



## PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY Review of the National Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

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Ports Australia is pleased that the Parliamentary Joint Committee on Intelligence and Security is examining the *Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022 (SLACIP)* and providing an opportunity for industry feedback. SLACIP will play an important role in furthering the maturity of critical infrastructure risk management in Australia. It is thus imperative that SLACIP is appropriate, as it has the opportunity to protect Australian critical infrastructure, or conversely leave vulnerabilities.

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Ports Australia is the peak industry body representing both publicly and privately owned port authorities and corporations across Australia. Ports Australia is governed by a Board of Directors comprising the Chief Executive Officers of 13 port corporations from across Australia.

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The Department of Home Affairs has conducted extensive consultation as part of the development of SLACIP, and Ports Australia appreciates this engagement. It is however stressed that several aspects still require attention to ensure that the reforms are as effective and efficient as possible, for the benefit of government, industry and Australia. These concerns have been raised by the ports in Australia, throughout the development of these critical infrastructure reforms, and one concern has been voiced since prior to the commencement of these reforms.

The pre-existing concern surrounds the entity which is deemed the 'responsible entity' for critical ports, as prescribed in the *Security of Critical Infrastructure Act 2018 (SOCI)* and the *Maritime Transport and Offshore Facilities Security Act 2003 (MTOFSA)*. Currently the *port operator* is named the default responsible entity for a critical port, however the *port facility operator* has control over the day-to-day site management and operations in many cases. A responsible entity needs to be the entity best placed to identify, manage, report and act on hazards to physical and operational assets. A substantial risk thus lies in the current prescription of the *port operator* as the default responsible entity, as they may be responsible for obligations that are outside of their control and could leave Australian critical infrastructure vulnerable to hazards. The SLACIP and *Transport Security Amendment (Critical Infrastructure) Bill 2022 (TSACI)* Bills however, present an opportunity to correct this, and revise the named default responsible entity for critical ports.

Recommendations for the process by which the Department of Home Affairs can address this pre-existing concern and others raised are outlined below and are followed by further information on each one.

### Key recommendations

1. Revision of the default responsible entity for critical ports and reconsideration of which entity (port operator or port facility operator) is the appropriate entity for the relevant SOCI and MTOFSA obligations;
2. Amendment to ensure reporting obligations are only for incidents which meet a certain threshold;
3. Assessment and elimination of any duplication in overlapping:



- federal and state regulatory requirements; and
  - SOCI and MTOFSA obligations; and
4. Assessment of the opportunities and risks to Government Assistance powers via tabletop exercises as practicable following the enactment of this legislation.

Information below was included in Ports Australia's recent submission to the Department of Home Affairs regarding the Exposure Draft TSACI and the Exposure Draft SCLACIP.

## I. Responsible entity for critical ports

Ownership and operation of port land, infrastructure and facilities differs across the sector. Some ports are landlords who lease out areas to port facility operators which undertake the day-to-day site management and operations, whilst others own and operate the land and facilities, and others are variations of these. The current SOCI and MTOFSA regime does not recognise or appropriately manage these variations.

A responsible entity needs to be the entity that is best placed to identify, manage, report and act on hazards to physical and operational assets. At present, the default responsible entity related to critical ports is the *port operator*. For a number of obligations it would be more appropriate for a *port facility operator* to be responsible. It is of *significant* concern that the port operator is the default responsible entity and suggests that the port operator is the most appropriate entity to implement the positive security obligations.

Landlord ports particularly may not have the level of insight on risk exposure and accordingly would be unable to adequately address the positive security obligations and keep the Australian Government informed of changes at the port facility owner and operator level. This may undermine the intent of the legislation, to protect Australia's critical infrastructure, if not recognised and rectified prior to enacting the reforms. It may also carry an unnecessary impost on other entities named as the responsible entity who do not have access to tenant/port facility operator information needed to comply with the obligation.

Due to the different operational models of the ports, it is Ports Australia's position that the responsible entity needs to be determined on a case-by-case basis and should have consideration to the structure and operations of the port. Ports Australia requests that consideration is given to circumstances where the *port facility operator* should be the default responsible entity as opposed to the *port operator* under SOCI and the allocation of obligations to maritime industry participants under MTOFSA. This is imperative as it determines which entity will be assigned positive security obligations and associated accountability.

It is *absolutely* necessary that the correct delineation between port owners, port operators, facility owners, and facility operators is made and that each has their own tailored set of reporting obligations that best reflects their risk profile – their internal characteristics and the external environment within which they operate. This will better enable the objectives of these reforms to be achieved in the ports sector. That is, the accuracy and quality of reporting to the Australian Government will improve; the application of any positive security obligations will be assigned to the appropriate entity, should they be required; the appropriate entity will be provided with the up-to-date security and risk information, and best practice advice; and any unnecessary regulatory burdens on entities that are not best placed to address these obligations will be eliminated.

Ports Australia recommends the Department of Home Affairs:

- draft a new approach to determining the default responsible entity for critical ports;
- engage port operators and port facility operators in a workshop to agree upon this approach; and
- progress the approach to revising the default responsible entity.



Level 2, 1 York St, Sydney NSW 2000  
02 9247 7581 | info@portsaustralia.com.au  
www.portsaustralia.com.au

**Table 1. Current and proposed considerations to determine the responsible entity of a critical port**

<b>Critical Ports – Responsible Entity</b>	<b>Determination considerations</b>	<b>Risks</b>	<b>Benefits</b>
<b>Current</b>	The <i>port operator</i> is currently the default responsible entity.	<p>For 'landlord ports', government will receive risk management plans and reporting from the port operator. Government will <i>not</i> directly receive risk management plans and reporting from the source that is managing the operational environment i.e. the port facility operator, unless that tenant has also been identified as critical under SOCI. Due to this potential lack of direct oversight, risks to government include:</p> <ul style="list-style-type: none"> <li>• lack of reporting;</li> <li>• time lag in reporting;</li> <li>• reduced reporting detail; and</li> <li>• reporting inaccuracies.</li> </ul> <p>Should these reporting risks be realised, critical infrastructure is more susceptible to:</p> <ul style="list-style-type: none"> <li>• exacerbation of issues (realised risks);</li> <li>• delays in receipt of Government Assistance; and</li> <li>• delays in other critical infrastructure entities being informed of industry breaches and hence less prepared to address new risks.</li> </ul> <p>Alternatively, a lot of port tenants may be subject to SOCI as they are critical liquid fuel assets, critical freight infrastructure assets or critical freight services assets. This means they will have the obligation to provide a risk management plan (if switched on), the issue is that the responsible entity for the port will also have an obligation to provide a risk management plan (if switched on).</p>	Maintain status quo. <i>Note: Ports Australia does not endorse this position.</i>



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www.portsaustralia.com.au

<b>Critical Ports – Responsible Entity</b>	<b>Determination considerations</b>	<b>Risks</b>	<b>Benefits</b>
<b>Proposed</b>	<p>It is recommended that the responsible entity for critical ports be determined on a case-by-case basis with the option to have the default entity being the port facility operator. As part of a case-by-case approach, consideration should be given to:</p> <ul style="list-style-type: none"><li>• whether the port operator or port facility operator undertakes the day-to-day operations at the port; and</li><li>• whether the port operator has the ability to impact the confidentiality, integrity, availability or reliability of the port facility operator’s operations.</li></ul>	Short-term risks related to the transfer of the responsible entity for some critical ports.	<ul style="list-style-type: none"><li>• Application of any positive security obligations will be assigned to the appropriate entity.</li><li>• Appropriate entity will be provided with the up-to-date security and risk information, and best practice advice.</li><li>• More prompt receipt of up-to-date and relevant details on port operations by government. As a result, reduced risks to government and responsible entities, and in turn Australia and its peoples.</li><li>• Unnecessary regulatory burdens on entities that are not best placed to address these obligations will be eliminated.</li></ul>



## 2. Reporting obligations

While TSACI adds a definition of “relevant impact” (as under SOCI) to what incidents are required to be reported, this only applies to cyber security incidents. Accordingly, it is suggested that a similar approach is taken to non-cyber security incidents. This would result in entities being required to only report incidents that are of “relevant impact” to the Department of Home Affairs, not every minor incident. Benefits of this would include reduced administrative burden on entities and the Department of Home Affairs, as well as the ability for the Department of Home Affairs to more readily identify incidents that are of significance.

## 3. Overlapping regulatory requirements

Ports Australia recommends that the Department of Home Affairs conducts a regulatory mapping exercise to understand potential or actual duplication in overlapping federal and state regulatory requirements that relate to the security of critical infrastructure. It would be of benefit to industry to have this shared, and to work on an approach to remove any duplication in reporting requirements.

At the same time it would also be helpful to map the regulatory obligation across SOCI and MTOFSA (as amended by SLACIP and TSACI) and to consider how to ensure that ports are not subject to two similar regimes at the same time, or if they are that compliance under one regime is treated as compliance under the other.

To the extent that there is a duplication of obligations between POs and PFOs it is requested that consideration is given to the appropriateness of the consequences that flow from non-compliance. For example, if a PFO is best place to report a security incident, a PO might have the same obligations (should it become aware) but it might not be appropriate to make them subject to an offence for not reporting the PFO incident.

## 4. Government Assistance powers

Government assistance powers as they relate to critical infrastructure will be new, and as highlighted in previous Ports Australia submissions, there are associated risks with these powers. As there is yet to be significant detail on how these powers would function, it is suggested that the Department of Home Affairs conducts tabletop exercises with industry to understand opportunities and risks related to the government assistance powers, and how these can be maximised and minimised respectively. Ports Australia would be willing to approach its members for such a collaborative exercise, should the Department of Home Affairs decide it is interested in undertaking this with port industry participants.

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Ports Australia appreciates the intent of these reforms, and the Parliamentary Joint Committee on Intelligence and Security’s current examination of whether these reforms have incorporated industry feedback and are as fit for purpose as possible. Should the Parliamentary Joint Committee on Intelligence and Security require further information from a port industry perspective, Ports Australia would be pleased to assist.