

# MARITIME TRANSPORT SECURITY BILL STEAMS INTO PARLIAMENT

As set out in the earlier portal update, the Federal Government introduced the Maritime Transport Security Bill 2003 ("Bill") into Federal Parliament last week.

## INTRODUCTION

According to the Bill, the purpose of the Bill is to safeguard against "Unlawful interference with Maritime Transport" (which is broadly defined and could conceivably, include bringing risks to the safety of ships and port facilities by the transport and loading of hazardous goods).

Also according to the Bill, the following elements are fundamental.

1. Establishing a regulatory framework centered on the development of Security Plans for ships and other "Maritime Transport Operations".
2. The requirement that Security Plans should make an appropriate contribution to the achievement of Maritime Security outcomes. These are defined in sub-clause 3(4) of the Bill to be as follows:
  - “(a) Australia’s obligations under Chapter XI – 2 of the SOLAS Convention and the ISPS code, including those with regard to the welfare of sea fares, are met;
  - (b) the vulnerability to terrorist attack of Australian ships, ports and other ships within Australia is reduced without undue disruption to trade;
  - (c) the risk that maritime transport is used to facilitate terrorist or other unlawful activities is reduced; and
  - (d) security information is communicated effectively among Maritime Industry Participants and Government Agencies with maritime transport security responsibilities. “

## OVERVIEW OF THE BILL

According to Clause 4 of the Bill, a simplified overview of the Act is as follows.

1. This Act establishes a scheme to safeguard against unlawful interference with maritime transport.
2. Part 2 provides for maritime security levels. The security measures to be implemented when different maritime security levels are in force are set out in maritime security plans and ship security plans. Part 2 also provides for the Secretary to give security directions in special circumstances.
3. Part 3 deals with maritime security plans. Maritime industry participants who are required to have plans must comply with their plans.
4. Part 4 deals with ship security plans and ISSC's (International Ship Security Certificates). Regulated Australian ships must have both a ship security plan and an

ISSC. These ships must be operated in compliance with their ship security plans and must continue to meet ISSC standards.

5. Part 5 puts obligations on Regulated Foreign Ships. The Secretary can give control directions to regulated foreign ships to ensure that security standards are maintained.
6. Part 6 provides for the establishment of maritime security zones. Additional security requirements apply in these zones which can be established within ports, and on and around ships.
7. Part 7 deals with screening, weapons and prohibited items.
8. Part 8 sets out the powers of officials under this Act. These officials are maritime security inspectors, duly authorised officers, law enforcement officers, maritime security guards and screening officers.
9. Part 9 sets out reporting obligations in relation to certain maritime transport security incidents.
10. Part 10 allows the Secretary to require security compliance information from maritime industry participants.
11. Part 11 provides a range of enforcement mechanisms. These are infringement notices, enforcement orders, ship enforcement orders, injunctions and a demerit points system.
12. Part 12 provides for review of certain decisions by the Administrative Appeals Tribunal.
13. Part 13 deals with "miscellaneous matters".

### **OBLIGATIONS OF PARTIES ASSOCIATED WITH THE SHIPPING INDUSTRY**

There will be significant obligations on those involved in the Maritime Industry pursuant to the Bill including the preparation and observance of various security plans. These plans must be detailed and provide for escalating levels of security directed by the Secretary of DOTARS.

There will also be significant powers conferred on the Secretary of the Department of Transport and Regional Services ("DOTARS") to implement minimum mandatory standards of security and mandate higher levels of security at times of particular concern to maritime facilities. The Secretary is given significant powers to enforce its rights pursuant to the Bill.

To assist in the implementation of the Bill, new categories of officers are created who are authorised to undertake various activities pursuant to the Bill and Maritime Security areas. This may well create significant confusion for parties the outset, it creates another level of regulation for those involved in the shipping industry which needs to be managed together with other security measures.

### **COMMENTS AND CONCERNS ON MARITIME SECURITY TRANSPORT BILL**

We all agree that Australia must observe its International obligations under the Safety of Life at Sea Convention ('SOLAS') through the new Chapters setting out the International Ship and Port Facilities Security Code ('ISPS'). We all also endorse moves by Government against Terrorism.

However, there are a number of significant reservations regarding the provisions of the Bill. These can be summarised as follows.

1. **Potential inconsistency to terminology and mechanisms that are set out in the International Convention**

If procedures or the terminology from SOLAS and ISPS are different to those in the Bill this creates a tension and potential inconsistency between the two provisions.

For example, according to Clause 3(1) of the Bill “the purpose of this Act is to safeguard against unlawful interference with Maritime transport”. The term “unlawful interference with maritime transport” is extensively defined in Clause 11 of the Bill. The definition extends to prohibitions against doing anything which puts safety at risk. This is an extension to the main thrust of ISPS which refers to “security”. Accordingly, it is possible that the Bill could lead to additional regulation against such issues as the carriage of hazardous goods. This could be far from the intent of SOLAS and ISPS.

2. **Costs to Maritime Industry**

2.1 The proposed regulation adds significantly to the costs for those involved in the industry whether they be Port Operators, Port Facility Operators or of Shipping Operators. These are in addition to existing costs and delays associated with current security measures including the Container X-ray Facility.

2.2 The potential obligations in respect of ‘screening’ may have the result that all persons, vehicles and goods (including containers and luggage) may need to be examined before being allowed to enter secure parts of Ports. This could mean significant additional expenditure and use for X-ray facilities and security personnel in screening goods **before** they leave the country as well as examination at time of arrival. Are we seeking 100% examination?

3. **Potential Interaction and Inconsistency between State and Territory Law**

I know that the Bill takes precedence but there needs to be a proper review of these inconsistencies before the Bill comes into effect to determine how inconsistencies are to be resolved.

4. **Significant Impact by Regulation**

The Bill sets out that significant additional effect will be given to the Bill by way of Regulation. This is not desirable given that there is less opportunity for public review of Regulation than for Legislation. For example, what constitutes “screening” is to be determined by Regulation as is the identity of those obliged to have “Maritime Security Plans”.

5. **Who is affected?**

5.1 There may be uncertainty as to who is a “Maritime Industry Participant” in that it includes those involved in a “maritime related enterprise” (not defined) and those “prescribed by regulations” (to be defined). This is important for a number of obligations pursuant to the Bill.

5.2 The parties obliged to have a “Maritime Security Plan” include a “Port operator”, a “Port Facility Operator” and types of participants prescribed by Regulations. This places a premium on knowledge of and compliance with the Regulations.

5.3 “Security Regulated Ports” are regulated and notified according to notice in the Government Gazette. Perhaps more “active” communication can be used such as fax or e-mail.

## 6. **Approval of Security Plans**

Is it compulsory to have the Secretary of DOTARS approve various Security Plans? The Bill only refers to the fact that parties “may” submit Plans for approval while the Explanatory Memorandum suggests this is compulsory.

## 7. **Creation and observance of “Maritime Security Plans” and “Ship Security Plans”**

7.1 Clause 24 sets out that who must hold “Maritime Security Plans” (described above). In addition, operators of “regulated Australia ships” must have “Ship Security Plans”

7.2 Interestingly, the parties who hold such “Security Plans” must not only observe their own “Security Plans” but must act not to hinder or obstruct the Security Plans of other parties. This places a premium as to how one is fully aware of the plans of others.

7.3 Both Maritime Industry Participants and Ship Operators must appoint “security officers” who presumably will be the first “port of call” for security matters.

7.4 Both Australian and Foreign regulated Ships must have “International Ship Security Certificates (“ISSC’s”). The Secretary of DOTARS can delegate a “recognised security organisation” to exercise its powers in relation to “Security Plans” and determining that ships deserve ISSC verification.

## 8. **Concerns as to Interaction with Customs Powers and Officers**

It is noteworthy that Customs already has significant powers over port areas which have been augmented pursuant to the recent Border Security Legislation including the power to patrol Airports and Ports and carry more firearms or defensive equipment. However, there seems to be significant opportunity for conflict in a number of ways. Some examples are as follows.

- (a) The description of Port areas need to be consistent to the description of Port areas in the Customs or other Legislation.
- (b) The ability of Customs to operate in their normal fashion in Port Security Zones appears to be in doubt in terms of access and the ability to carry weapons and exercise their relevant powers. The difficulty is that only certain Law Enforcement Officers are able to carry firearms or defensive equipment in the restricted areas. For Customs, that will only include those Customs Officers prescribed by regulation (Clause 151). This may create problems for the due exercise of powers.
- (c) The potential inconsistency between directions given by Customs to directions given by other parties included as Officers whose roles are created by the Bill.
- (d) Potential inconsistency between “pre-arrival information” to be provided under the Bill compared to that to be provided pursuant to the Customs Act.

There is potentially significant tension between persons holding roles created by the Bill and Customs and Immigration Officers.

**9. Ability of DOTARS to conduct its obligations pursuant to the Bill**

9.1 The Bill creates significant additional obligations and grants additional significant powers to DOTARS. To what degree is there confidence that DOTARS is able to observe those obligations? How will they enforce these obligations?

9.2 The Secretary of DOTARS is granted significant powers, some of which are subject to AAT or judicial review. The exercise of powers should also be subject to review by the Commonwealth Auditor-General at an early opportunity.

**10. Creation of different categories of Officers pursuant to the Legislation**

10.1 The Bill creates a number of new “Officers” with different terminology and different powers. These include the following.

- (a) Maritime Security Inspectors
- (b) Duly Authorised Officers
- (c) Law enforcement Officers
- (d) Maritime Security Guards
- (e) Screening Officers

10.2 A primary problem is the number of these officers and the fact that their titles are so similar.

10.3 Each of these “Officers” have different (and overlapping) powers and responsibilities. In addition, parties have different obligations in terms of their responses to those Officers. For example, it is an offence to hinder the operations of some (but not all) of these Officers. The creation of the new roles and the new powers suggest that there should be obligations to **all** such officers to carry identification cards, to identify themselves by production of the identification cards and to provide statements to parties under investigation as to their rights and obligations in response to exercises and powers by those parties. At the moment, there is no consistency to these issues. This should be consistent to the arrangements used in the Trade Modernisation Legislation regarding responses to Monitoring Officers and Export Examination Officers.

10.4 There is some doubt as to how these officers are to exercise their powers. For example, in exercising powers to hold persons pending arrival of a ‘Law Enforcement Officer’ a Maritime Security Guard or Screening Officer must not use “more force” or subject a person to “greater indignity” than is necessary and reasonable. However, Maritime Security Inspectors, Law Enforcement Officers and Duly Authorised Officers need only to avoid subjecting a person to “greater indignity” than is necessary and reasonable. Does this suggest that the later category of a person can use as much force as appropriate? In any event, what is “greater indignity than is necessary and reasonable”?

## 11. **Guidelines for Infringement Notices**

The Legislation provides for Infringement Notices. This has a number of consequences.

- 11.1 The recommendations for Infringement Notices set out in the recent ALRC Report regarding an Infringement Notice Scheme should be incorporated in the Bill. This would include the development of Guidelines as a Disallowable Instrument. Some experience could be drawn from the Trade Modernisation Legislation.
- 11.2 It should be clarified whether these Infringement Notices affect the Licences held in Port Areas (such as Warehouse or Depot operators).

## 12. **Demerit Arrangements**

There are provisions regarding demerit points and their administration. Again these should be administered in a way consistent to the ALRC Report.

## 13. **Use of Strict and Absolute Liability**

There is extensive use of Strict Liability and Absolute Liability. Has this use been reviewed to be consistent to the Senate Committees recommendations on use of Strict and Absolute Liability? Further, some of the defences require the defendant to prove the alleged defence exists in the manner contemplated by the Commonwealth Crimes Act.

## 14. **Penalties for failure to report**

This should require DOTARS to adopt significant public information and education sessions to ensure parties are aware of their obligations and what actually constitutes a 'Maritime Security Incident'. It is significant to note that these obligations extend to 'employees' which will create difficulties as it includes **both** actual employees and contractors of Maritime Industry Participants. Employers will need to resolve whether to indemnify employees.

This educative process needs to include the mandatory form of the Report for such incidents.

## 15. **Information Gathering Powers**

As always there are concerns where a body is granted powers to compel the provision of information such as the Secretary of DOTARS as in Clauses 183 to 185. This extends to removing the privilege against self-incrimination (subject to some protection).

## 16. **Imprisonment**

Note that some offences have imprisonment as a penalty!

## 17. **Over reliance on the Aviation Transport Security Bill**

There have been suggestions that the Bill relies too heavily on the provisions of the Aviation Transport Security Bill. Certainly, there is common terminology and concepts to that Legislation. However, airports lend themselves more closely to precise control and regulation which renders some of those 'close control' provisions inappropriate to Port areas.

**18. Delegation by the Secretary of DOTARS**

Clause 202 sets out the categories of persons to whom the Secretary of DOTARS can delegate various powers. While those persons must operate under the direction of the Secretary and must hold senior positions at DOTARS, it would appear to be appropriate for those delegates to be obliged to have to undertake proper training before being appointed. I would suggest that any delegation be subject to the delegate having undertaken training such as applies for delegates of the CEO of Customs exercising powers under the Trade Modernisation Legislation.

**CONCLUSION**

As can be seen from the above, there are a number of areas in which I believe the Bill can be improved. Further, there is still significant concern within the Maritime Industry that the obligations being imposed by the Bill (and potentially by the Regulations) are inconsistent to International Conventions and are unduly onerous when compared to real risks or too impractical. There is also the significant concern that many of the obligations are more consistent with those imposed upon operators of aviation areas. Accordingly, it is hoped that lobbying can take place (whether by a Parliamentary Inquiry or otherwise) to bring some more practicality and improvements to the Bill.