



# GUIDANCE NOTICE

## National Standard for Commercial Vessels – Certificate of Competency

### The meaning of “owner” in the National Law

The purpose of this Guidance Notice is to explain the meaning, and the practical consequences of the meaning, of the word “owner” in the National Law. Some confusion has arisen because the word “owner” in the National Law covers a much broader range of people than just the ‘legal’ owner.

As will be seen, under the National Law a vessel may have many “owners” other than the legal owner/s, and those “owners” may change from time-to-time, depending on the operational circumstances of the vessel, without the vessel having been bought or sold.

#### The definition in the National Law

The National Law says:

*owner of a vessel includes:*

- a. a person who has a legal or beneficial interest in the vessel, other than as a mortgagee; and
- b. a person with overall general control and management of the vessel.

(**Note:** In the National Law and other Commonwealth legislation, the word “person” generally covers both natural persons – i.e. individuals - and corporate persons – e.g. companies.)

The first part of that definition (**paragraph a.**) covers some of the persons that would ordinarily be considered ‘real’ owners - that is, persons who have legal title in the vessel because, for example, the vessel was sold to the person under a contract of sale that transfers legal title in the vessel to the person. However, the first part of the definition also covers persons with a “beneficial interest” in the vessel. The meaning of “beneficial interest” and the distinction between it and “legal interest” will be explained by example below.

The second part of the definition (**paragraph b.**) is the source of most of the confusion, because it turns persons who are not ‘real’ owners into “owners” for the purposes of the National Law. A person who has no legal or beneficial interest in a vessel will nonetheless be an “owner” for the purposes of the National Law, while ever the person has “overall general control and management of the vessel”.

In effect, **operators** of a vessel are among the “owners” of that vessel for the purposes of the National Law. (In the starkest example, a person who steals a vessel and starts using it for commercial purposes will be an “owner” for the purposes of the National Law, even though a thief never has any legal or beneficial interest in the property stolen. In this example, the National Regulator would pursue the thief for breach of the “owner” safety duties and related operational obligations in the National Law.)

#### Typical Examples

The simplest example is a vessel that is owned – in the legal and beneficial sense - and operated by one individual. That individual has all of the legal interest in the vessel, has all of the beneficial interest in the vessel, and has overall management and control of the vessel. In this example there is only one ‘owner’, in whatever sense that word is used, and there is only one “owner” of that vessel for the purposes of the National Law, provided the individual continues to be the only person with overall management and control of the vessel.

However, there are many other structures and arrangements for the ownership and operation of vessels.

A second typical example is where a vessel is ‘financed’ and the finance company retains legal title in the vessel until it is paid off, but the purchaser has a contractual right to exclusive use of the vessel provided the purchaser keeps up the payments. The contract also requires the purchaser to arrange for all approvals, permissions, authorities and certificates necessary to ensure the compliance of the vessel, and its use, with all laws.

Let’s call the finance company ‘Genericorp Finance Limited’ and the purchaser ‘Lake Eyre Ferries Pty Ltd’. The purchaser engages the vessel in commercial ferry operations on Lake Eyre and manages all of the maintenance of the vessel. In this example:

- The **legal owner** is Genericorp Finance Limited
- The **beneficial owner** is Lake Eyre Ferries Pty Ltd
- Lake Eyre Ferries Pty Ltd has overall management and control of the vessel, so is also owner in that sense.

Note that if John Doe stole the vessel from the banks of Lake Eyre, took it to Victor Harbour and started engaging the vessel in commercial shark-diving charters, **John Doe would then have overall management and control of the vessel and therefore become an “owner” for the purposes of the National Law.**

A final more complicated but nonetheless quite common example is a ‘family trust’.

Most companies in Australia are ‘1 dollar companies’, and many of them are set up to be trustees of a family trust. Let’s call one of these companies ‘ABC Pty Ltd’.

ABC Pty Ltd is the trustee of the Bloggs Family Trust. The beneficiaries of the Bloggs Family Trust are Joe Bloggs, his wife Josephine Bloggs, and their children John and Georgia Bloggs.

The trust property includes the vessel *MV Minnow*. However, no member of the Bloggs family knows anything about operating vessels. The trustee decides to lease *MV Minnow* to Bob Smith, who engages the vessel in commercial whale watching on working days, and to Sid Jones, who engages the vessel in commercial fishing charters on weekends and public holidays. Bob and Sid are each responsible for all maintenance and manning of the vessel, while it is engaged in their respective operations.

In this example, there are at least seven “owners” of the *MV Minnow* for the purposes of the National Law:

- The legal owner is ABC Pty Ltd
- The beneficial owners are Joe, Josephine, John and Georgia Bloggs
- Bob has overall management and control of the vessel on working days, and is therefore an “owner” during working days
- Sid has overall management and control of the vessel on weekends and public holidays, and is therefore an “owner” during weekends and public holidays.

As can be seen from these examples, it will be almost impossible for staff carrying out National Regulator functions to know, for certain, who all of the various “owners” of most vessels may be at a particular point in time. It is not possible to know who the legal and beneficial owner/s of a vessel is/are without an in-depth analysis of generally very complex legal correspondence that may not be available to the National Regulator and, even if that analysis is done, it will still only be valid at that point in time. These ownership issues are further complicated by the inclusive rather than exhaustive nature of the definition of “owner”, the effect of the definition of “entity” and the effect of sections 147, 148 and 149 of the National Law.

## Deceased Estates

Prior to the executor dealing with assets of an estate they will usually need to obtain a grant of probate which can then be used as evidence of the executor’s authority to deal with the assets of the estate by, for example, transferring legal title in land or other assets that are part of the estate.

If it appears to the National Regulator that:

- Bob was the legal owner of a DCV;
- Bob is deceased (certificate of death or other substantive evidence);
- Fred has been granted probate of Bob’s will (court documents),

it is open to the National Regulator to treat Fred as the legal owner of the DCV and, therefore, to process applications from Fred as if Fred is the legal owner of the DCV.

However, it is important to note that:

- Just because the National Regulator has records that say Bob was the legal owner of a DCV does not make it so – it may be that Bob financed the vessel and the finance company has legal title in the vessel.
- Just because Bob dies does not mean everything he owned becomes part of his estate – it may be that his DCV was owned jointly, and therefore ownership vested automatically in the other owner/s on his death and is therefore not part of his estate in the first place.

## Practical Tips

### 1. The National Regulator’s primary focus should be on the person who has overall management control of the vessel.

By definition, any person who has overall management and control of a vessel at a point in time is an “owner” of that vessel at that point in time for the purposes of the National Law. More importantly, as a matter of practicality, that person will have the capacity to influence all of the matters that determine the safety of the operation in which the vessel is engaged at that point in time. It may happen to be that in some cases the person with overall management and control of the vessel is also the legal owner. But it’s the management and control aspect that justifies the imposition of the “owner” obligations in the National Law upon that person. That said, care should be taken not to neglect the broader circumstances in which a person is an “owner” of a vessel for the purposes of the National Law and may justifiably be pursued for failure to comply with the owner obligations of the National Law.

Remember:

- A person does not need to be the 'legal' owner of a vessel in order to obtain a Certificate of Operation authorising the operation of a vessel, or a Certificate of Survey for a vessel. **Any** person may apply for a Certificate of Operation authorising the operation of **any** vessel. **Any** person may apply for a Certificate of Survey for **any** vessel. Legal ownership of the vessels the subject of the Certificate/s applied for is not a relevant criterion for the grant of the Certificate.
- In essence, the criterion for the grant of a **Certificate of Operation** is whether the applicant has the capacity and competence to run the operation safely, irrespective of who happens to be the legal owner of the vessel/s to be operated. Further, different Certificates of Operation may authorise the operation of the same vessel.
- In essence, the criterion for the issue of a **Certificate of Survey** is whether the vessel meets the applicable construction and equipment standards, irrespective of who happens to be the legal owner/s of the vessel.
- It is up to whoever is operating a DCV at a point in time to show that, at that time, that operation of that vessel was authorised by a **Certificate of Operation** or exempted from the requirement. If a DCV is engaged in an operation that is not authorised by a Certificate of Operation or exempted from the requirement, offences are committed by the master and all owners (as defined) who conducted, or caused or permitted the conduct of that operation.
- It is up to whoever is operating a DCV at a point in time to show that, at that time, that vessel was the subject of a valid **Certificate of Survey** and in compliance with the conditions on the Certificate, or exempted from the requirement. If a DCV is engaged in an operation for which a Certificate of Survey is required, offences are committed by the master and all owners (as defined) who conducted, or caused or permitted the conduct of that operation.

## 2. When interacting with applicants and other industry participants, find out the capacity in which they are acting.

All interactions between the industry and the National Regulator will involve individuals dealing with individuals. However, individuals can have, and act, in different capacities: their personal capacity; their capacity as a director of a family trust company in its trustee capacity; their capacity as a director of a family trust company in its personal capacity; their capacity as the office 'gopher' for a business.

When someone comes to the Marine Safety Agency office counter and says: “I’m here to apply for a Certificate of Operation and Certificate of Survey for the vessel MV *Minnow*”, it may be that the applicant is actually a company that employs the person at the counter, and the legal owner of the MV *Minnow* is actually neither the person at the counter nor the company that employs him or her. It may be that the person has no authority to do anything on behalf of the applicant. If the applicant is a company and the company satisfies the criteria for a Certificate, the Certificate must be granted to, and in the name of, the company, not the individual who handed the application over at the counter.

These are all matters that are essential to the integrity of the certification and compliance and enforcement systems. A separate Guidance Note is therefore being developed to explain the basic concepts of corporate structures and the authority of individuals within them.

## 3. A document evidencing a person’s ownership, or being nominated as an owner in a vessel registration system, does not make it so.

Most artefact registration systems are intended to reflect the outcome of the various transactions that determine title to the artefact, but they are not a ‘guarantee’ of title. Transactions can and do occur outside registration systems, and these transactions can change legal and beneficial interests without any corresponding change to the information in the register. Further, because of the definition of “owner” in the National Law, persons who are not nominated as a vessel owner in a registration system may still be owners of that vessel for the purposes of the National Law.

You should therefore **never assume** that details of the “owner” of a vessel in a registration system or other records are an authoritative, definitive and exhaustive statement of who the owners of the vessel are as a matter of law generally or for the purposes of the National Law in particular.

## 4. If in doubt, contact AMSA on +61 6279 5000 for more information on the requirements of the National System.