vessels conducting particular dangerous operations.

Victorian law already imposes local knowledge certificate requirements. Under section 81 of the *Marine Safety Act 2010* (Vic) (the MSA), the Safety Director, by notice published in Government Gazette, may declare a part of State waters as waters in respect of which a local knowledge certificate is required to navigate types of classes of vessel specified in the notice. This means that certain types or classes of vessels will not be able to be navigated within declared waters without a local knowledge certificate.

Specifically, local knowledge certificates are required for masters operating in declared waters when:

- the master of a vessel that is a 'trading' vessel of greater than 12 metres in length is entering, leaving or navigating within any declared waters within the limits of the State which are not part of pilot required waters;
- the master of a vessel that is a 'trading' vessel of greater than 12 metres in length and no greater than 35 metres in length is entering, leaving or navigating within any declared waters within the limits of the State which are also part of pilot required waters;
- the master of a vessel that is a fishing vessel of greater than 35 metres in length is entering, leaving or navigating in any declared waters within the limits of the State which are not part of pilot required waters;
- the master of a commercial vessel that is greater than 35 metres in length and which operates either permanently or for the time being solely within the limits of a port as defined above is not required to have a pilot on board if the master holds a local knowledge certificate for the relevant declared waters in accordance with the Act; and
- the master of a vessel other than a vessel described above is considered by the Safety Director to require a local knowledge certificate for the particular operations of the vessel.

A master must hold a local knowledge certificate for the relevant declared waters in accordance with the MSA. Regardless of local knowledge requirements, a person must hold an appropriate certificate of competency for the vessel size and type.

AMSA understands that MSV is taking the necessary steps for the newly expanded Phillip Heads area to be declared as waters requiring a local knowledge certificate.

If you have any further questions, please do not hesitate to contact Clare East, Manager Regulation and Policy Section, Domestic Vessels ([clare.east@amsa.gov.au](mailto:clare.east@amsa.gov.au)).

Yours faithfully,

A handwritten signature in black ink, appearing to read 'M Larsen', with a stylized flourish at the end.

Mal Larsen  
GENERAL MANAGER  
DOMESTIC VESSELS

15 January 2016

