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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House, Canberra

Submitted via webform:
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Dear Committee Secretary

Shipping Australia's submission on *"Review of the Transport Security Amendment (Security of Australia's Transport Sector) Bill 2024".*

A. About Shipping Australia

1. Shipping Australia is the principal Australian peak body that represents the locally owned and the locally active ocean freight-focused shipping industry. We provide policy advice, insight, and information to just over 70 members, who, between them, employ more than 3,000 Australians. We provide policy input to Australian State, Territory and Commonwealth Government bodies. We are recognised across Australia by politicians, public service officials, national media and trade media as being the national association for Australian shipping.

2. Our membership includes Australian ports, the local arms of global shipping agents and domestic shipping agents, towage companies, the locally active arms of ocean shipping lines, and a wide variety of Australian-owned and locally operated maritime service providers. Services provided by our members include ocean freight shipping, local seaport cargo handling, domestic harbour towage, Australian marine surveying, and domestic pilotage, among other services. Our members handle nearly all Australian containerised seaborne cargo. They also handle a considerable volume of our car, and our bulk commodity trades.

B. Executive summary

A. Global shipping is inherently cross-border in nature and, if it is subject to multiple different and conflicting rule-sets around the world, then it simply cannot carry world trade.

B. International shipping provides a vast range of benefits to ordinary, everyday Australian families and Australian businesses; it underpins our economy, our workforce, and our very way of life.

C. A global regime on the policy, compliance, and enforcement of maritime security already exists.

D. Imposition of burdens on shipping, and particularly transaction & reporting costs, can lead to a decreased quality of life for Australians (by e.g. making trade, and therefore the cost of living, more expensive than they would be otherwise).

E. Australia's shipping and international trade is already subject to extensive transaction costs (particularly through ongoing compliance costs and reporting); adding more burdens will put upwards pressure on the cost of living and create further difficulties for Australian families.

F. All rules / laws etc ought to involve thorough and genuine consultation and should be based on evidence etc (see our submission below under block "G"). What evidence is there, for example,

that policy goals can be achieved by unduly burdening ship masters with the potential for yet more criminal liability? Is there any rationale for reasonably believing that the benefits of imposing such liability outweigh the costs?

G. The various proposed criminal offences in the bill are unduly harsh, draconian, and are too broad in scope. The criminal offences ought to be reformed or restricted e.g.

   i. by being converted to some kind of civil wrong;

   ii. they should not be strict liability offences;

   iii. multiple penalties should not imposed for the same behaviour; and

   iv. they should not be so broad as to cover ***all*** employees of maritime industry participants.

H. To meet policy goals, without unduly adversely affecting the benefits that shipping provides to Australians, global shipping ought to be regulated:

   i. with the lightest possible touch;

   ii. without conflicting regulatory regimes (e.g. as between different nations, or as between Australian Federal and State / Territory jurisdictions; or even as between different rule-sets in the same jurisdiction); and

   iii. at the highest possible policy level (i.e. at the International Maritime Organization level).

C. Importance of shipping to Australia

3. International shipping is vitally important to the Australian economy – to our imports, our exports, to the jobs available to Australians and to our standard of living. While, of course, there are no areas of Australian life that are immune from review or reform, ocean shipping services are vital to Australia.

4. It therefore follows that minimal disruption to, or cost impositions on, ocean shipping is in the Australian national interest as any factors that adversely affect shipping thereby adversely affect the Australian economy and the quality of life of everyday Australian families.

5. As global shipping is inherently cross-border in nature, it is essential that the industry is governed at the highest levels of global governance; international trade simply could not take place on a large enough scale to support all the economies of the world if this principle is not fundamentally observed.

6. The United Nation's specialised agency, the International Maritime Organization, is the body that regulates international commercial shipping at the highest international level, and it should remain so.

7. Exports and imports of goods and services (including intangible services) accounted for 25.8% and 19.9% of our gross domestic product in 2022, according to World Bank Data (accessed 06 July 2023).

8. The combined volume and value of Australia's import and export cargo (2020-2021), according to the Bureau of Infrastructure and Transport Research Economics (BITRE) publication, "*Australian Sea Freight 2020-21*", was about 1.61 billion tons valued at about $601.4 billion. Approximately 99.93% by volume of all cargo that enters or leaves this country is carried by ocean-going ships.

9. There were 6,315 uniquely identified cargo ships which together made a total of 30,613 port calls at Australian ports in 2020–21. This included 6,219 unique cargo ships that made 17,303 voyages to Australian ports directly from overseas ports, according to the Bureau of Infrastructure and Transport Research Economics (BITRE) publication, "*Australian Sea Freight 2020-21*".

10. It was estimated in "*Australian Trade Liberalisation: analysis of the economic impacts,"* 2017 Centre for International Economics Report on Australian Trade Liberalisation for the Department of Foreign Affairs and Trade, that 1-in-5 Australian jobs were related to global trade. If that ratio still holds true today, then, based on August 2023 Australian Bureau of Statistics data which shows that over 14.1 million Australians were employed, global trade supports over 2.8 million Australian jobs.

11. It should now be obvious that ocean shipping services are vital to Australia. It follows that minimal disruption to, or cost impositions on, ocean shipping is in the State and the Australian national interest as any factors that adversely affect shipping thereby adversely affect State & Australian economies.

D. Governance of international shipping and maritime security rules

12. All activities, rules, policies, regulations, legislation, etc should be consistent and aligned with International Maritime Organization (IMO; a specialist agency of the United Nations.) treaties, rules, regulations and guidance.

13. The primacy of the IMO over international and national jurisdictions in the regulation of global commercial maritime traffic is an internationally-accepted – and an Australia-accepted – principle. It is consequently inappropriate for national- and sub-national governments to write laws in this area that conflict with or add additional governance to international maritime law.

14. This principle of IMO primacy is – or ought to be – especially true in Australia given that our nation is a founding member of the IMO, has held a seat on the IMO Council (the organisation's executive organ), has repeatedly sought re-election to that body and has signed up to the IMO Convention, the first article of which states that the purposes of the Organization are *"(a) to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade… [and]… (b)* ***to encourage the removal of*** *discriminatory action and* ***unnecessary restrictions by Governments affecting shipping engaged in international trade****".*

15. International shipping is already subject to an extensive maritime security regime that has been agreed by nation states around the world under the auspices of the International Maritime Organization.

16. International maritime security is regulated via Chapter XI-2 of the 1974 (as amended) International Convention for the Safety of Life at Sea (SOLAS) and the International Ship and Port Security Facility (ISPS Code) which entered into force on 01 July 2004. The Convention & Code create obligations for ships and port facilities with respect to their own security and the interface between them.

17. Obligations are placed on the ship owner / operator, the port, the personnel, and are overseen by the flag state and the designated shoreside authority, who have a responsibility to ensure security in their own jurisdiction(s). The key requirements are for the development of a ship specific security plan for every ship of 500 gross tons (a measure of the internal volume of the ship and not a measure of weight). There is also an obligation on ports to develop and implement a Port Facility Security Plan. Such plans are approved by national authorities and are subject to audit and review. The ISPS Code also sets out carriage requirements for equipment to track and identify ships, including automatic identification systems, and long-range identification and tracking.

18. There are a wide range of other shipping-related maritime security rules, such as those found in the 1982 (as amended) UN Convention on the Law of the Sea, the 1988 (as amended) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. Meanwhile, a wide range of bodies issue a variety of maritime security related information, guides, workbooks, systems, best practices etc.

19. There are a range of requirements on ships and shipping companies, such as having a company security officer, a ship security assessment, training and pre-employment checks on seafarers, on scene-security assessments, a ship security officer, duties and responsibilities for the officer of the watch and the gangway watch, and more.

20. In short, there is a vast and detailed range of international-shipping imposed security obligations ranging from the very top-most level of maritime law and policy (e.g. UN Conventions) down to detailed obligations and protocols (e.g. the gangway watch being required to keep an alert watch at all times of the gangway and other access points to a ship).

21. Shipping Australia notes the references to *"access"* and *"access to computer data"* et seq in the proposed new section 10 insert along with the proposed 10B and 10C i.e. the meaning of a cyber security incident, the meaning of unauthorised access etc; we also similarly note the various amendments giving effect to unlawful interference provisions in respect of computer security.

22. We note that there is already a very substantial body of international shipping and maritime law, practice and guidance related to maritime cyber-security as this is related to safe and responsible shipping, which is provided for under the IMO's *International Management Code for the Safe Operation of Ships and for Pollution Prevention* (ISM Code; adopted 1993). The ISM Code became mandatory from 01 July 1998 when SOLAS chapter IX (Management for the Safe Operation of Ships) entered into force.

23. Shipping Australia notes that the ISM Code at section 1.2.2 requires that all shipping companies have as an objective the assessment of all identified risks to their ships and that there should be the establishment of appropriate safeguards. The ISM Code at section 12.3 adds that a shipping company's safety management system should ensure compliance with all mandatory rules and regulations and that applicable codes, guidelines, and standards, as recommended by the IMO, flag state administrations, classifications societies and maritime industry organisations are taken into account.

24. Shipping Australia notes that the IMO has issued *MSC-FAL.1-Circ.3-Rev.2* "*Guidelines on maritime cyber risk management"* (07 June 2022). That document sets out a range of high-level principles, and refers shipping companies to a range of literature by (but not limited to) the industry bodies ICS, IUMI, BIMCO, OCIMF, Intertanko, Intercargo, Intermanager, WSC, and IACS, among others.

25. Shipping Australia also notes that these aforementioned industry associations have produced the *"Guidelines of Cyber Security Onboard Ships"*.

26. Shipping Australia further notes that the IMO has issued *Resolution MSC.428(98) of 2017* which states that an approved safety management system should take into account cyber risk management in accordance with the objectives and functional requirements of the ISM Code and that the maritime administrations of IMO member states should ensure that cyber risks are appropriately addressed in safety management systems.

27. For the purposes of policy and legal harmony across the 170 plus IMO member states in the world, it is essential that any Australian developments do not add any significant twists, or changes, or substantial deviations from international maritime law, policy and practice.

E. Governance of Australian shipping

28. It is imperative that Australian Federal / State / Territory rules, policies, guidance, laws etc are in harmony with each other so that we do not have situations in which different rulesets, interpretations of rules, or compliance methodologies, conflict in respect of the same situation. For instance, there are examples of ships having received Federal biosecurity clearance to enter Australian waters based on informed and substantive grounds assessment, only to be turned away by State authorities on narrow or state-specific rules. Allowance should be made when the substantive requirements are met.

29. All rules, policies, laws, guidance, regulations and the like, should be readily available and freely accessible (i.e. both easy to access and free of charge) by any member of the general public.

30. It is the view of Shipping Australia members that there is already a fully-formed and implemented international maritime security system and that any additional requirements that are imposed by Australia ought to be aligned with, and complementary, to the existing system.

31. It should also be borne in mind that the recent *Security of Critical Infrastructure Act 2018* reforms included the transport industry and there are overlaps with the *Transport Security Amendment (Security of Australia's Transport Sector) Bill 2024.*

32. Shipping Australia notes the presence in the existing and proposed legislation for regulated Australian ships to have exemptions from the requirement to have ship security plans, or to have an international ship security certificate within the meaning of the ISPS Code. We are opposed to these exemptions.

33. All ships ought to be subject to the same, minimum, set of security requirements. Even though we acknowledge that some vessels may not be travelling internationally – e.g. tugs, barges, some of the larger kinds of boats – they nonetheless interact with internationally-trading vessels. Operators and personnel aboard internationally trading ships ought to be able to have comfort in knowing that all vessels that interact with ships are subject to the same minimum-security standards.

F. Issues with reporting requirements

34. Shipping Australia is concerned that there should be no increase in additional reporting requirements.

35. It is by now well known that easing and simplifying trade promotes and increase in the well-being of populations around the globe.

36. ***Improved trade facilitation measures could result in a 3.7% decrease in maritime transport costs*** ("*Reduction of GHG emissions from ships*," submission to the Marine Environment Protection Committee No. 82 of 30 Sept to 04 October 2024 of the International Maritime Organization, Agenda Session Item 7, Report of the Comprehensive impact assessment of the basket of candidate GHG reduction mid-term measures – full report on Task 1, 26 July 2024, pages 21 and 67.

37. Trade transaction costs related to border procedures vary by circumstances / context / situation and studies suggest that directly and indirectly incurred trade transaction costs ***each amount to anywhere between one percent to 15 percent of the value of traded goods*** (See: "*Quantitative Methods for Assessing the Effects of Non-Tariff Measures and Trade Facilitation"* pp. 161-192 (2005), "*Benefits of Trade Facilitation: A Quantitative Assessment"*; Walkenhorst P, and Yasui, T; doi.org/10.1142/9789812701350_0009).

38. Assuming trade facilitation leads to ***a reduction in trade transaction costs of 1% of the value of world trade, then aggregate welfare gains are estimated at about USD$40 billion worldwide***, with all countries benefiting. See: *"Quantitative assessment of the benefits of trade facilitation,"* by Walkenhorst, P. and Yasui, T. in *"Overcoming Border Bottlenecks: the costs and benefits of trade facilitation,"* ISBN 978-92-64-05694, OECD 2009.

39. It is clear that various rules and procedures related to cross-border trade impose costs that adversely affect societies around the world. There is, of course, always a trade-off between benefits and costs. As a general proposition, it is nonetheless valid to argue that limiting the transaction costs on shipping to the absolute minimum while still meeting justifiable policy goals is sound transport & trade policy.

40. However, the reality is that shipping to / from Australia is subject to substantial unnecessary burdens.

41. Shipping Australia understands each vessel arriving and departing Australia must submit at least 37 separate sets of information submitted in ten ways as part of at least 19 regulatory reports to at least four separate government bodies (Source: "*Maritime Single Window; Current Reporting Flows*", Department of Infrastructure, circa 2022/ 2023).

42. Over 35,000 hours is spent every year in Australia on shipping-related reporting, and, on average, a vessel will spend two hours reporting when there are no issues and over six hours when there are issues (Source: "*Maritime Single Window; Current Reporting Flows*", Department of Infrastructure, circa 2022/ 2023).

43. Ships calling in Australia are already quite burdened with paperwork. There should be no additional reporting imposed on ships or shipping. If it is absolutely unavoidable that there is extra reporting, then these requirements should be streamlined with existing reporting and should be rolled into the Department of Infrastructure's Maritime Single Window project.

G. Principles for standard / rule / policy / law-making

44. Any proposal for significantly changing or creating rules, policies, regulations, legislation etc:

    a) should involve thorough and genuine consultation with industry;

    b) should not have any pre-determined outcome;

    c) should be based on evidence;

    d) should identify all reasonable courses of action, especially alternative courses of action and the option of taking no action at all, and whether there are any opportunities to simplify, consolidate, repeal, reduce, or reform existing rules, policies, regulations, legislation etc;

    e) should be subject to a thorough quantitative and qualitative analysis, which reviews costs and impacts of the proposal vs reasonable alternative courses of action and against taking no action;

    f) should have clear policy objectives that are capable of being achieved;

    g) should be imposed at the minimum level possible so as to achieve necessary policy objectives and should use the best available regulatory techniques and technologies that do not entail excessive or unnecessary costs, delay, administrative compliance or use of resources;

    h) should be subject to an appropriate review mechanism at an appropriate interval after entry into force.

H. Criminal offences, penalties, and related matters

45. Shipping Australia notes with some concern the broad scope of the criminal offences and the size of the penalty. For instance, the proposed section 172(4) makes it an offence for the master of a security regulated ship to become aware of a maritime cyber security incident and fail to report it to the Secretary of State as soon as possible and, in any event, within 12 hours of so becoming aware. The penalty is 200 penalty units which is currently AUD$22,000 (being $110 x 200).

46. Given that being convicted of a crime can have serious lifetime repercussions and given that the trigger for criminal liability is the state of becoming "*aware*", it is concerning that there is no definition in the proposed text or the existing legislation of what *"becoming aware"* actually means.

47. It also seems unjust and impractical to criminalise a ship master in this aspect – there is no particular reason why such a burden ought to fall on a ship master given that ship masters (who are expert in navigation, seafaring or cargo operations) are not experts in cyber security. It would seem much fairer and more practical for such an offence – if such is even required – to fall upon the company or the appropriate company security officers rather than upon a ship master.

48. On a similar theme, we note section 176(5) imposes criminal liability on "*an employee*" of a "*maritime industry participant*". A "maritime industry participant" under section 10 of *the Maritime Transport and Offshore Facilities Security Act 2003* includes port operators, port facility operators, ship operators, contractors, and a "person who conducts a maritime-related enterprise".

49. Under the proposal, as it is currently written, if any of these persons are:

    a. employed;

    b. by a maritime industry participant; and

    c. "*become aware*" of…

        i. a maritime transport security incident; that

        ii. had, is having, or is likely to have, a significant impact;

        iii. on the availability of a maritime asset; and

    d. does not immediately report that incident to the maritime industry participant;

then that person will have committed an offence.

50. The current text of the proposed amendments as written above would impose a criminal liability, with escalating fines, on ***any*** employee. Some of these organisations employ hundreds, even thousands, of Australians. Is it really the Parliament's intention to impose criminal liability for non-reporting on the most junior employee who has just joined the workforce after leaving full time education and who somehow becomes aware of a cyber-security incident? Or upon a person who spends his / her days cleaning a facility? Or any other employee in the workforce who may have become aware of the incident and is then theoretically obligated to report? How would such employees, who would not be maritime operations experts, even be able to assess how likely it is that a maritime transport security incident would likely have a significant impact?
51. Shipping Australia is also concerned that these offences appear to be offences of strict liability i.e. they do not appear to require any element of intent, fault, recklessness, or any other mental state. This proposed legislation appears to criminalise accidents e.g. forgetting to report. That could be quite a foreseeable and very human consequence of being in a major cyber security incident and especially, as in the case of a ship master, while simultaneously being concerned with the safety of lives aboard.
52. Given that there can be long-term consequences for picking up a criminal record, these provisions are surely far too broad in their scope and go far beyond what is necessary. They are draconian as written and ought to be reduced in their scope / coverage and should not be strict liability offences.
53. Additionally, it seems rather harsh to impose criminal liability for non-reporting especially if the person is not employed in a cyber-security or information-reporting role. We would suggest that if there must be a penalty then a non-criminal alternative, such as a civil penalty, be imposed instead.
54. We are also concerned that ship masters, and other personnel, seem to be exposed to a repeated criminal liability and penalty for the same matter. For instance, the master would become liable for a 200 penalty unit fine at 12 hours and again at 72 hours after becoming "aware". We have similar concerns in relation to the proposed sections 173(4) and (5) which present similar issues in response of the "ship operator" for a security regulated ship. It would seem more just that, if a penalty is to be imposed, it should only be imposed once rather than twice.
55. The master theoretically has a defence in believing upon reasonable grounds that the Secretary of State and the Australian Signals Directorate are already aware of the incident; it is not clear how a master might become aware given that he or she will (a) be busy with dealing with the effect of a cyber security incident (and this could be an emergency situation) (b) could be located some distance off the coast. Nor, on the same point, is it clear how any employees who might be aware of maritime security related incident but who are not in security, navigation, info-tech, or other reporting roles would be able to report, or would even know that they had to report.

Submission authorised by:

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