



Australian Shipowners Association

22 August 2005

Secretary
Senate Rural and Regional Affairs & Transport Legislation Committee
SG.62 Parliament House
Canberra ACT 2600

Dear Secretary

Senate Committee inquiry: Maritime Transport and Offshore Facilities Security Amendment (Maritime Security Guards and Other Measures (Bill) 2005

I refer to this inquiry initiated by the Senate Selection of Bills Committee. As has been previously stated to this Committee by ASA, maritime security has been, and remains an issue of significant concern to the owners and operators of Australian controlled shipping.

This inquiry touches specifically upon the proposed new extension of powers to maritime security guards.

The original Maritime Transport Security legislation contained certain powers for 'maritime security guards'. Essentially, the powers conferred upon a 'maritime security guard' were limited to the power (alone) to physically restrain persons in certain reasonable circumstances until such time as they could be dealt with by a law enforcement officer.

In many respects, this earlier provision failed to take into account the practicalities of confronting an individual in a maritime security zone. The proposed amendments address the practical limitations of a maritime security guard's activities, for example:

- The power to ask an individual who they are and why they are in the maritime security zone
- The power to request an individual to leave a maritime security zone
- The power to actually remove an individual from a maritime security zone
- The power to remove vehicles and/or vessels from a maritime security zone

ASA considers these practical extensions of the powers of a maritime security guard to effect the intent of the legislation – to detect and deter individuals from unlawful interference with maritime transport.

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Outstanding aspects of the proposed amendments

The current Bill proposes additional powers of questioning and removal of persons. These compliment the existing powers to physically restrain persons. However, ASA suggests that this suite of powers overlooks the critical need to empower maritime security guards to search people (in reasonable circumstances). There remains a potential at present for maritime security guards to remove or detain certain persons with no legal ability to confirm whether this person is armed etc. This presents a real and present threat to guards that could dissuade them from effecting their obligations.

Further, the proposed new Section 163B(4) establishes that this is a strict liability offence to not leave a maritime security zone after being appropriately requested to do so.

Whilst the Criminal Code provides for other defences to strict liability offencesⁱⁱ it appears odd that a strict liability offence, which would normally exclude 'fault' from the physical elements of the offence, allows for a 'reasonable excuse', as suggested in the proposed new Section 163B(3). These 2 provisions would seem at odds with each other.

Ongoing concern: Protection of privacy interests

Australian operators remain concerned at the lack of support from the Department of Transport to ensure the protection of MSIC applicants' privacy information beyond the period of implementation – 31 December 2006. The proposal remains to authorise disclosure of personal information beyond disclosure between Federal and government bodies/agencies i.e. to employers.

In this regard, the consensus view of the DOTARS MSIC Working Groupⁱⁱⁱ to maintain government receipt of applicants' criminal records/histories does not appear to have been acknowledged within DOTARS broadly.

Confidence in the validity of MSICs

Given the portability of MSICs required of seafarers and truck drivers, confidence in the validity of MSICs (over their 5 year life) is essential. The determination made on the information provided in the ASIO and Federal Police background checks is essential to this confidence.

Through the 9 month implementation period commencing about 1 October 2005, DOTARS - or more specifically OTS - will act as the central conduit for the receipt of criminal background reports from ASIO and the Federal Police, and will make the determinations on whether to issue an MSIC in a centralised manner. DOTARS/OTS will then advise an Issuing Body whether to issue an MSIC or not for an applicant. However, ASA has been advised by senior departmental representatives that because of funding constraints beyond December 2006, this role/function will currently be divested to Issuing Bodies after 31 December 2006.

DOTARS will maintain an involvement, but only in the capacity of scheme auditor and in setting/overseeing the criteria for assessment and determination of applications.

This raises multiple concerns. It is anticipated that the majority of employers will retain the Issuing Body function in-house. Even where they do not, those 3rd party Issuing Bodies that do exist e.g. 1-Stop, have publicly indicated that they will not be making MSIC application determinations – this would remain with employers. (It is understood that 3rd party Issuing Bodies are unwilling to take on a responsibility for a decision making process that is reviewable at the AAT).

From the outset, employers have steadfastly reiterated the privacy and other difficulties that they will face receiving the criminal backgrounds of their employees from the Federal Police. There may even be conflicting corporate disclosure obligations to shareholders in some situations if an employer is in possession of this information. If DOTARS (or another central government agency) cease to continue as the repository of these reports, there will be no other option but for employers to receive this information.

This post-December 2006 implication is not openly being communicated to employers by OTS or DOTARS. In fact, DOTARS are conspicuously silent in any public material on who will perform the function of 'MSIC application arbiter' beyond 31 December 2006. Compounding this development is a lack of clear guidance as to the full extent of obligations that may apply to an issuing body after 31 December 2006.

What is the effect of the proposed amendment?

Federal Police/ASIO/DOTARS will remain empowered to disclose personal information of MSIC applicants to employers/Issuing Bodies after the currently-proposed withdrawal of DOTARS from the application process in June 2006.

There are a range of benefits to the regime from OTS'/DOTARS' continued direct involvement in this function:

- There is consistency of application of the criteria for issuing an MSIC with a centralised application process - there are real concerns that unsuccessful MSIC applicants may seek to 'forum shop' around the country otherwise.
- Confidence in the validity of issued MSIC's is maximised (there is no question as to where it was issued, or by whom). This is relevant where ships' relief crews are often sourced on short notice.
- A centralised approach allows the development of a basic database of issued/approved MSICs. This would enable basic checking of validity by employers for relief crews on ships and sub-contracting truck drivers for port facilities - more detailed re-applications (if required) could follow thereafter.
- Privacy issues of employers receiving the criminal histories of their employees are overcome. There is a concern for example, that employers would have to act on certain knowledge about their employees over and above the obligations of the Act and this places employers in an invidious situation.

- The MSIC is an identity card - not an access card, and a relationship with an employer or union should not be required to establish background and identity. In this regard, an independent 'issuing body' i.e. DOTARS, is an essential component in the regulatory structure.

ASA would propose that the disclosure provisions be limited, preventing disclosure to MSIC applicant employers.

As far as ASA has been advised, it would appear that the only obstacle for continued DOTARS involvement is funding – we would encourage that appropriate requests are made now in anticipation of the 2006 Federal Budget.

ASA is unable to appear before the Senate Committee at its scheduled hearings on 29 August 2005. We are more than willing, however, to assist with any additional information sought by the Committee on this subject.

Yours sincerely

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Director, Canberra

ⁱ See Maritime transport Security Act 2003 (Cth) ss161-163

ⁱⁱ See Criminal Code 1995 s.6.1(3)

ⁱⁱⁱ The DOTARS MSIC Working Group is comprised of representatives of Seagoing and shore based employers and sea and road unions, chaired by DOTARS. It is not apparent that the consensus views of the Working Group have been acknowledged or promoted by DOTARS.