

Committee Secretary
Senate Standing Committees on Rural and Regional Affairs and Transport
PO Box 6100
Parliament House
Canberra ACT 2600
rrat.sen@aph.gov.au

Senate Standing Committees on Rural and Regional Affairs and Transport an inquiry into the performance of the Australian Maritime Safety Authority under Standing Order 25 (2) (a).

Submission

I thank the Senate Standing Committee on Rural and Regional Affairs and Transport (Committee) for the opportunity to make a submission in relation to this inquiry.

My name is Philip Jones-Hope and I was employed by the Australian Maritime Safety Authority (AMSA) from November 2011 to April 2018.

I do not have any documentation, or records on which to rely upon in my possession. As such my submission is limited to my best recollection of events in relation to the Mills tragedy.

Two roles of relevance to the inquiry in which I served during my tenure with AMSA are:

- Senior Solicitor in AMSA's Office of Legal Counsel, reporting to Mr. Clinton McKenzie, AMSA's General Counsel- (2011 – Mid -May 2015); and
- Senior Advisor – Prosecutions and Compliance, reporting to Mr. David Marsh, AMSA's Manager, Compliance and Enforcement (Mid -May 2015- 3 Sept 2015).

For the avoidance of any doubt, at no time did I hold, nor did I ever exercise any delegation, power, or authority in relation to whether a prosecution should proceed, or whether a brief of evidence should be provided to the Commonwealth Director of Public Prosecutions (CDPP) on any matter. To my best recollection, at the time of my departure from my position as Senior Advisor to Mr. Marsh (3 Sept 2015), the level to which this decision making authority had been delegated within the agency from the CEO, Mr. Kinley, was to the General Manager, Domestic Commercial Vessels.

At the time of the Mills tragedy a major aspect of my duties and functions was to act as the primary legal contact, in the first instance, to delegates and Marine Safety Inspectors (MSI) under the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (National Law).

My role included assisting delegates and MSI with legal support in the exercise of their powers under the National Law, including assisting with their drafting of administrative sanctions such as notices.

The National Law provided for both appointed MSI, as well as by definition all Commonwealth, State and Territory police officers to be defined as MSI. The practical consequence was that I was the legal POC for several hundred MSI and delegates nationally. My role also required providing advice to Mr Marsh on alleged offences that had been identified through breach reports by MSI which had been received by him.

It is important for the Committee to be aware that up to 3 September 2015, the time I resigned from my senior advisory position to Mr Marsh, the entire AMSA Compliance and Enforcement (C & E unit) for the National Law consisted of Mr Marsh, myself and one administrative assistant. As such the C &

E unit had no investigative function. AMSA, consistent with the then Inter Governmental Agreement, relied upon the MSI external to AMSA to undertake such functions.

The role of the C & E unit was to assess, and where necessary seek further information from MSI to support compliance and enforcement action against alleged offenders. Any action taken or recommended by the C & E unit was required to be consistent with AMSA's compliance and enforcement policy and protocols, which had been approved by AMSA's executive in consultation with the State / Territory maritime agencies.

Mills incident

November 2014 – Mid May 2015

During this period Mr Marsh, Mr McKenzie and I worked closely with Department of Transport – WA (DOT-WA), particularly with Mr Chris Mather, Ms Sue Mathews, and to a lesser extent Mr Ray Buchholz.

Our focus during this time was to collectively provide support:

- In responding with administrative sanctions. As I recall these sanctions were the issue of a number of direction and prohibition notices under the National Law, to deal with what we, collectively AMSA and DOT-WA, believed to be the immediate maritime safety issues of a Certificate of Operation (CoO) holder / master that we viewed as 'sub- standard'. These actions included operational and artefact (vessel) subject matter across the CoO holder's entire fleet.
- Brief the Australian Government Solicitor on defending the administrative action taken against the operator by AMSA (through DOT-WA as delegate) which had been challenged by the CoO holder in the courts.
- Provide legal support in the preparation of affidavits for proceedings.
- Respond to and provide input to the administrative review process reviewing decisions which we had supported or been involved with in the first instance.
- Concurrently to supporting the administrative sanctions we continued to provide ongoing legal and operational guidance to MSI who were investigating the incident. This included attempting to action interviews between MSI and the CoO holder. Attempts which were ultimately refused.
- Communicating appropriately with the CoO holder's legal counsel.

My recollection of this period was that all persons, including those DOT-WA persons mentioned above, Mr McKenzie, Mr Marsh, and I, were heavily invested, emotionally and physically, sometimes working around the clock to, within our legal and regulatory bounds, respond to the full extent available to us.

I acknowledge comments made by both Mr Mather and Mr Buchholz at the recent Committee hearing held in WA. These comments outlined their frustration and disappointment at the outcomes of the review process and subsequent court hearing in relation to the administrative sanctions issued by DOT-WA as a delegate of the national regulator (AMSA). While I recognise and respect the reasoning that underpinned these outcomes, I can share with the Committee that it is well known to both Mr Mather and Mr Buchholz that I personally shared their frustration and disappointment. For completeness, my clear recollection is that while I would not be presumptuous and suggest I speak for Mr McKenzie or Mr Marsh, I recall observing what I took to be their frustration and disappointment as well.

Mid May 2015- 3 September 2015

Due to a restructuring within AMSA, that included both the Office of Legal Counsel (OLC) and the Domestic Commercial Vessel Division (DVD), I was approached by the then General Manager of DVD, Mr John Faldun, to transition from my role as a senior solicitor of OLC to a senior advisor position within DVD.

My role was to report to Mr Marsh and continue to assist him with my legal knowledge and skill within the newly created C & E unit. I was required to assess received breach reports of alleged offences under the National Law and continue to support delegates and MSI exercising powers and functions under the National Law, in essence continue most of role I had performed in my position in OLC. I was also required to liaise with Mr McKenzie for the provision of any legal advice, noting legal advice was the remit of OLC.

My best recollection is that on or around mid to late May, the time I transitioned to this role, two folders were received from Ms Sue Mathews who I believe held the position of Manager-Investigations for DOT-WA. These folders contained a compilation of raw evidence and DOT-WA preliminary views of potential alleged offences arising from the conduct of the CoO holder / master of vessel '1066', as well as two other vessels 'Pia Rebecca' and 'Takhasi'. I also recall at the same time viewing a WA Police report regarding the police investigation into the Mills incident. I do not recall whether this report was annexed to the DOT-WA folders or provided separately.

I do not have any access to records that I can reference in relation to either report. I do however recall that it was evident and acknowledged that considerable effort had been invested by both DOT-WA and the WA Police on both. While not in any way wishing to diminish these efforts I am aware comments made in the recent Committee hearing in WA by both DOT-WA and WA Police officers that asserts each report could be taken as representing "95% of the work required" to complete a brief of evidence to the CDPP for prosecution. This is simply not accurate.

WA Police report

To the best of my recollection the WA Police report focused on whether or not the master of the '1066' breached general safety duties provided for by the National law, specifically section 16 where a master of a domestic commercial vessel commits an offence if the master does not, "*so far as reasonably practicable, implement and comply with the safety management system for the vessel*".

I believe at issue was whether the master had conducted and recorded 'Head counts' of passengers in accordance with the safety management system (SMS) for the operation of the vessel. I have emphasised both actions, as while the evidence provided little doubt that there had been a failure to 'record' the 'Head count' in accordance with the SMS, the WA Police report contained witness evidence that could be seen to corroborate the master's and deckhand's statements that the appropriate 'Head counts' were 'conducted'.

In and of itself I recall a general view that the WA Police report at that point in time only supported, when applying the agreed compliance and enforcement policy and protocols, an administrative offence with respect to the SMS. As I recall, despite the generally held concern and belief that the 'Head counts' may not have been undertaken, the report did not, in its own right, provide evidence that would satisfy the criminal evidentiary burden that a 'Head count' at the cessation of the journey did not take place and therefore give rise to more serious offences.

I do recall that Mr Marsh and I had a conversation with officers of WA Police in relation to their report. However I do not recall which officers they were, or specific details of the conversation, only that the

conflicting witness accounts were discussed and that we (AMSA), through DOT-WA would continue to investigate matters raised in the report. I have no further knowledge if any subsequent discussions or correspondence with WA Police regarding the report, or the status of the investigation occurred.

Up to the time I resigned from my position in DVD (3 Sept 2015) I am not aware of any decision to close out or cease enquiry to seek further evidence that would, in conjunction with the WA Police report, lead to supporting a prosecution for negligent or reckless conduct in not conducting appropriate 'Head counts' that could be linked to the death of Mr Mills. That said, despite efforts by DOT-WA MSI, to the date of my resignation from the role, I am not aware of any further evidence being collected.

I can only surmise that this lack of evidence to support a more serious offence is also the reason WA Police did not pursue state criminal offences against the master for the alleged conduct.

DOT-WA

The two folders provided by DOT-WA could be best characterised as to outline alleged conduct giving rise to offences under the National law in two broad categories being vessel operations and vessel safety equipment.

The content of these two folders evidenced significant effort on the part of DOT-WA and their MSIs. The contents however were more a compilation of raw evidence with little or no analysis or linkage to the elements of any alleged offence. In essence they were a tremendous 'starting point' for further investigation.

The raw evidence and the preliminary investigation that led to that raw evidence required detailed review and assessment which was undertaken by myself and Mr Marsh. This review was not conducted in isolation. Consultation within DVD, including Mr Hemming – National Operations Manager DVD, DVD acting General Managers (noting Mr Fladun's absence due to illness), as well as Mr McKenzie, occurred regularly, both to inform, test, and seek guidance particularly around overcoming deficiencies in the evidence.

Further and importantly, both Mr Marsh and I were in constant contact with DOT-WA, particularly Ms Mathews and MSIs. As the raw evidence was assessed, Ms Mathews would help task her MSIs to help address any deficiencies by conducting further investigation. I recall there were considerable issues as a consequence of competing evidence, or ambiguity, with the evidence collected by DOT-WA to support offences provided for by the National Law. This was not a reflection on the MSI or DOT-WA, rather it appeared, at least up to the time I resigned, that on objective review the evidence continued to fall short of the required criminal evidentiary threshold.

This review and the subsequent further action process was a considerable task for all. At the time I was concerned with the lack of resources within AMSA being made available to the C & E unit, noting that while the review of the evidence in the Mills incident was viewed as of the upmost importance, both Mr Marsh and I were also dealing with multiple matters being brought to the C & E unit's attention from the national network of delegates and MSI. I recall a number of robust conversations I had with Mr Marsh expressing my concerns. If I am not mistaken, I remember committing these concerns to Mr Marsh in an email. I am aware Mr Marsh also held these concerns and while I did not have visibility of any correspondence, I am aware from my conversations at the time with Mr Marsh that he elevated these concerns to the executive of AMSA.

Towards the end of my tenure in the role, attention turned to an anomaly found in the evidence in relation to safety certification of life rafts on vessels owned and operated by the CoO holder. There

was a belief that fraudulent conduct may have occurred in falsifying documentation that may have given rise to serious *Criminal Code Act 1995* (CC Act) offences. At the time I recall that a general view was held by all, including DOT-WA, Mr McKenzie, Mr Hemming, Mr Marsh and I, that provided appropriate evidence could be collected these CC Act offences represented the best opportunity to seek appropriately serious punishment. For the avoidance of any misunderstanding while this view was held by the collective, it did not, at least during my tenure, result in any decision being made not to continue to pursue evidence to support potential National Law offences that had been identified by either DOT-WA or WA Police.

On or around this time Mr Marsh and I had discussions with Mr Gary Davey and his team from the CDPP. These discussions did not seek to get formal advice or opinion on the potential success of a prosecution, or whether a brief should be forwarded to the CDPP. At that time the intention was to discuss potential offences and seek guidance to how deficiencies in the evidence to date might be overcome. My view and take away at the time was that a brief of evidence for CDPP's consideration was the ultimate goal, but further investigation would need to be undertaken to gather evidence to support a successful prosecution.

Subsequent to those initial conversations with the CDPP I resigned from the role to take up a senior role in AMSA's Search and Rescue division. Ms Mandy Nixon took up my advisory role in the C & E unit of DVD reporting to Mr Marsh.

As part of Ms Nixon's transition into the role, at the request of Mr Marsh, I accompanied Ms Nixon to a meeting in early September 2015 to the CDPP Townsville office. This meeting was attended by Mr Davey and a number of officers from his team. The meeting continued on with the conversation Mr Marsh and I previously had with Mr Davey. To be clear, consistent with our previous conversation, the meeting did not seek advice from the CDPP about the prospects of success or whether a brief of evidence should be provided to the CDPP. The meeting focussed on seeking guidance and 'testing' the existing evidence at hand in relation to all identified offences, particularly the more serious CC Act offences, and to identify the type of evidence that still needed to be collected to support a successful prosecution.

After that meeting I played no further role in the C & E unit, or the Mills incident investigation. I am aware that Ms Nixon who had a significant investigations experience background and Mr Phil Stewart, a South Australian MSI with significant investigation experience, who Mr Marsh had success in actioning a secondment to AMSA, continued, with the support of DOT-WA, to pursue the collection of more evidence to support all of the identified offences.

In conclusion

- I am not aware of what, if any, further evidence was able to be collected.
- I am not aware when or whom took any decision in relation to the prosecution of any of the identified offences.
- I do not recall at any time during my tenure in the relevant roles Mr McKenzie, the CDPP, or myself being asked or volunteering a formal legal opinion on whether a brief of evidence should be provided to the CDPP for the identified offences.
- I do not recall observing at any time Mr McKenzie, Mr Marsh or any other person make a decision not to prosecute, nor is it my belief that either Mr McKenzie or Mr Marsh held such authority.

- At no time did I hold, nor did I ever exercise any delegation, power, or authority in relation to whether a prosecution should proceed, or whether a brief of evidence should be provided to the CDPP on any matter.
- I am aware, through social conversation, that in 2016 a decision must have been made not to prosecute. This awareness is from my knowledge that at that time Mr Hemming, Mr Marsh and Ms Nixon travelled to DOT-WA to debrief them on that decision.

I thank the Committee for the opportunity to make this submission and hope that it is of assistance with its inquiry.

Philip Jones-Hope

28th March 2019