



Dr Jane Thomson
Committee Secretary
Senate Standing Committee on Rural and Regional Affairs and Transport
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

Thank you for your letter of 8 March 2019 requesting further information relating to AMSA's decision not to proceed with prosecutorial action relating to the death of Mr Damien Mills.

Response to Items 1-4

The questions under items 1-4 relate to details of discussions with the CDPP. As previously mentioned, the primary people involved with these meetings are no longer employed at AMSA. Our record search has also not produced any documents or minutes to reflect specific discussions with the CDPP about the WA police report. However, we are able to offer the attached table and documents relating to discussions that AMSA had with the CDPP about matters related to Dolphin Dive Centre Fremantle.

As previously provided to the Senate (in the confidential correspondence dated 16 January 2019), an AMSA staff member who was at the later meeting with the CDPP on 30 November 2015 recalls that:

"the bulk of the conversation related to the Criminal Code (DOT) issues, but I do recall us discussing the Police investigation and the issues that led to AMSA not submitting a formal brief of evidence to them for their consideration. I recall us speaking about head counts and lack of evidence generally to support the 'minor regulatory offences' raised by the Police".

Specific to the headcount charge, the evidence given to AMSA did not support, beyond reasonable doubt, that a head count was not conducted. Mr Lippiatt maintains that he did conduct a head count at the end of the voyage. Five of the 34 other people who spoke to police definitively say that a headcount was not conducted at the conclusion of the charter. Of the remaining 29 people, 23 indicate that they either do not know, do not believe or do not remember if a headcount was conducted, and the remaining six were not asked about headcounts. The primary difficulty faced by AMSA in assessing the veracity of the allegation that a headcount was not conducted was that there was no identified procedure for

conducting a headcount – as a result, the Master could have done a head count without that process being obvious to an observer.

Additional evidence has been produced by the AMSA staff member who attended a meeting with the CDPP on 30 November 2015 - a notebook entry made contemporaneously at the meeting refers (**see reference in table below and attached**). He recalls, and his notes confirm that it was at this meeting that Gary Davey from the CDPP stated, words to the effect of, there remained significant obstacles to completing a brief of evidence with a reasonable likelihood of successful prosecution.

AMSA accepts that the documentation of decisions and recording-keeping in this matter was unacceptable. We would also like to assure the Committee that AMSA has implemented new process and procedures for decision-making. An *Enforcement and Inspector Support* team has been established to investigate and, if necessary, take enforcement action in relation to the most serious breaches of AMSA's regulatory framework and other serious incidents. The team investigates all fatalities reported to AMSA. We also have better internal processes for decision-making, documentation and reporting. This includes, formally briefing the Chief Executive Officer on every investigation involving a fatality. AMSA has also implemented an investigation case management IT solution which records critical decisions throughout the investigation continuum.

Response to Item 5

Some of the information requested relates to my responses at the Budget Estimates hearing to detailed questions of events in 2014. While I assisted the Committee as best as I could from recall, I would like to correct my statement that Mr Marsh made the decision not to progress a brief to the CDPP. The Manager of Investigations, David Marsh was not responsible for making the final decision that a prosecution brief should not be provided to the CDPP. That decision rested with the General Manager of Domestic Vessels Division (GM-DVD), in accordance with the National Law Compliance and Enforcement Protocol (extract below).

Decision to cease an investigation or not to prepare prosecution brief

72. The General Manager Domestic Vessels Division may at any time, decide to cease an investigation by the National Regulator of a potential offence or that a prosecution brief will not be provided to the CDPP.

This decision could be on matters such as:

- a lack of evidence;
- the age or health of the alleged offender or a key witness; or
- mitigating factors such as self-reporting.

This is also a very serious decision, and regard should be had to the principles above and the guidance materials available to AMSA staff.

Response to Item 6

Item 6 of the Committee's letter requests the evidence that AMSA provided to the Coroner, seeks information on legislative provisions that applied at the time, as well as information on regulatory changes about headcounts. In response to the first part a copy of the evidence AMSA provided to the Mills coronial is enclosed.

In terms of the second part of this item, it is not practicable for AMSA to make a “definitive statement” about the “legislative provisions that were in place at the time of Mr Mills’ death”. Those provisions would include provisions related to masters under the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (the National Law Act), Commonwealth laws that confer functions and powers on AMSA and create offences, general Commonwealth laws creating offences (such as the *Crimes Act 1914* and the *Criminal Code Act 1995*) and relevant laws of Western Australia.

The operational standards that apply to a domestic commercial vessel are imposed through conditions on a certificate of operation, which are dealt with in Part 4, Division 3 of Schedule 1 of the *Marine Safety (Domestic commercial vessel) National Law Act 2012* (the National Law).

Sections 53 and 54 of the National Law create offences for owners and masters who operate a DCV without a certificate of operation. Sections 55 and 56 create additional offences for owners and masters who operate a domestic commercial vessel in breach of a condition of a certificate of operation.

Marine Order 504 (Certificates of operation – national law) 2013 (Marine Order 504 - 2013), which was in force on 31 October 2014 and imposed specific conditions on certificates of operation. These conditions gave effect to ‘grandfathering’ arrangements allowing existing vessels such as the *Ten Sixty-Six* to comply with certain state and territory requirements that applied before 1 July 2013.

As an existing class 1 passenger vessel, the owner of the *Ten Sixty-Six* was required to comply with the operational requirements and practices applied by Western Australia on 30 June 2013.

The practices and requirements imposed by Western Australia prior to 1 July 2013 include those in the *W.A. Marine (Emergency Procedures and Safety of Navigation) Regulations 1983* which gave effect to the NSCV Part E (Operational Practices), Edition 2 dated 2008. Clause 2.11.2.2:

“For all other passenger-carrying vessels (*vessels on voyages less than 12 hours in duration*) a head count of the passenger on board at any time shall be maintained.” (Italics inserted.)

An offence under section 56 of the National Law may be committed by breaching a condition on the certificate of operation.

Statutory requirement to implement and comply with a safety management system - at the time of Mr Mills' death

Aside from the conditions imposed on the certificate of operation for the vessel the owner and master have general safety duties imposed by the National Law. The general safety duties are a separate and additional obligation from the requirement to comply with the conditions imposed by a certificate of operation. However, these two requirements interlink and are complementary.

Since 1 July 2013, the National Law has provided, among other things, that the owner of a DCV must implement and maintain a safety management system (SMS) that ensures that the vessel and the operations of the vessel are, so far as reasonably practicable, safe. A corresponding duty is placed on the master of a vessel to implement and comply with a SMS. A master commits an offence if by act or omission they contravene this requirement, with penalties ranging from 60 penalty units to imprisonment for two years or 1800 penalty units, or both.

'Safety management system' is not defined in the National Law. However, the principle of doing what is 'reasonably practicable' is well established from its application in workplace health and safety regulation. Whether a master has done what is 'reasonably practicable' to discharge their obligation to ensure the safety of the vessel and its operation is determined objectively. That means that the master must meet the standard of behaviour expected of a reasonable person in the master's position and who is required to comply with the same duty, taking into account and weighing up all relevant matters.

Possible prosecutions

Section 6(2)(b) of the local application provisions of National Law Act lists twenty two specific subject matters about which State and Territory laws may operate concurrently with the National Law Act. Those subject matters include laws relating to "management of passengers", "the actions of persons under the influence of alcohol", "service ... of ... beverages on vessels" and "workplace health and safety".

WA Police recommended charges for offences against National Law Act section 16 (Master's general safety duties- the actual offences are in section 18) for failing to implement and comply with the Safety Management System in relation to induction of crew and not conducting a count of the passengers at the conclusion of the charter while disembarking.

WA Department of Transport recommended charges for offences against National Law Act sections 17 and 18, because they alleged that safety equipment (fire suppression and life rafts) were not serviceable, and section 45 (breach of a condition of a certificate of survey) because they alleged that more passengers were carried than were permitted on a Certificate of Survey. Section 45 is an offence in relation to the owner of a domestic commercial vessel (not the master).

AMSA subsequently developed a draft brief of evidence in relation to alleged offences under Commonwealth Criminal Code Act section 145.1 (using a forged document related to certification for fire suppression and life rafts) and 137.1 for providing false and misleading information in relation to the clearance of the prohibition notice). Conversations subsequent to the production of this brief of evidence indicate that the CDPD and AMSA then considered an additional Criminal Code Act charge of general dishonesty (section 135.1(1)).

Mr Lippiatt could have been prosecuted under any of those legislative provisions including those provisions dealt with by Laws in Western Australia if there was evidence to the required criminal standard that an offence had been committed.

“Please specify what regulatory changes were undertaken to tighten the requirements for headcounts.”

Marine Order 504 (Certificates of operation and operation requirements – national law) 2018 (Marine Order 504 – 2018) incorporated the operational requirements contained in Part E into a new schedule of this Order. This was intended to simplify the regulatory structure. In incorporating these operational requirements, AMSA took the opportunity to clarify the wording of the head count requirement to reinforce that there was a positive obligation on the master of a vessel to ensure that a head count is undertaken. The head count requirement now provides that:

“For a voyage that is less than 12 hours long, the master must:

- a. ensure that at least 1 head count is conducted of all passengers on board the vessel; and
- b. know the number of passengers on the vessel at any time.”

The new Order also, among other things, places an enhanced focus on the owner’s responsibility to ensure that vessels have appropriate crewing levels to supervise passengers and keep them safe.

A requirement of Marine Order 504 is that the owner must conduct and document in their SMS an appropriate crewing evaluation in order to determine the number and qualifications of the master and crew required for their particular operation. The factors that they must take into account are set out in the Order. Previously, one of the factors the owner needed to consider was “the number of persons to be carried on the vessel”. This was extended to provide that the owner’s evaluation take into account, among other things

“the number of persons to be carried on the vessel and the effectiveness and timeliness arrangements for passenger monitoring by the crew.”

Coupled with appropriate communication, education and enforcement, this requirement complements the existing head count requirement to ensure that headcounts be undertaken by crew as frequently as is necessary for the type of operation and reported to the master.

Yours sincerely

MICK KINLEY

20 March 2019