Australian Shipowners Association

7 July 2005

Senator the Hon Bill Heffernan
Chair, Senate Rural & Regional Affairs
& Transport Legislation Committee
Suite SG.62
Parliament House
Canberra ACT 2600

Dear Senator Heffernan

Inquiry into Maritime Transport Security Amendment Act 2005

The Australian Shipowners Association (ASA) appreciates the opportunity to contribute to the consideration of this important piece of security legislation – maritime security has been, and remains an issue of significant concern to the owners and operators of Australian controlled shipping.

We note that there are 7 specific areas that the RRAT Legislation Committee is seeking to focus on in this inquiry. There are many aspects of the Australian maritime security regime that ASA and its members are relatively comfortable with. Accordingly, in this written submission, we will only focus on the areas of lingering concern. We are willing, however, to respond to the Committee on any other questions it may wish to direct to us.

Does the regulatory framework to be implemented adequately protect privacy interests?

ASA notes the proposed amendments to sections 105, 109 and 113 (contained in Schedule 2 of the amending Bill). The relatively innocuous proposed amendment contained in sub-section (5) of each of those sections "authorise the use or disclosure of information (including personal information within the meaning of the Privacy Act 1988) for the purposes of, or in relation to, assessing the security risk posed by a person."

This needs to be read in conjunction with the existing provisions in each of those sections of the *Maritime Transport Security Act 2003 (Cth)* (the Act) which provides in ss.105(2)(a), 109(2)(a) and 113(2)(a) for the making of regulations for access to security zones "including conditions of access, the issue and use of security passes and other identification systems."

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Together, these provisions are the legislative skeleton of the Maritime Security Identification Card (MSIC) system.

Of concern to the owners and operators of Australian controlled shipping is the proposal to authorise disclosure of personal information beyond disclosure between Federal and government bodies/agencies.

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 June 2006, this role/function will currently be divested to Issuing Bodies after 30 June 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 by 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-July 2006 implication is not currently 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 30 June 2006.

What is the effect of the proposed amendment?

The proposed amendments contained in Schedule 2 of the Amending Bill empower the Federal Police/ASIO/DOTARS 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's/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 employers 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.

Proposed requirement for 'Sponsor's letters'

Incorporated into the current proposed model is a requirement for each MSIC applicant to obtain a letter from an employer or maritime union justifying an applicant's need for an MSIC. For want of a better description, this letter is becoming known as the 'sponsor's letter'. It is intended by DOTARS that this letter accompany every MSIC application for both existing employees, but more importantly for new entrants or returnees to the industry.

With respect to the regulatory regime requiring a relationship with either an employer or a maritime union, we find it anomalous that a requirement for a 'sponsor's letter' is being sought to accompany each application.

Employers are not likely to provide these letters to potential applicants who are not currently/about to be employed by them. OTS has suggested that a potential

applicant would alternatively be able to approach one or other of the unions to obtain this letter.

This is not strictly part of the proposed amendments to the Act. However, ASA does not see this proposal - encouraging relationships with maritime unions - as consistent with the Government's freedom of association principles, and do not see how it assists in establishing the identity of an individual - that is established by the pragmatic 100-point check made at the time an MSIC application is lodged.

Confirmation of an applicant's identity, and the suitability of their background is established by the ASIO and Federal Police (and in some circumstances Immigration) checks. The 'sponsor's letter' adds nothing to this process. It also unnecessarily clouds the identity card/access card/employment relationship. Some suggestions that it prevents 'non-maritime' applicants, virtually presupposes that port facility/ship security arrangements will fail, assuming applicants would be granted entry on the holding of an MSIC alone. Presumably the security/access arrangements documented in each operator's audited security plans are more robust than that.

Both these concerns were formally raised with senior officials within OTS in April with a verbal response that 'we will have to agree to disagree'.

The appropriateness of the cost recovery model in respect of such an important area of national security

For the majority of ship operators, the whole of a ship is declared as a ship security zone. By extension, every member of the crew will be required to hold an MSIC. In some respects, this is different to the port/port facility experience where there are often more limited security zones.

As such, for seafarers, the MSIC will effectively become a new and necessary condition of employment – much in the same way as the requirement for a valid AMSA medical, or appropriate seagoing qualifications.

However, it is not a condition of employment that has been implemented by employers or internationally. Rather it is being imposed by the Australian Government. While ASA members appreciate the underlying philosophy behind implementation of an MSIC regime, it is an additional employment cost that has been imposed by the Australian Government on an industry that has well documented concerns about labour costs.

Industrially, it is likely to prove very difficult to recover this cost from employees, even over a period of time. It remains unclear how the application costs of new entrants or returnees to the industry will be treated.

It is little surprise, therefore, that operators reluctantly embrace the cost recovery model.

The adequacy of existing security checks for foreign seafarers

The security treatment of foreign seafarers is a vexing legislative issue. It is the opinion of ASA that the MSIC regime is essentially driven by shore-based labour concerns i.e. certainty of the appropriateness of the employees of ports/port facilities to be handling cargoes. Unfortunately however, ports/port facilities and ships are treated equally in the Act, and the requirement for one 'maritime industry participant' extends to the other. Many Australian ship operators believe that they are inheriting an identification system not directly intended to apply to their crews. Due to legislative limitations, it is also a system that can not apply to the majority of crews – foreign crews – servicing Australia's trade.

Whilst MSICs will apply to all relevant personnel in every Australian port/port facility, they will apply only to a minority of crews in those facilities i.e. the Australian crews present in those facilities at any given time.

This is not to say that foreign crews have not been considered, and ASA continues to contribute to the working group established by the Department of Prime Minister & Cabinet considering whether a new category of seafarer visa should be established for foreign crews.

In some respects, this will redress the balance between domestic and foreign crews, however, it does appear to have been driven as much by the shore-side desire for MSICs as a need for more effective border control.

In the same way that Australian operators see the cost recovery requirements of this new condition of employment as anomalous, ASA would see that an additional cost recovery on foreign operators (crews) for visa applications on security grounds should not be introduced. From discussions to date, there are minimal, if any, additional costs to implement such a visa system.

The fair operation of security checks with respect to existing employees

It is difficult to comment at this stage on whether security checks will operate 'fairly' or not – the system/regime is still being finalised and is some months away from initial implementation. However, 2 observations ought to be made:

- In order to be considered 'fair', ASA believes that it is essential that there is a consistent application of the MSIC application criteria between applicants. It is our strongly held belief that this can only be achieved with a central body determining applications that present potential 'exclusionary' offences. It is inevitable that an individual Issuing Body or employer will subjectively determine whether Federal Police reports of offences constitute exclusion from an MSIC.
- For ship operators, in almost all circumstances, holding a valid MSIC will constitute a condition of employment. For existing employees who fail to obtain an MSIC, all attempts will be made to find alternative duties. This is not a redundancy. Rather, it will be a case of a seafarer no longer holding a requisite

‘certification’ for employment as opposed to being ‘redundant’ to operations. It should be noted, however, that alternative duties will not always be available.

The adequacy of consultation mechanisms in respect to the regulatory framework

Since the events in New York of 2001 and subsequently Bali, consultation is one area that the Australian Government must be complimented on – there has been no shortage of consultation with the industry and the representative organisation conduits have been well utilised.

The contributions of industry, from the perspective of ASA, have been well received and where possible, accommodated and the full and frank discussions have always ensured that industry has been aware of any underlying reasoning for certain decisions being taken – even where they disagree. This approach has ensured a swift implementation of the International Ship and Port Facility Code (ISPS Code) and the Act in Australia.

We look forward to the opportunity to address the RRAT Legislation Committee directly, and provide additional input as required.

Yours sincerely

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