

Issues arising from the Committee's review

- 3.1 In the course of this inquiry the Committee received evidence and raised queries about several issues within the ISPS Code and the (at that time) exposure draft of the Maritime Transport Security Bill 2003 (MTSB). Some of these are canvassed briefly in this chapter. It will become clear that many of the problems that were identified in submissions and at port inspections were almost solely the result of a lack of available information at that stage. Others, such as terminology used in the Code and the legislation, have been addressed by the Department since the concerns were raised in the Committee's inquiry process.
- 3.2 Concerns of port authorities and operators addressed in submissions and at inspections were noted by the Committee and raised with representatives of DOTARS. The Committee is now of the view that many of these issues have been covered either by the final draft of the legislation and the regulations (which at the time of advertising had not been drafted) or will be 'ironed out' during the implementation phase.

Consultation process

- 3.3 The Committee has taken a particular interest in consultation undertaken by the Department with regard to the proposed treaty action, both with stakeholders and interested parties during negotiations on the treaty and the drafting of the legislation, and the

consultation which must occur under the terms of the ISPS Code and legislation in the event of a maritime security incident.

Consultation with stakeholders and interested parties

- 3.4 As mentioned in the introduction to this report, the Committee wrote to port authorities and other interested parties, inviting comments on this review.

Involvement of maritime unions

- 3.5 The Committee was assisted in the review by discussions with employee organisations during the meeting with the Port Corporation in Newcastle. Representatives raised concerns about seafarers' welfare and labour rights, and the lack of consultation with the relevant unions by the Department.
- 3.6 The Committee notes that the main issue for the MUA and the Australian Institute of Marine and Power Engineers (AIMPE) was the status of those organisations according to the treaty, and the role that they believed that should be played by employee organisations, given the size of their membership and the new roles faced by maritime workers in the changing security environment.
- 3.7 The concern of the maritime unions that they be given the status of maritime participants was problematic, in the Department's view
- if we were to say they were maritime industry participants, we would be effectively saying that they are regulated entities under the act and they would have to have security plans and get caught up in the operation of the act. We are not necessarily sure that this is the way to go.¹
- 3.8 The Committee trusts that the maritime unions will be satisfied with the amendments to the regulations, which codify union involvement during the security planning and implementation processes. While the Government does not consider it appropriate to recognise unions formally in the bill, nor the range of other industry associations, such as AAPMA

Maritime Industry Participants are required to demonstrate in their maritime security plans a mechanism for ongoing

1 Mr Andrew Tongue, *Senate Rural and Regional Affairs and Transport Committee Transcript of Evidence*, 27 October 2003, p. 45.

consultation with their employees...The Secretary will consider the adequacy of the consultation included in the plan when making a decision to approve a security plan.²

3.9 Further, the Committee notes DOTARS' recognition of unions as a key stakeholder in the ongoing implementation of the maritime security framework

DOTARS is proposing an ongoing industry consultative committee to monitor the maritime security (*sic*), and would involve the unions in this process.³

Consultation in the event of a maritime security incident

3.10 The Committee also received submissions and information during port inspections which highlighted concerns about the role of the Secretary of the Department of Transport in issuing directions with minimal consultation with the harbour master in a port, who may be in a better position to understand and interpret an escalating maritime incident at various security levels. The Committee received assurances from DOTARS that this situation would be addressed in the regulations and the Committee hopes that concerns of port authorities and harbour masters have been adequately addressed in this regard. The Committee heard on 22 October 2003 that

the issue really revolves around the consultation that is necessary between the harbourmaster, the port security officers and the department through the secretary. It has been recognised that there is obviously a need to consult. In fact, in the drafting instructions we have talked about inserting into the regulations something which says that the secretary must consult with the port security officer and with the harbourmaster in regard to the issuing of the direction wherever practical or feasible.⁴

2 Extract from letter from the Hon John Anderson MP, Deputy Prime Minister and Minister for Transport and Regional Services, to Mr Martin Ferguson MP, tabled in the House of Representatives on 1 December 2003.

3 Extract from letter from the Hon John Anderson MP, Deputy Prime Minister and Minister for Transport and Regional Services, to Mr Martin Ferguson MP, tabled in the House of Representatives on 1 December 2003.

4 Mr John Kilner, *Transcript of Evidence*, 22 October 2003, p. 8.

- 3.11 Further, Ms Helen Board from DOTARS stated that ‘the bill quite deliberately specifies that the secretary can only give those instructions on the basis that he has credible information’.⁵

Costs

- 3.12 The NIA states that initial cost estimates suggest that the maritime industry will need to invest up to \$313 million initially and up to \$96 million in subsequent years.⁶ The Committee is not convinced by the accuracy of these figures, and Mr Andrew Tongue stated in June that it was ‘the best estimate on the table’ but that ‘it is possibly a little bit high’.⁷ He stated that ‘in some parts of the sector there is more security in place than we had anticipated and that some of it is quite good quality’.⁸
- 3.13 The Committee also heard during informal discussions which took place in Fremantle and Newcastle that the costs involved in undertaking risk assessments were extremely difficult to quantify, as different consultants would charge different fees for similar services, and it would be difficult to ascertain a benchmark as to what constituted a reasonable fee in each circumstance.
- 3.14 Regardless of the decision each individual port authority will make with regard to engaging a maritime expert to assist in preparations for the implementation of the legislative requirements, the Committee acknowledges the oft-expressed view of the Department that ‘the government has been clear about its position in regard to cost recovery’ and that any costs should be borne by industry: ‘it is the cost of doing business’.⁹
- 3.15 The Committee notes that concerns raised about the level of financial assistance offered to industry by other national governments, or the relatively high budgetary allocation for implementation of the Code (especially by the United States) did not recognise that the US is implementing Part B of ISPS in addition to Part A. DOTARS noted that Australia

5 Ms Helen Board, *Transcript of Evidence*, 22 October 2003, p. 8.

6 NIA, para. 26.

7 Mr Andrew Tongue, *Transcript of Evidence*, 16 June 2003, p. 35 and p. 36.

8 Mr Andrew Tongue, *Transcript of Evidence*, 16 June 2003, p. 35.

9 Mr John Kilner, *Transcript of Evidence*, 22 October 2003, p. 15.

is just basing the bill on part A, which the IMO has considered as mandatory. Part B is just recommendatory, so the US model is more prescriptive than ours.¹⁰

Terminology used in the ISPS Code and the legislation

3.16 Of significant concern to several stakeholders was the use of different terminology within the ISPS Code and the exposure draft of the MTSB. The Committee trusts that the same stakeholders who expressed strong opinions about the confusion that may be caused by differences in terminology will be pleased that this has been rectified in the final draft of the legislation. Evidence received by the Senate Committee notes that the legislation now reflects the IMO terminology.¹¹

Jurisdiction

3.17 The Committee is aware of concerns from several quarters about the jurisdictional definitions in the Code and the legislation. The Committee heard that from the Department's point of view, expressed at the June hearing, 'the waterside is our toughest area' in terms of separating zones for pedestrian/recreational use as well as for various facilities, such as a cruise terminal or oil and gas facilities.¹²

3.18 The most recent comment available on these matters from DOTARS was made by Mr Tongue at the Senate Committee's public hearing on 27 October 2003, where he acknowledged the continuing difficulties with this issue because of the 'complexity of ports with the operation of a multitude of state and federal laws and public and private actors'¹³

That is why there is a significant focus in the legislation on the planning process and the risk assessment prior to that

10 Ms Clare Guenther, *Transcript of Evidence*, 22 October 2003, p. 11.

11 Mr John Hirst, *Senate Rural and Regional Affairs and Transport Committee Transcript of Evidence*, 27 October 2003, p. 13.

12 Mr Andrew Tongue, *Transcript of Evidence*, 16 June 2003, p. 38.

13 Mr Andrew Tongue, *Senate Rural and Regional Affairs and Transport Committee Transcript of Evidence*, 27 October 2003, p. 30.

process. So it is really a two-stage process: undertaking a risk assessment looking at both the port as a whole and individual facilities; and then looking at a planning process at both a facility level and a port level. That will inevitably raise these jurisdictional questions about who is responsible for the waterside, who can devote resources, what existing zones under state law are already in place and whether the ports wish to seek coverage under this bill to expand and enforce zones and so on.¹⁴

- 3.19 Mr Tongue stated that a key issue will be the designation of the boundary of the security regulated port, and that ‘the ports will need to come back to us and say, “here is the zone that we think needs to be encapsulated under this regulatory regime.” ’ Mr Tongue advised the Committee that these responses were expected to vary enormously from port to port.¹⁵

Effectiveness of ISPS Code

- 3.20 The Committee shares the concern raised by some maritime industry participants and commentators that the ISPS Code will have little real effect on reducing threats to maritime security if Contracting Governments (for example in countries with open registers) do not make a serious commitment to upholding and enforcing increased security measures. Given the size of the costs that will be borne by Australian industry, the Committee would like to be confident that other Contracting Governments to the IMO will share the same level of commitment to ensure the Code is adequately enforced.
- 3.21 The Committee understands that the description of the code as a ‘giant paperwork cathedral’¹⁶ has been used to criticise the obligation under the Code to have security plans on every ship and in every port, while a recent OECD report on maritime security indicated that there are literally tens of thousands of entry points in the modern

14 Mr Andrew Tongue, *Senate Rural and Regional Affairs and Transport Committee Transcript of Evidence*, 27 October 2003, p. 31.

15 Mr Andrew Tongue, *Senate Rural and Regional Affairs and Transport Committee Transcript of Evidence*, 27 October 2003, p. 31.

16 Mr William Langewiesche, correspondent for *Atlantic Monthly*, on ABC Radio National *Background Briefing*, 31 August 2003.

supply chain.¹⁷ The Committee looks forward to receiving detailed information about the successful implementation and operation of the ISPS Code in other shipping nations in the future (see Recommendation 2).

¹⁷ *Report on Security in Maritime Transport, Risk Factors and Economic Impact*, Organisation for Economic Cooperation and Development, Paris, 31 July 2003.