

AUSTRALIAN UNIONS SUBMISSION TO THE -  
PARLIAMENTARY JOINT COMMITTEE ON THE AUSTRALIAN CRIME  
COMMISSION

**INQUIRY INTO THE ADEQUACY OF AVIATION AND MARITIME  
SECURITY MEASURES TO COMBAT SERIOUS AND ORGANISED CRIME**

The unions making this joint submission represent workers involved in both mainland and Offshore Oil and Gas industries impacted by the MTOFSA 2003 and associated regulations which include the application of the MSIC provisions.

“Unions” include the Maritime Union of Australia, Australian Workers Union, Rail Tram & Bus Union and Australian Maritime Officers Union, along with the International Transport Workers Federation.

In discharging our responsibilities to our members, unions seek to protect the health and safety of employees in the workplace. The issue of transport security is one of the most serious issues of workplace safety and is always afforded the highest priority.

Counter terrorism measures must however be balanced with a need to protect the privacy, job security, community values and human rights of the workforce, while ensuring that adequate protection is in place to minimise any potential terrorist threat to the broader community.

Australian Unions have been an active participant in the consultation process in relation to the development of the original legislation Maritime Transport Security Act 2003 which was extended and renamed the *Maritime Transport and Offshore Facilities Security Act 2003 (MTOFSA)*.

“Unions” maintain a vigorous participation in the further development of all related regulations and participate in a number of key industry working groups including the Maritime Security Consultative Forum and the Maritime Security Identification Card working group.

### **Terms of Reference**

The terms of reference ask that **“the committee will examine the effectiveness of current administrative and law enforcement arrangements to protect Australia's borders from serious and organised criminal activity.”**

Of particular interest to the Unions is (c) –

**“the effectiveness of the Aviation Security Identification Card (ASIC) and Maritime Security Identification Card (MSIC) schemes; including the**

***process of issuing ASICs and MSICs, the monitoring of cards issued and the storage of, and sharing of, ASIC and MSIC information between appropriate law enforcement agencies;”***

We have accepted and supported the introduction and ongoing commitment to the MTOFSA Act 2003 and associated regulations which include the introduction of the MSIC card as a counter terrorism measure.

In the process of applying for an MISC our members have been required to, among other measures, complete and sign a consent form for a police records check by the Australian Federal Police (AFP), again demonstrating each worker’s personal commitment to Australia’s counter terrorism efforts and border protection.

## **Background**

In almost every terrorist attack in recent history there is one front line group who have been killed or injured, they are transport workers. Whether they are train drivers, pilots, flight attendants or seafarers the simple act of going to work each day can expose them to risk in this context.

Transport unions around the world understand support and actively engage in the formation of national and international legislation designed to protect workers from the violent manifestation of extremism in all its forms.

In many ways Australian Maritime Transport Security policy has led the way in the formation of transport security provisions where transport unions have worked with governments from all political churches in order to reach the best possible outcomes in a constantly changing environment.

In any context the Unions’ views must never be conveniently misconstrued as being protectionist. Our record for supporting counter terrorist measures stands on its own merit as does our six year involvement in the maritime security legislative processes.

The terms of reference of this inquiry have focussed on the adequacy of the security cards to combat serious and organised crime.

There are two key elements to this debate which needs to be articulated so that the committee can put the Unions position into clear perspective.

### **Distinction between ASIC and MSIC**

The Aviation Security Identification Card ASIC was introduced significantly earlier than its Maritime equivalent and had little initial involvement or consultation with the relevant unions. It was a process which appears to have been brokered essentially between the then Department of Transport and Regional Services (DOTARS) and Qantas.

The Maritime Security Identity Card (MSIC) by comparison was included in the development of MTOFSA and the subject of broad Industry, Union and Government collaboration over the entire legislative processes and amendments under the former government. This was done in an environment of a sometimes hysterical public debate in the press but a quality outcome was delivered nonetheless.

### **MSIC – Counter Terrorism or Policing**

The Unions remain convinced that we can contribute to Australia's counter terrorism regime through our support of the MSIC card and MTOFSA. It is critical however that the MSIC remain focussed on countering potential exposure to a terrorist threat in the maritime environment.

MSIC was developed in the spirit of industry cooperation to facilitate the specific objectives identified in the International Ship Port Facility Security Code dealing with controlled access.

### **MSIC Eligibility Criteria**

Eligibility criteria has been the subject of much discussion at the industry forums and working groups as it sets the bar at which subjected workers can successfully apply for the card. In effect it has become "**AUSTRALIA'S RIGHT TO WORK CARD**" in the maritime industries.

Outrageous media reports quoting low rejection rates of MSIC applications use that statistic as the only basis to pronounce the card a failure.

In fact there is no other comparable industry requirement from which to draw an evaluation. Nor can there be any way to calculate how many workers simply do not apply after reading the criteria thinking they might not meet the standard.

In his critique of the GHD report referred to later in this submission Dr Mark Nolan compares the scope of the MSIC Eligibility Criteria to background checks for child care workers

It may be useful to refer to other occupational security screening legislative schemes (e.g. for child care workers etc under the *Commission for Children and Young People Act 1998* (NSW)). In doing so, we can obtain a sense of proportion about how to select offences which are most relevant to the occupational context being regulated for security reasons. Section 33B of the *Commission for Children and Young People Act 1998* (NSW) lists excludable prohibited persons whose prior offending closely relates to threat of child sex-offending. Notably, there is no lengthy speculative list of offences thought to be "gateway offences" leading to a future likelihood of child sex offending.

Decisions over listing MSROs as part of the MSIC scheme could benefit from such a narrow focus on offences related clearly to the feared (terrorist) behaviour. Below, the suggestion is to match MSROs as closely as possible to elements of the terrorist act definition in s 100.1 of the *Criminal Code Act 1995* (Cth). We should be mindful that the Commonwealth Attorney-General has just received community consultation on an exposure draft of proposed reforms to that definition. Tailoring the list of MSROs more closely to offending clearly related to the definition of terrorist acts is superior to using more speculative lists. More speculative lists result when guided by the type of criminological theorising present in *The Report* (see criticisms below) aimed at identifying antecedent crimes leading down a pathway to terrorist offending. The weaker approach used in *The Report* leads to inconsistent results including the recommended list of MSROs being *both* under-inclusive as well as over-inclusive.

*Dr Mark Nolan*

Key to the debate has been the relationship between the maritime security relevant offenses (MSROs) and the threat of terrorism from within the maritime industry.

The Office of Transport Security's arguments to expand the list of MSROs to include a criminal focus rely solely on their one commissioned report from GHD consultants. The Unions with broad support from industry agree that the GHD report is fundamentally flawed and of insufficient quality to draw any reliable conclusions.

Unions consulted Dr Mark Nolan (BSc (Hons), LLB, PhD), a senior lecturer at the ANU College of Law to analysis the GHD report and his findings are included in this submission. (Attachment 1)

Based on Dr Nolan's recommendations unions believe that the eligibility criteria discussion would be best served by commissioning a more appropriate study into the subject which could better analyse both the issues surrounding MSIC Scheme and any proposed changes to it.

Dr Nolan finds that the current setting can be improved and are current both under inclusive and over inclusive.

**Table 6.07C – Maritime Security Relevant Offences (MSRO)**

	Item	Kind of offence
Disqualifying offences a person convicted of an offence mentioned in item 1, 2, or 3, is disqualified from holding an MSIC, but, under	1	An offence mentioned in Chapter 5 of the Criminal Code. Note Offences for this item include treason, espionage and harming Australians.

regulation 6.08X, is entitled to seek reconsideration of the disqualification decision.	2	An offence involving the supply of goods (such as weapons or missiles) for a Weapons of Mass Destruction program as mentioned in the Weapons of Mass Destruction (Prevention of Proliferation) Act 1995
	3	An offence involving the hijacking or destruction of an aircraft or vessel
<p>An issuing body must not issue an MSIC to a person who has been convicted of an offence mentioned in item 4, 5, 6, 7, 8, or 9, unless the Secretary, acting under regulation 6.08F, decides that the person is unlikely to constitute a threat to security and approves the issue of an MSIC to the person.</p> <p>If a person is refused approval by the Secretary under Regulation 6.08F, he or she may seek reconsideration of the decision under Regulation 6.08X.</p>	4	An offence involving treachery, sabotage, sedition, inciting mutiny, unlawful drilling, or destroying or damaging Commonwealth property, mentioned in Part II of the Crimes Act 1914
	5	An offence involving interference with aviation, maritime transport infrastructure or an offshore facility, including carriage of dangerous goods on board an aircraft or ship, or endangering the security of an aerodrome, a port or an offshore facility
	6	An identity offence involving counterfeiting or falsification of identity documents, or assuming another individuals identity
	7	Trans-national crime involving money laundering, or another crime associated with organised crime or racketeering
	8	People smuggling and related offences mentioned in Chapter 4, Division 73 of the Criminal Code
	9	An offence involving the importing, exporting, supply or production of weapons, explosives or a trafficable quantity of drugs.

### **Nexus between Criminality and Terrorism**

The Australian Crime Commission raises this fundamental issue which has been at the centre of recent debates about expanding the application of the MSIC.

It is an area which calls for enormous intellectual research and a few paragraphs does the issue no justice nor does it address the impact of accepting that conclusion without further analysis.

The MSIC working group continues to press the Federal Government to further explore the subject based on Australian empirical evidence and contemporary Australian legal case history.

The Australian National University has already completed a body of work in this field however there is no doubt that both national security interests and policy makers would be greatly assisted by a clearer understanding of the relationship between criminality and terrorism and the likelihood of petty criminals to become a terrorist threat.

### **Human Rights & Natural Justice**

MSIC provisions stem from the MTOFSA 2003 which satisfies Australia's obligations to the International Ship & Port Facility Security Code and Safety of Life at Sea (SOLAS) Amendments 2002, ISPS Code.

Throughout the preamble of the ISPS Code are references to a balance between security and the recognition of human rights.

This fundamental guiding principal is amplified in the associated annex MSC/Cir.1112 which specifically addresses rights to shore leave:

*3. The 2002 SOLAS Conference incorporated the protection of the fundamental human rights of seafarers into the SOLAS chapter XI-2 and the ISPS Code. The preamble to the ISPS Code clearly states that the code shall not be interpreted in a manner that is inconsistent with existing international Instruments protecting the rights and freedoms of maritime and port workers.*

As well as this international obligation to human rights Australian workers requiring unescorted access to security regulated zones and thus MSICs must be afforded natural justice and expect to be treated in line with community values.

### **Crime on the waterfront**

Unions are unaware that the incidence of criminal activity is more prevalent on the Australian waterfront than in other domestic workplaces. We have seen and read divisive and scurrilous reports including newspaper headlines about organised crime being rampant on our waterfront but the articles lack substance while the social commentators' arguments are hardly compelling.

Both Australian Crime Commission maritime case studies included in their submission rely on allegations and suspicions. They suggest there is evidence

of gangs of organised criminals operating and infiltrating the transport industries but the evidence is not included in that submission.

If that is the case however, the criminal justice system is already armed with a suite of agencies and powers that must act immediately to address this reported surge of unlawful activity.

The ACC submission into this inquiry lists 10 major agencies with jurisdiction within the defined maritime sectors charged with law enforcement and regulatory compliance.

### **Gaps in Security**

Unions do concede however that there may be some gaps in Australia's Maritime Security regime and have identified them in previous submissions in the lead up to MTOFSA 2003 in a senate hearing into MSIC in 2004.

These include-

- The absence of any requirement for background checks for those who have effective responsibility for the allocation of labour, the scheduling of ships, awarding of transport logistics contracts and recruitment of employees.
- The use of contracted security staff in most terminals with no continuity or commitment to the workplace.
- Lack of attention to waterside and airbourne restricted zones.
- The inconsistent and low level of background checks required for Maritime Crew Visas for Foreign Seafarers to work in the Australian coastal trade.
- The inability for the MSIC to be applied consistently in real terms to foreign nationals granted unescorted access through maritime security regulated zones such as ships, ports and facilities.
- The unavailability of Australian regulated and crewed ships to accommodate our coastal trade leaving us reliant on foreign flagged substitutes.
- The carriage of high consequence and dangerous goods such as explosive grade ammonium nitrate into and around our port cities on substandard ships.
- The very low reserve of the Australian maritime skills base to fill core jobs in our ports, terminals, regulators and associated industries.

- The low level of container inspections and the nonexistent level of inspection of “reportedly” empty containers transhipped into and around the Australian coast.
- The “Trojan Horse” concerns around the stuffing and un-stuffing of containers by “unchecked” staff outside of the security regulated zones.

## **Criminal Intelligence**

Any suggestion of the use of criminal intelligence in the sense described in the GHD report is rejected by the unions as divisive, unreliable and counter productive.

This kind of evidence has been responsible for targeting union officials as described in the TWU submission and is notoriously unreliable.

Unions agree that the enormously unjust treatment and violation human rights in Mohammed Haneef case stands as a warning against the reliance on unsubstantiated criminal intelligence. In this case the victim (Haneef) was continually denied the presumption of innocence based unproven allegations of terror related activities.

Again the field of criminal intelligence is generally unclear to all of industry and the potential impact cannot be measured.

## **Conclusion**

While transport unions in Australia remain committed to counter terrorism measures on the waterfront there is no justification for broadening the focus of maritime security settings to suit crime fighters.

To lift the MSIC provisions out of MTOFSA for use as yet another anti-crime tool will not help fight crime it will merely punish workers who may have offended in their past , in essence initiating double jeopardy.

Unfortunately in 2010 terrorism is a force to be dealt with and requires dedicated measures along with compromises from workers in some industries. For any other agencies to capitalise on these compromises blurs the objectives of counter terrorism and could risk support for it.

Transport Unions abhor organised crime in all of its guises and understands its impact on Australian society. MSIC however is not the tool for the job, better policing and a more coordinated approach to beating organised crime may well be.