



INFORMATION, ANALYSIS  
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest  
No. 63 2003–04

## Maritime Transport Security Bill 2003

ISSN 1328-8091

© Copyright Commonwealth of Australia 2003

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

## **Inquiries**

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646

Information and Research Services publications are available on the ParlInfo database.

On the Internet the Department of the Parliamentary Library can be found at:

<http://www.aph.gov.au/library/>

Published by the Department of the Parliamentary Library, 2003

INFORMATION AND RESEARCH SERVICES

Bills Digest  
No. 63 2003–04

Maritime Transport Security Bill 2003

Angus Martyn and Morag Donaldson  
Law and Bills Digest Group  
27 November 2003

## Contents

Purpose.....	1
Background.....	1
The amendments to the SOLAS Convention.....	1
Australia and maritime transport.....	2
The impact of the Bill .....	3
Main Provisions.....	6
Part 1—Preliminary .....	6
Part 2—Maritime security levels and security directions .....	9
Part 3—Maritime security plans .....	11
Part 4—Ship security plans and International Ship Security Certificates.....	12
Part 5— Regulated foreign ships .....	14
Part 6—Maritime security zones.....	16
Part 7—Other security measures.....	16
Part 8—Powers of officials .....	18
Part 9—Reporting maritime transport security incidents.....	21
Part 10—Information-gathering.....	21
Part 11—Enforcement.....	22
Part 12—Review of decisions.....	24
Part 13—Miscellaneous .....	24
Concluding Comments .....	25
Endnotes.....	27

# Maritime Transport Security Bill 2003

**Date Introduced:** 19 September 2003

**House:** House of Representatives

**Portfolio:** Transport and Regional Services

**Commencement:** Most of the Act commences on the day on which it receives Royal Assent, including some of the operative provisions. The remaining operative provisions commence on a single day to be fixed by proclamation or, failing that, 12 months after the Act receives Royal Assent.

## Purpose

To introduce a comprehensive security framework for Australian ports, Australian shipping and foreign shipping in Australian waters.

## Background

### The amendments to the SOLAS Convention

In December 2002, Australia and other members of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 ('the SOLAS Convention') agreed to significant amendments to the SOLAS Convention. Amongst other things, the amendments incorporated an entirely new agreement, the International Ship and Port Facility Security Code ('the ISPS Code'). In part, the ISPS Code is intended to provide a standardised international framework for security-related risk evaluation and management in the maritime sector. The ISPS Code contains detailed requirements for Contracting Governments, port authorities and shipping companies in a mandatory section (Part A), together with a series of guidelines about how to meet these requirements in a second, non-mandatory section (Part B).

According to the International Maritime Organisation ('the IMO'), the measures adopted in December 2002 represent:

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

the culmination of just over a year's intense work by IMO's Maritime Safety Committee and its Intersessional Working Group on Maritime Security since the terrorist atrocities in the United States in September 2001.<sup>1</sup>

It is likely that the amendments to the SOLAS Convention will enter into force internationally on 1 July 2004. The amendments were tabled before the Australian Parliament on 14 May 2003. The [National Interest Analysis](#) accompanying the tabling stated:

Failure to accept the IMO maritime security measures could seriously disadvantage Australia's trading interests, particularly to the USA. This is because international shipping companies may be reluctant to put their ships into ports that have not implemented the security measures for fear of being subject to delays at ports which have implemented the measures. Overseas ports that have implemented the measures may delay or refuse entry to ships coming from ports that do not comply with the measures.<sup>2</sup>

Section 4.45 of Part B of the amendments to the SOLAS Convention provides that even ships registered in States not party to the SOLAS Convention should be treated in accordance with the amendments to the SOLAS Convention and thus subject to the various maritime transport security arrangements implemented by Contracting Governments.

## Australia and maritime transport

Some statistics on maritime transport are set out in the Explanatory Memorandum to the Bill (at page 6), including the facts that:

- measured by weight, 99% of Australian trade (on-going and in-coming) goes by ship
- measured by value, 73.5% of trade goes by ship
- measured by volume, 99% of Australian trade is transported by foreign flagged vessels
- there are about 70 Australian flagged vessels engaged in maritime transport within and from Australia
- by dollar value, the most significant maritime transport partners for imports and exports are Japan and the United States of America
- each year, about 10,000 maritime transport voyages are made to, from and within Australia, with 22,000 calls at port
- about 280,000 foreign seafarers and about 230,000 cruise-ship passengers visit Australia each year, and

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- there are some 70 ports in Australia handling international and interstate voyages.

## The impact of the Bill

In his second reading speech, the Minister for Transport and Regional Services said of the Bill:

In Australia the new arrangements will affect around 300 port facilities in about 70 ports and 70 Australian flagged ships involved in international and interstate trade. Consistent with the existing arrangements for protection of our critical infrastructure generally, the maritime industry will be responsible for funding the security measures identified in their security plans. While the Australian Government recognises that the cost to the maritime industry will be significant, security costs are now part of the normal cost of doing business in the changing global environment.

Overall, the Bill strikes the right balance between prescription and flexibility while enabling our national security objectives to be met. It will ensure that our reputation as a safe and secure trading nation is maintained.<sup>3</sup>

One contentious issue surrounding the Bill involves the cost of implementing the security measures, particularly the question of who should bear the cost. The Explanatory Memorandum comments that (emphasis added):

Due to the urgency of the task and the international compliance deadline, there has not been time to subject the regulatory model proposed in the Bill to detailed quantitative and qualitative research to determine the impact of the Bill on the Australian maritime transport industry, other jurisdictions, and consumers. ...

...

At this early stage of implementation, it is extremely difficult to estimate the cost of enhancing security at the approximately 70 ports which will become security regulated ports, and the up to 300 port facilities within these ports. ...

...

Given [various] caveats, the figures below must be treated with caution. They are based on an early estimate made by an independent consultant engaged by DOTARS [Department of Transport and Regional Services], who undertook a desktop audit of potential security costs to 50 Australian ports based on a prescriptive regulatory model. ...

...

*In summary, total set-up costs to security regulated ports, including the port facilities within these ports, could be up to \$300 million with ongoing costs up to \$90 million p.a.*

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Increasing from [maritime] security level 1 to 2 [see **clauses 21-26** of the Bill] could mean introducing extra security measures such as additional patrols, limiting access points, increasing searches of persons, personal effects and vehicles, denying access to visitors, and using patrol vessels to enhance waterside security. The cost of such measures could be about \$5,000 per day for each port or port facility concerned. Port and port facility operations should be able to continue without significant delays at this level.

Maritime security level 3 is unlikely to be imposed on a national basis. ...

The costs of augmenting security at maritime security level 3 could be considerable and could result in operations being slowed down. For example, a container terminal could lose about \$100,000 per day in revenue from suspension of container ship operations. Costs at liquid bulk terminals (for example, petroleum products, gas) and dry bulk terminals (for example, coal, iron ore, grain) would be considerably less as there are less people and equipment involved in the operations of such terminals.<sup>4</sup>

As well as costs to port operators, there will also be costs to Australian shipping. The Explanatory Memorandum estimates these at an initial cost of \$13 million, with annual ongoing expenses of \$6 million.<sup>5</sup>

The [submissions](#) made by State governments and key industry stakeholders in the maritime transport and ports sector to the inquiry by **the Senate Rural and Regional Affairs and Transport Legislation Committee** ('the Senate Committee') into the Bill generally support the need for enhanced maritime transport security. However, they express concerns about:

- the need for ongoing consultation about the implementation of maritime security measures in ports, port facilities and ships
- the lack of specificity in the Bill which may be overcome by regulations (for example what constitutes expected standards of protection at the various security levels, and the definition, role and liability of a 'ship operator' or 'shipping agent')
- the Bill being too closely modelled on aviation models and therefore failing to recognise maritime operations properly (for example, the Bill does not take into account the fact that the Harbour Master in each port has statutory and regulatory powers under State law in relation to safety of vessels and the efficient operations of ports. The Bill also does not properly take into account the role of port operators in whole-of-port security arrangements)
- concepts in the Bill being at variance with provisions in the ISPS Code
- the Bill failing to provide for the role of seafarer religious and welfare organisations in the maritime transport industry

***Warning:***

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



- the reliability (and authenticity) of documentation for foreign ships and their crews
- the security arrangements for ports used by naval and other defence vessels (including foreign vessels), which vessels are otherwise exempted under the Bill, and
- the expense involved in implementing the security measures and whether affected bodies will be able to recover those costs.<sup>6</sup>

Notably, the Queensland Government applauds the Australian Government's decision to extend the security measures contained in the Bill to foreign flagged ships on intra-state voyages.<sup>7</sup> Also, the Maritime Union of Australia and the Australian Institute of Marine and Power Engineers express extreme disappointment that their views have not been considered to date.<sup>8</sup>

Many of the concerns raised in the submissions to the Senate Committee are also raised in submissions made by State governments and industry stakeholders to the [inquiry](#) by **the Joint Standing Committee on Treaties** into the implementation of Australia's obligations under the amendments to the SOLAS Convention, including consideration and adoption of the ISPS Code. Again the [submissions](#) (including ones from interested parties who did not make submissions to the Senate Committee) support the need for increased security measures, and express concerns about:

- costs
- differences between the Bill and the ISPS Code
- the need for consultation on draft regulations
- the Bill not reflecting a proper understanding of international maritime shipping arrangements or of some ISPS Code implementation measures
- port operators designated under the Bill having particularly extensive areas of liability but limited powers of enforcement
- whether the exemption given to Australian Defence Force facilities and vessels is appropriate, and
- the practical implications of possible conflicts between the Bill and State legislation, particularly in relation to navigation and port operations.

As noted in some of the submissions, significant portions of the Bill are closely modelled on provisions of the Aviation Transport Security Bill 2003. The major similarities include the powers of the Secretary of DOTARS, the development and approval process for security plans, screening and clearance provisions, the powers of various security officials, reporting and information gathering requirements and enforcement provisions. The

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

various offences and penalties applicable to them are also broadly similar to those in the Aviation Transport Security Bill 2003. The majority of offences are ‘strict liability’ offences, meaning that a fault element (intention, recklessness or negligence) does not have to be proved in order for an offence to occur. However, many of the strict liability offences contain a defence of ‘reasonable excuse’; the defendant bears the evidential burden of demonstrating that any act or omission on his or her part in committing the offence was in fact reasonable in the circumstances.

The Bill was passed by the House of Representatives on 8 October 2003.<sup>9</sup>

## Main Provisions

### Part 1—Preliminary

**Subclause 3(1)** of the Bill provides that the purpose of the Act (when passed) is ‘to safeguard against unlawful interference with maritime transport’. The term ‘unlawful interference with maritime transport’ is defined in **proposed section 11**. Neither the SOLAS Convention nor the ISPS Code contain this term—it appears that the term is largely derived from a similar term in the Aviation Transport Security Bill 2003. Apart from key actions, such as ‘taking control of a ship by force, or threat of force, or any other form of intimidation’ (ie hijacking), the definition in **proposed paragraph 11(a)** also includes:

committing an act, or causing any interference or damage, that puts the safe operation of a port, or the safety of any person or property at the port, at risk

It is arguable that the drafting allows for a rather broad range of activities to be deemed to be ‘unlawful interference with maritime transport’. For example, an unauthorised on-site demonstration that impedes traffic flow would fall within the definition. It is notable that the definition is broader than the definition of ‘unlawful interference with aviation’ in proposed section 10 of the Aviation Transport Security Bill 2003 which does not refer to ‘safety of property’.

**Clause 6** provides that ‘extended geographical jurisdiction – category B’ of section 15.2 of the *Criminal Code* applies to offence provisions of the Bill. Thus an offence may still be committed where all the relevant conduct and/or result of conduct occurs outside Australia,<sup>10</sup> but there is still some Australian connection – eg where the conduct involves an Australian-registered ship or the offending conduct is committed by an Australian citizen, resident or company. Regulations made under the proposed Act will have similar extended geographical jurisdiction. As noted by the Explanatory Memorandum, no offence will occur if the relevant conduct is done by a non-Australian person or company and the conduct is not a crime under the law of the foreign country where it occurs: see subsection 15.2(2) of the *Criminal Code*.

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**Clause 7** provides that the Commonwealth and State/Territory governments are bound by the Bill, but only the Commonwealth is exempt from prosecution. Note that the implication in the Explanatory Memorandum that State/Territory governments are exempt from prosecution is wrong: see **subclause 7(2)**.<sup>11</sup>

State or Territory laws relating to maritime transport security continue to apply except to the extent (if any) that they are inconsistent with the operation of the Bill: **clause 8**. As noted in the background section to this Digest, there is concern about the specifics of how State/Territory law, particularly as it applies to ports and surrounding navigation areas, will interact with the various requirements of the Bill.

**Subclause 9(1)** provides that warships or other ships ‘operated for naval, military, customs or law enforcement purposes by Australia or by a foreign state’ are not subject to the Bill, unless a specific provision provides to the contrary. The same exemption applies to ships ‘owned, leased or chartered by, or otherwise in the operational control of’ the Commonwealth or State/Territory governments and being used wholly for non-commercial activities. It also applies to ports, or parts of ports, under the exclusive control of the Australian Defence Force (ADF). The ADF and the Australian Customs Service also fall outside the definition of a ‘maritime industry participant’,<sup>12</sup> as does any Commonwealth agency prescribed in the regulations: **subclause 9(2)**. The exclusion of warships and other Government vessels is consistent with the amendments to the SOLAS Convention and the ISPS Code.<sup>13</sup> However, it is not obvious that the amendments to the SOLAS Convention and the ISPS Code provide for exemptions to military port facilities and the like.

Terms are defined in **clause 10**.

The term ‘port’ is defined in **clause 12**. Most significantly, open water outside the port where ships anchor or otherwise wait before entering a port also fall within the definition of ‘port’.<sup>14</sup> This is consistent with the amendments to the SOLAS Convention.<sup>15</sup>

The terms ‘security regulated port’ and ‘security regulated ship’ are defined in **clauses 13 and 15** respectively. The various security obligations in the Bill apply to such ports and ships.

A port, or part of it, becomes a ‘security regulated port’ when the Secretary of DOTARS publishes a written notice in the *Gazette* declaring it to be so.<sup>16</sup> A port must have some operational connection with a security regulated ship to be so declared: **subclause 13(1)**.

The Secretary *may* publish a notice in the *Gazette* designating a person as the ‘port operator’ for a ‘security regulated port’: **subclause 14(1)**. In designating the port operator, the Secretary must ‘take into account’ the ability of the person to undertake the functions of a port operator, the physical and operational features of the port, and the views of the person or persons (currently) responsible for managing the operations of the port: **subclause 14(2)**. While the provision refers specifically to a ‘person’, presumably where

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

a corporation currently manages port activities (eg Port of Melbourne Corporation), an officer of that corporation can become the designated port operator.<sup>17</sup> There is no provision in the Bill for a person to refuse designation as a port operator. A port operator has extensive obligations under the Bill. It is unclear what happens if the Secretary fails to designate any port operator for a security regulated port, although presumably this is more a theoretical than likely possibility.

The Secretary does not declare a ship to be a 'security regulated ship'. A ship is a 'security regulated ship' if it meets the criteria set out in **clause 16** ('regulated Australian ship') or **clause 17** ('regulated foreign ship'). Generally, a ship is a 'security regulated ship' if it is a passenger ship; a cargo ship of 500 or more gross tonnes; a mobile offshore drilling unit (ie not attached to a seabed); or otherwise a ship of a kind prescribed in the regulations.

If the ship is an Australian ship, it must be 'used for overseas or inter-State voyages' to be a 'security regulated ship': **proposed paragraph 16(1)(a)**. While a particular Australian cargo ship of more than 500 tonnes normally engages in interstate voyages, on occasion it may only do intrastate trips. The vessel would not be a 'security regulated ship' on intrastate voyages. If the ship is a foreign ship, it only becomes a 'security regulated ship' when it is in Australian waters (defined in **clause 10** to include Australia's territorial sea, waters on the landward side of that sea, and inland waters prescribed in regulations), or in (or intending to proceed to) an Australian port: **subclause 17(1)**. The regulations may provide that a ship (which would otherwise meet the definition) is *not* a 'regulated Australian ship' or a 'regulated foreign ship': **subclauses 16(2) and 17(2)**. Note that **clause 9** already provides that certain ships (particularly naval vessels) are exempt from the Bill.

**Clause 18** deals with general defences to offences committed under the Act (when passed). **Subclause 18(1)** provides that a person does not commit an offence if the offence arose because the master of a ship engaged in conduct in the operation or control of a ship. The master's conduct must be 'reasonable' in circumstances where the conduct was necessary to protect the safety or security of the ship or its cargo, a person on or off the ship, another ship, or a port, port facility or other installation within a port. This defence seems to be slightly broader than that contained in Regulation XI-8 of the SOLAS Convention, which only mentions the 'safety and security of the ship' as giving rising to an imperative on the part of the ship's master. Further, a person does not commit an offence where he or she is required to do something in compliance with a 'security direction'<sup>18</sup> or a 'control direction'<sup>19</sup>: **subclauses 18(2) and (3)**.

**Clause 19** provides that a person may communicate with a ship operator by communicating with the shipping agent for the ship.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Part 2—Maritime security levels and security directions

There are three maritime security levels ranging from level 1 (the default level) up to level 3 (the highest level). Maritime industry participants will be required in their security plans (see **Part 3** of the Bill) to include information on the measures to be undertaken at each level and must implement those measures according to the security level declared by the Secretary to be in force at the time. As is the case for the Aviation Transport Security Bill, the Secretary has the power to issue security directions that may require measures over and above those contained in security plans.

**Clause 21** provides that unless a declaration is made under **proposed section 22**, maritime security level 1 is in force. Under **subclauses 22(1) and (2)**, the Secretary may declare by writing that maritime security level 2 or 3 is in force for a security regulated port (or part thereof, a regulated Australian ship, a regulated foreign ship, a maritime industry participant and/or operations conducted by a maritime industry participant. **Subclause 22(3)** states that the Secretary can only declare that security level 2 or 3 applies if ‘a heightened risk to maritime transport has been identified’ and that risk means it is ‘appropriate for a higher level of security’ to apply. **Subclause 22(3)** varies somewhat from the relevant definition in the ISPS Code. Under the ISPS Code, level 3 is appropriate when ‘a security incident is probable or imminent’.<sup>20</sup> The security level applicable to a particular port also applies to all security regulated ships and industry participant operations within the defined port boundaries. The declaration remains in force for the period (if any) specified in the declaration or until it is revoked by the Secretary: **clause 23**. If the declaration applies to a port, **clause 24** provides that the declaration applies to all operations and security regulated ships in the port. Any additional security direction given by the Secretary does not affect the security level applying to any ship, port etc: **clause 26**.

**Clause 27** provides that where security level 2 or 3 is declared to apply to a security regulated port, the Secretary must ‘as soon as practicable’ notify the port operator and any industry participant operating within the port<sup>21</sup> of the changed security level. The port operator must in turn notify various persons as soon as practicable, including the master of every security regulated ship within the port or about to enter the port. A failure by the port operator to fulfil his or her notification obligations is an offence and carries a penalty of 10 penalty units (or \$1,100).<sup>22</sup> It is a strict liability offence, but does not apply if the port operator has a reasonable excuse for not complying with the notification requirements. A failure by a port operator to notify relevant persons of a *revocation* of a declaration of a security level 2 or 3 carries a substantially higher penalty—50 penalty units (\$5,500): **clause 31**.

The Secretary’s obligations to notify specific persons of a security level 2 or 3 declaration applicable to particular ships, designated areas within ports and maritime industry participants are covered in **clauses 28-30**. Port operators have no notification obligations regarding these declarations.

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**Clause 32** provides that the regulations may prescribe particular requirements relating to the notification and revocation of declarations. The Explanatory Memorandum suggests that this ‘may include, for example, requirements for electronic or oral notification’.<sup>23</sup>

**Clauses 33-40** deal with ‘security directions’. These require additional security measures to be implemented or complied with. The Secretary must not issue a security direction unless ‘it is appropriate to do so because an unlawful interference with maritime transport is probable or imminent’: **subclause 33(3)**. There is no specific requirement for the Secretary’s decision to be made on reasonable grounds. The ‘probable or imminent’ requirement corresponds to security level 3 in the ISPS Code.

Under **clause 35**, security directions may be issued to a very wide range of persons, including maritime industry participants or employees of such participants, passengers or anyone at a security regulated port. In the latter two categories, the Secretary is taken to have given the direction if it is clearly displayed at the place where the direction applies. If the Secretary requires, port operators are obliged to ‘communicate all or part of the direction’ to specified maritime industry participants operating within the relevant port(s). A failure by the port operator to fulfil such obligations is an offence and carries a penalty of 50 penalty units (\$5,500). It is a strict liability offence, but does not apply if the port operator can establish a reasonable excuse. **Subclause 36(2)** provides that if the Secretary gives a direction to a ship operator, that person must communicate the direction to the master of the relevant ship. Again offence provisions apply.

A security direction remains in force for 3 continuous months, unless it is revoked by the Secretary: **subclause 37(3)**. There is nothing to prevent the Secretary immediately reissuing a direction (after the first 3 months has passed), provided the conditions set out in **clause 33(3)** continue to exist. The Secretary may revoke a direction at any time, but **subclause 38(1)** provides that the Secretary must revoke a direction if the unlawful interference with maritime transport giving rise to the direction is ‘no longer probable or imminent’. Where the Secretary gave a security direction to a person, the Secretary must notify that person of the revocation: **subclause 38(2)**.

Similar to provisions in the Aviation Transport Security Bill, **clause 39** provides a sliding scale of penalties for failing to comply with security directions ranging from 200 penalty units for a port operator, ship operator or port facility operator, to 50 penalty units for any other person. The ‘failure to comply’ offence is one of strict liability, but does not apply if a person has a reasonable excuse.

A security direction may include confidentiality requirements. Under **clause 40**, a person to whom a direction has been given and who fails to comply with confidentiality requirements commits an offence. There is no indication in the Bill as to what those requirements may be. However, it should be noted that a person does not commit an offence if the disclosure is made to a court, tribunal, ‘authority or person that has the power to require the production of documents or the answering of questions’: **proposed**

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**paragraph 40(1)(c)**. The offence carries a penalty of 20 penalty units (\$2,200). There is no ‘reasonable excuse’ defence.

### Part 3—Maritime security plans

Maritime industry participants, including port operators, port facility operators and other industry participants prescribed in regulations are required have a maritime security plan: **clause 42**. The content of such plans is set out in **clauses 47-48**. Key elements include: a security assessment for the participant’s operation and the detailing of what security activities or measures are to be undertaken or implemented for maritime security levels 1, 2 and 3. These requirements are consistent with the SOLAS Convention and the ISPS Code.

A participant, who is required to have a maritime security plan but who does not have one in force, commits an offence under **clause 43**. The penalty for a port operator or port facility operator is 200 penalty units (\$22,000), or 100 penalty units (\$11,000) for any other maritime industry participant. Similar penalties apply if a participant has a plan in force but ‘fails to comply’ with it: **clause 44**. The offences under **clauses 43 and 44** are strict liability offences, but they do not apply if the participant has a reasonable excuse.

**Clause 45** sets out the responsibilities of participants in relation to the maritime security plans of other participants. There are two broad responsibilities. First, a participant ‘must not engage in conduct that hinders or obstructs compliance with the maritime security plan of another participant’. Notably, **the Bill** does not indicate if conduct which may be reasonable but in some way ‘hinders or obstructs compliance’ is acceptable. Secondly, if a participant’s plan ‘covers the activities’ of any other participants, those other participants must ‘take all reasonable steps to comply with the [first participant’s] plan’ *if* they have been given all the relevant parts of the plan. Where any ‘other participant’ is required to have a maritime security plan, the obligation to take reasonable steps to comply with the first participant’s plan only occurs if the other participant has agreed in writing to do so: **proposed subparagraph 45(3)(b)(iii)**. A participant who fails to comply with the maritime security plans of other participants does not commit an offence, but he or she may be subject to an enforcement order issued by the Secretary under **proposed section 189** or an injunction granted by the Federal Court under **proposed section 197**.

**Clauses 47-49** set out the content and form of maritime security plans.

**Clauses 50-59** deal with how maritime security plans are to be approved, varied, cancelled etc. If the Secretary is satisfied that the plan ‘adequately addresses’ the requirements in **proposed sections 47-49**, he *must* approve the plan. Otherwise he must refuse approval, giving reasons for doing so: **clause 51**. The Secretary ‘may take account of existing circumstances as they relate to maritime transport security’: **subclause 51(3)**. **Clause 52** provides that if the Secretary approves a plan, the plan comes into force at the time of approval. If the Secretary becomes satisfied that an approved plan no longer ‘adequately

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

addresses' the requirements of **proposed sections 47-49**, the Secretary may direct the participant in writing to vary the plan: **subclause 53(1)**. If the participant fails to vary the plan, the Secretary *must* cancel the approval of the plan: **subclause 53(4)**.

A participant may revise a maritime security plan (**clause 54**), but the revised plan is subject to approval by the Secretary under **clause 51**. The Secretary may also direct a participant to revise a plan if the Secretary is no longer satisfied that the existing plan 'adequately addresses' the requirements in **proposed sections 47-49**: **clause 55**.

Maritime security plans must be revised every 5 years: **clause 56**.

If the Secretary is not satisfied that an existing plan is adequate, and if he is satisfied that it is inappropriate for the plan to be varied or revised, the Secretary must cancel the plan: **clause 57**. The Bill provides no guidance as to when variation or revision would be inappropriate.

Under **clause 58**, cancellation of the plan can also occur through the accumulation of a certain number of demerit points. (For an explanation of the demerit point system, see the discussion later in this Digest in relation to **clause 198**).

#### Part 4—Ship security plans and International Ship Security Certificates

**Part 4** only deals with regulated Australian ships. Foreign ships are covered in **Part 5**.

All regulated Australian ships must have a security plan: **clause 61**. The term 'regulated Australian ship' is defined in **clause 16** (including the requirement that the ship be 'used' for overseas or interstate voyages).<sup>24</sup>

If a regulated Australian ship is being used for maritime transport and there is no ship security plan in force for the ship, the ship operator commits an offence under **clause 62**. Likewise if the ship is being used for maritime transport and there is a ship security plan in force for the ship but the ship is not operated in accordance with the plan, the ship operator commits an offence under **clause 63**. The penalty for both offences is 200 penalty units (\$22,000). Both offences are strict liability offences, but do not apply if the operator has a reasonable excuse. The term 'maritime transport' is not defined in the Bill, so there may be problems defining the scope of this offence.

**Clauses 64-65** provide that regulated Australian ships and maritime industry participants must not hinder or obstruct compliance with the ship security plan of another ship. However, they are not obliged to comply with any security plan of another ship. These clauses do not create offences, but if the operations of a regulated Australian ship or an industry participant hinders or obstructs compliance with a ship security plan, the Secretary may issue an enforcement order under **proposed section 189** or the Federal Court may grant an injunction under **proposed section 197**. (These provisions are similar

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



to the requirements to comply with other participants' maritime security plans in **clause 45**).

**Clauses 66-68** deal with the content and form of ship security plans. **Clauses 69 to 78** set out how the plans are to be approved, varied, cancelled etc. (These provisions are similar to those relating to maritime security plans in **clauses 50-59**).

**Clauses 79-87** cover International Ship Security Certificates (ISSCs). ISSCs are a key part of the 2002 amendments to the SOLAS Convention discussed in the background section of this Digest. As the name implies, an ISSC certifies that a ship's security plan and associated security equipment comply with the relevant parts of chapter XI-2 of the amended SOLAS Convention and the ISPS Code.

All regulated Australian ships being used for maritime transport must have an ISSC (or 'interim' ISSC in force for the ship): **clause 79**. Otherwise, the relevant ship operator commits an offence with a penalty of 200 penalty units (\$22,000): **clause 80**. It is a strict liability offence, but does not apply if the operator has a reasonable excuse.

**Clause 82** provides that the Secretary must give a ship operator an ISSC for a regulated Australian ship if the operator has applied for an ISSC, there is a ship security plan in force for the ship, and the ship is ISSC verified. **Clause 83** provides that a ship is 'ISSC verified' if a maritime security inspector has inspected the ship, the inspector has verified that the ship meets the requirements determined in writing by the Secretary (including the time in which the ship must be inspected). In setting these requirements, the Secretary must 'have regard to the obligations set out in the ISPS Code': **subclause 83(2)**. An ISSC lasts for 5 years unless the Secretary cancels it, the ship operator is no longer the operator for the ship, the ship security plan has ceased to be in force or the ship is no longer ISSC verified: **clauses 84-85**.

Pending ISSC verification, the Secretary may give the ship operator an interim ISSC if certain conditions are met: **clause 86**. An interim ISSC is valid for up to 6 months. Section 19.4.1 of the ISPS Code allows for interim ISSCs, but only in certain circumstances (which are not reflected in **clause 86**).

Where the master of a regulated Australian ship makes a false or misleading statement in connection with whether an ISSC or interim ISSC is in force for the ship, he commits an offence under **clause 87**. The offence carries a penalty of 50 penalty units (\$5,500) and involves a complicated system of strict liability and defensible provisions.

**Clause 88** enables the Secretary to delegate of any of his **Part 4** (Ship security plans and ISSCs) powers and functions to a person who both satisfies criteria to be prescribed in the regulations and is 'engaged' by a 'recognised security organisation'. The term 'recognised security organisation' is not defined in the Bill (except insofar as **subclause 88(2)** provides that the Secretary 'may determine in writing that an organisation is a *recognised security organisation*'). The delegate must comply with any directions of the Secretary. The

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Secretary may also authorise a delegate to conduct inspections of ships: **clause 89**. Where the delegate inspects a ship, he or she is taken to be a maritime security inspector for the purposes of proposed subsection 83(1). The Explanatory Memorandum comments:

This provision is to allow for suitably qualified organisations to carry out the functions of approving ship security plans, ISSC verification and issuing ISSCs. ... it may be the case that a recognised security organisation is authorised to carry out ISSC verifications but that the Secretary continues to issue the ISSC on the advice of the recognised security organisation.

For the time being, the Australian Government intends that the Secretary will exercise all of the functions and powers described in this Part and will not delegate any functions to a recognised security organisation. Such delegation may be required in the future and this Division has been included in the Bill to allow for that, if required.<sup>25</sup>

The provision for delegation under **clause 88** seems consistent with section 19.1.2 of the ISPS Code.

## Part 5— Regulated foreign ships

**Subclause 91(1)** requires that the ship operator for a regulated foreign ship must have a valid ISSC or an approved ISSC equivalent, for the ship and ensure that the ship is carrying the 'required ship security records'. The term 'required ship security records' is not defined in the Bill, but **clause 91** is consistent with Chapter XI-2/9.2 of the SOLAS Convention (being one of the recent amendments) and section 10 of the ISPS Code. The Secretary decides what kinds of certificates are considered to be 'an approved ISSC equivalent': **subclause 91(3)**.

**Clause 92** requires the master of a regulated foreign ship to provide certain information before the ship enters Australian waters, a port (whether or not it is a security regulated port), or a maritime security zone within a port. The regulations may provide that different pre-arrival information requirements apply in different places or areas. The amendments to the SOLAS Convention and the ISPS Code do not explicitly contain provisions allowing such information to be requested if a foreign ship wishes to enter territorial waters without intending to enter a port. However, Article 25(1) of the [United Nations Convention on the Law of the Sea, 1982](#) ('UNCLOS') allows a coastal state to take necessary steps 'to prevent passage [of a ship through its territorial waters] which is not innocent'. Article 25(3) permits a coastal state 'without discrimination in form or in fact among foreign ships, [to] suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises'. Importantly, the suspension must apply to all foreign ships.

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**Clause 93** provides that the master of a regulated foreign ship must allow a maritime security inspector to board the ship for inspection. (The powers of the inspector are set out in **Division 2 of Part 8 of the Bill**). By comparison, Regulation XI-2/9.2.5 of the SOLAS Convention (being one of the recent amendments) only allows inspection of the ship if the Port State has ‘clear grounds’ for believing that the ship is in non-compliance. Regulated foreign ships must also comply with the relevant maritime security level applying in the security regulated port they are in and any security directions given to them: **clauses 94 and 96**.

The operations of a regulated foreign ship also must not hinder or obstruct compliance with a maritime security plan of a maritime industry participant or a ship security plan of a regulated Australian ship in a way which ‘compromises the security’ of the participant’s operations or the regulated Australian ship: **clause 97**. This is a key provision.

**Clause 98** provides that if the master (or ship operator) of a regulated foreign ship is notified by the Secretary or a port operator that maritime security level 2 or 3 is in force for the ship, or is given a security direction or a control direction, and fails to acknowledge the notification or direction to the Secretary, the master (or ship operator) commits an offence. In the case of a master, the penalty is 25 penalty units (\$2,750) or a ship operator, 100 penalty units (\$11,000). They are strict liability offences, with no defence of reasonable excuse.

**Clause 99** enables the Secretary to issue a direction (called a control direction) to the ship operator or master of a regulated foreign ship to take, or refrain from taking, specified action. As the Explanatory Memorandum states, ‘this clause provides the major regulatory powers over regulated foreign ships’.<sup>26</sup> Crucially, **subclause 99(3)** states that the Secretary must not give a control direction unless it is necessary to ensure compliance with the obligations imposed on regulated foreign ships under **clauses 91-97**, or it is direction of the kind that can be given under Chapter XI-2 of the SOLAS Convention or the ISPS code. **Subclause 99(4)** provides a non-exhaustive list of the actions that can be the subject of a control direction, including removing the ship from Australian waters (which seems to be based more on Article 25(1) of UNCLOS than any right conferred by the SOLAS Convention). The direction is of no effect until it appears in writing: **subclause 99(5)**.

**Subclause 100(2)** provides that if a master or operator of a regulated foreign ship contravenes a control direction, the Federal Court may grant an injunction under **proposed section 197**.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Part 6—Maritime security zones

There are three types of maritime security zones: port security zones, ship security zones and on-board (ship) security zones.

**Clause 102** empowers the Secretary to establish, by written notice including a map, one or more port security zones within a port. **Clause 103** provides that the regulations may prescribe different types of port security zones for a number of purposes including, but not limited to, the control of movement of people or ships within a security regulated port. **Clause 104** sets out the matters to be considered by the Secretary in establishing a port security zone. **Clause 105** provides that the regulations may, ‘for the purposes of safeguarding against unlawful interference with maritime transport’, prescribe requirements in relation to each type of port security zone. **Subclause 105(3)** provides that the regulations may prescribe penalties for offences against regulations made under **proposed section 105** but sets limits on those penalties.

**Clauses 106-109** set out similar provisions in relation to ship security zones.

**Clauses 110-113** set out similar provisions in relation to on-board security zones.

## Part 7—Other security measures

**Part 7** deals with the screening and clearing of people, goods, vehicles and vessels. It also creates offences for possessing weapons or prohibited items in maritime security zones, screening points and regulated Australian ships. It is very similar to the scheme established in **Divisions 1-4** in **Part 4** of the Aviation Transport Security Bill, with some variations due to the subject matter of the Bill.

**Clauses 115-119** deal with screening and clearing of people, goods, vehicles and vessels.<sup>27</sup> The requirements for screening and clearing (including when and how people, goods, vehicles and vessels are to be screened or cleared, and by whom) are to be prescribed by the regulations: **clause 119**. The Secretary also has certain powers to specify that certain people, goods, vehicles and vessels can pass through screening points without being screened. Importantly, regulations may give additional powers to the Secretary, such as the ability to specify what equipment must be used in the screening process: **subclause 119(3)**.

The regulations may also provide for offences for breaches of screening and clearance requirements, with a sliding scale for the penalty for the offences ranging from 200 penalty units for a port operator, ship operator or port facility operator, to 50 penalty units for other persons: **subclause 119(4)**.

**Clauses 120-126** deal with weapons. The term ‘weapon’ is defined in **clause 10** to mean a firearm, anything prescribed by the regulations to be a weapon, and a defective weapon

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

(being a device which, except for a defect or absence of a part would be a weapon, or something that is ‘reasonably capable’ of being converted into a weapon).

**Clause 120** provides that certain persons may have a weapon in their possession in a maritime security zone. Those persons are:

- a law enforcement officer (defined in **clause 151** to mean a member of the Australian Federal Police, a member of a State or Territory police force, or a customs officer prescribed in the regulations)
- a member of the ADF who is on duty, and
- a person authorised by the regulations or permitted in writing by the Secretary to have the particular weapon.

A person not falling within these categories who possesses a weapon in a maritime security zone commits an offence punishable by 100 penalty units (\$11,000) or seven years’ imprisonment: **clause 120**. According to the Explanatory Memorandum, a prison term can only be imposed if the person *intentionally* possesses the weapon or is *reckless* as to the fact that he or she is in an area where carriage of a weapon is not permitted.<sup>28</sup>

**Clause 121** is similar to **clause 120** but it relates to the possession of a weapon when passing through a screening point. Only law enforcement officers and persons authorised by the regulations or permitted by the Secretary to possess a weapon may carry it through a screening point. The same offence provisions and penalties apply as for **clause 120**.

**Clauses 122-123** cover the carriage or possession of weapons on board regulated Australian ships. As for **clause 121**, law enforcement officers and persons authorised by the regulations or permitted by the Secretary to carry or possess a weapon on board a regulated Australian ship are not subject to the offence provisions contained in **clauses 122-123**. ‘Possession’ includes having the weapon located ‘at a place that is accessible to the person’ on board the ship – eg in cabin lockers, toilets etc. No offence is committed if the weapon is ‘under the control’ of the master of the ship: **subclause 123(e)**. Again there is both a strict liability offence involving a penalty of 100 penalty units (**clause 122**) and a general offence (requiring an element of intention or recklessness) involving a penalty of seven years’ imprisonment (**clause 123**).

If a person is authorised or permitted to have a weapon in his or her possession in a maritime security zone but the authorisation or permission is subject to conditions, a person who fails to comply with those conditions commits an offence under **clause 124**. The offence, carrying a penalty of 50 penalty units, is a strict liability offence, but does not apply if the person has a reasonable excuse: **clause 124**. The Secretary may give permission to a class of persons: **clause 125**.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**Clause 126** provides a general regulation-making power ‘for the purposes of safeguarding against unlawful interference with maritime transport’ in relation to the carriage and use of weapons in a maritime security zone or on board a regulated Australian ship. **Proposed paragraph 126(2)(b)** provides for the making of regulations ‘dealing with a person ... who is suspected of [unlawfully] carrying or using a weapon’.

**Clauses 127-133** largely duplicate **clauses 120-126** except they concern ‘prohibited items’ rather than weapons. A ‘prohibited item’ is defined in **clause 10** to mean an item that ‘could be used for unlawful interference with maritime transport’ and ‘is prescribed in the regulations for the purposes of [defining prohibited items]’. The penalties for offences involving a prohibited item are less than for offences involving a weapon. The penalty is 20 penalty units for a strict liability offence or two years’ imprisonment for a general offence.

## Part 8—Powers of officials

**Part 8** deals with the powers of various classes of officials with maritime security functions. There are five classes of officials:

- maritime security inspectors (**clauses 135-145**)
- duly authorised officers (**clauses 146-149**)
- law enforcement officers (**clauses 150-160**)
- maritime security guards (**clauses 161-163**), and
- screening officers (**clauses 164-168**).

**Clauses 135-145** deal with maritime security inspectors. Such inspectors are appointed by the Secretary and must be a public service employee in DOTARS, a law enforcement officer, or a person who satisfies criteria prescribed in the regulations. The inspector must carry an identity card issued by the Secretary: **clause 137**. The powers which a maritime security inspector may exercise (for the purposes of determining if a person or ship is complying with the Act or investigating a possible contravention) are set out in **clause 139**. They include the powers to board and inspect a security regulated ship, to inspect and photograph equipment, and to observe the operating procedures for the ship and discuss those procedures with a person carrying them out or with another industry participant. An inspector may inspect, photograph or copy security-related documents or record<sup>29</sup> on the ship and operate equipment on the ship for the purposes of gaining access to a document or record relating to the ship.

The inspector is not required to give notice to inspect a ship within the boundaries of a security regulated port: **subclause 140(1)**. If, however, the inspector wishes to exercise a power in a private living area of a ship (defined in **subclause 140(4)**), he or she must

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

either obtain the consent of the master and the person living in the area or obtain a warrant from a magistrate under **proposed section 144**, and the master or a person nominated by the master must be present when the inspection occurs. In exercising any power under **proposed sections 138-141**, an inspector ‘must not subject a person to greater indignity than is necessary and reasonable for the exercise of the power’.

An inspector may also inspect any area, building, vehicle or vessel under the control of a maritime industry participant within certain limitations: **clauses 141-142**.

A person who engages in conduct and hinders or obstructs an inspector in the exercise of a power commits an offence under **clause 143**. It is a strict liability offence carrying a penalty of 50 penalty units, but does not apply if the person has a reasonable excuse.

**Clauses 144-145** deal with the issue of ship inspection warrants.

**Clauses 146-149** deal with the appointment and powers of duly authorised officers (being customs officers, ADF members, immigration officers, AMSA surveyors, or quarantine officers appointed by the Secretary in writing). They have powers in relation to the ‘operational area of a [security regulated] ship for the purposes of determining whether a person or a ship is complying with this Act’: **clause 149**.

**Clauses 150-160** deal with the powers of law enforcement officers, including stop, search and removal powers. A ‘law enforcement officer’ is a member of the Australian Federal Police or a State or Territory police force, or a customs officer prescribed in the regulations. The powers do not limit the exercise of any another power which a law enforcement officer may have: **clause 160**.

The stop and search power (**clauses 153-155**) may be exercised in relation to people, vehicles and vessels in a maritime security zone or on a regulated security ship if the officer ‘reasonably believes that it is necessary to do so for the purposes of safeguarding against unlawful interference with maritime transport’. The law enforcement officer may conduct an ‘ordinary search’ or a ‘frisk search’ of the person.<sup>30</sup> The officer must identify himself or herself as a law enforcement officer and inform the person why he or she is being stopped and/or searched. A person who engages in conduct and hinders or obstructs an officer in the exercise of a power under **proposed sections 153, 154 or 155** commits an offence punishable by 2 years’ imprisonment. It is a general offence requiring an element of intention or recklessness.

The phrase ‘purposes of safeguarding against unlawful interference in maritime transport’ in **clauses 153-155** may have a broad application, particularly given the comments made earlier in this digest about the definition of ‘unlawful interference in maritime transport’. The ‘stop and search’ powers are largely based on those contained in the Aviation Transport Security Bill 2003. There is no need for the law enforcement officer to reasonably suspect that the person is committing or has committed an offence before stopping and/or searching the person (compare **clause 156**).

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Under **clause 156**, if an officer ‘reasonably suspects that a person on a security regulated ship’ is committing or has committed an offence under the Act, he or she may ask the person to leave the ship, or if the ship is within a maritime security zone, the zone. If the person fails to comply with the request, he or she commits an offence (penalty: 50 penalty units). Under **clause 157**, the officer may remove the person from the ship or zone. The officer must not use any more force, or subject the person to greater indignity, than is necessary and reasonable to effect the removal.

**Clauses 158-59** provide law enforcement officers with powers to remove vehicles or vessels which present ‘a risk to maritime transport security’ or lack ‘proper authorisation’ to be in the relevant zone.

**Clauses 161-163** deal with maritime security guards. The regulations must prescribe the training and qualification requirements for maritime security guards, and requirements for identity cards. They may also prescribe uniform requirements. A maritime security guard is empowered to ‘physically restrain a person’ if the guard ‘reasonably suspects that the person is committing, or has committed, an offence against this Act’ and if the guard ‘reasonably believes it is necessary ... to ensure that a person who is not cleared is not in a cleared area; or ... maintain the integrity of a maritime security zone’: **subclause 163(1)**. The guard may detain the person ‘until the person can be dealt with by a law enforcement officer’: **subclause 163(2)**. The Bill sets no time limit on detention, nor any requirement as to when the guard must contact a law enforcement officer. A guard ‘must not use more force, or subject a person to greater indignity, than is necessary and reasonable’: **subclause 163(3)**.

**Clauses 164-168** cover screening officers. The regulations must prescribe training and qualification requirements for screening officers, and requirements for identity cards. They may also prescribe uniform requirements. **Subclause 165(1)** provides that a person who is ‘authorised or required to conduct screening’ is a screening officer.

If a screening officer considers it necessary to screen a person properly, he or she may *request* the person to remove any item of clothing. The screening officer must not *require* a person to remove clothing, nor may the officer remove or cause the removal of the clothing. This offence carries a penalty of 50 penalty units. It is a strict liability offence, but does not apply if the officer has a reasonable excuse: **subclauses 166(1)-(4)**. If a person refuses to remove clothing or refuses to be screened, the officer must refuse to allow the person to pass through the screening point: **subclause 166(5)**. **Clauses 167 and 168** provide screening officers with powers of restraint and detention similar to those of maritime security guards under **clause 163**.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



## Part 9—Reporting maritime transport security incidents

A ‘maritime transport security incident’ is defined in **clause 170** to mean either a threat or an act of ‘unlawful interference with maritime transport’ where the threat or act ‘is, or is likely to be, a terrorist act’. A ‘terrorist act’ is defined in section 100.1 of the *Criminal Code* but excludes ‘advocacy, protest, dissent or industrial action’ that is not intended to cause serious harm to, or endanger, the healthy and safety of the public or a section of the public.<sup>31</sup>

Certain people must report maritime security incidents. They are:

- port operators (**clause 171**)
- ship masters (**clause 172**)
- ship operators (**clause 173**)
- port facility operators (**clause 174**)
- persons with ‘incident reporting requirements’ (being maritime security inspectors, duly authorised officers, maritime security guards, screening officers and other maritime industry participants) (**clause 175**), and
- employees of maritime industry participants (**clause 176**).

The reporting requirements are set out in **clauses 177-181**. Where a designated person becomes aware of a maritime security incident and fails to report the incident as soon as possible, the person commits an offence. The penalty varies from 50 penalty units to 200 penalty units. It is a strict liability offence, but does not apply if the person has a reasonable excuse. The Secretary may publish a notice in the *Gazette* setting out the information to be included in a report and/or the way in which the report is to be made: **clause 182**. The Secretary’s notice is a disallowable instrument. A report that ‘does not comply with any requirements’ in place under **proposed subsection 182(1)** is taken not to have been made (in which case the person who ‘made’ the report may be guilty of an offence under **proposed sections 171-176**).

## Part 10—Information-gathering

**Clause 184** permits the Secretary ‘if [he or she] believes, on reasonable grounds, that a maritime industry participant has security compliance information’ to require the participant to give the information to the Secretary. The term ‘security compliance information’ is defined in **subclause 184(1)** to mean information ‘that relates to compliance, or failure to comply, with this Act’. The Secretary must issue a written notice to the participant setting out the period, form and manner in which the information is required. The period must not be less than 14 days. A person failing to comply with a

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

notice commits an offence punishable by 45 penalty units (\$4,950). It is strict liability offence, but does not apply if the person has a reasonable excuse.

A person is not excused from complying with a notice under **proposed section 184** because the information might incriminate the person: **clause 185**. However, if the person is a natural person, then the information; the giving of the information; and any information, document or thing obtained as direct or indirect consequence of giving the information, is not admissible as evidence against the person in a criminal proceeding or any other proceeding for the recovery of a penalty, other than a proceeding under section 137.1 or 137.2 of the *Criminal Code*.<sup>32</sup>

## Part 11—Enforcement

**Clauses 186-200 (ie Part 11)** set out various options for enforcing the Act, being:

- infringement notices (**clause 187**)
- enforcement orders (**clauses 188-196**)
- injunctions (**clause 197**), and
- demerit points (**clauses 198-200**).

**Part 11** seems to be largely modelled on **Part 8** of the Aviation Transport Security Bill 2003.

**Clause 187** provides that the regulations may establish a system of infringement notices. A person who is alleged to have committed an offence under the Act may pay a penalty to the Commonwealth as an alternative to prosecution. The penalty must not exceed one-fifth (20%) of the maximum fine that a court could impose (following a successful prosecution of the offence). The option is not available for the more serious offences under the Act, eg failing to have an appropriate maritime security plan in place, and certain ‘possession of weapon’ offences.

**Clauses 188-196** cover enforcement orders. There are two main types of orders: those aimed at maritime industry participants (**clauses 189-193**) and those aimed at regulated Australian ships (**clauses 195-196**). The Explanatory Memorandum comments that:

Use of an [enforcement] order reflects the policy that rectification of a problem is the preferred outcome to prosecution. As an enforcement order is a civil enforcement remedy, the Secretary will only need to be satisfied of these matters on the balance of probabilities rather than the criminal standard of beyond reasonable doubt. If an enforcement order is contravened an injunction may be sought from a court.<sup>33</sup>

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

The Secretary may make a written order ('an enforcement order') to prohibit or restrict specified activities by a maritime industry participant, or to require a maritime industry participant to take specified action, if the Secretary reasonably believes (on the balance of probabilities)<sup>34</sup> that the participant has contravened the Act and it is necessary to 'make the order to safeguard against unlawful interference with maritime transport': **subclauses 189(1) and (2)**. The enforcement order must 'bear a clear and direct relationship to the contravention' and 'be proportionate to the contravention': **subclause 189(3)**. It cannot involve the payment of money other than that already recoverable at law: **subclause 189(4)**.

The commencement, duration, review and notification of enforcement orders are set out in **clauses 190-192** (eg the Secretary must review an enforcement order every 3 months). It is not an offence to contravene an enforcement order, but the person may be subject to an injunction under **proposed section 197**.

**Clause 195** provides that the Secretary may give a direction to the ship operator or master of a regulated Australian ship ('a ship enforcement order'). The direction requires the ship operator or master to take, or to refrain from taking, specified action: **subclause 195(1)**. The Secretary must reasonably believe that the ship has operated in contravention of the Act, or the order is necessary 'to safeguard against unlawful interference with maritime transport': **subclause 195(3)**. The order must bear 'a clear and direct relationship to the contravention' and 'be proportionate to the contravention': **subclause 195(4)**. **Subclause 195(5)** provides a non-exhaustive list of the action that a ship operator or master may be directed to take, eg removing the ship from specified waters. It is not an offence to contravene an enforcement order, but the ship operator or master may be subject to an injunction under **proposed section 197**.

**Clause 197** provides that Secretary may apply to the Federal Court for an injunction restraining a person from engaging in conduct or requiring the person to do an act or thing, if a person 'has engaged, is engaging or is proposing to engage in any conduct in contravention of this Act'. The Court may grant the injunction by consent (ie if the parties agree) without determining whether the person has contravened the Act. The Court may also grant an interim injunction pending its determination of the application, but it cannot require any person to give an undertaking as to damages as a condition of granting an interim injunction.

**Clause 198** permits the regulations to establish a 'demerit points system'. The system may be used to cancel the approval of a maritime security plan (**clauses 199 and 58**) or a ship security plan (**clauses 200 and 77**). Demerit points may only be accrued where an industry participant or ship operator is convicted or found guilty of certain offences against the Act, or pays a penalty under an infringement notice.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Part 12—Review of decisions

**Part 12** only has one section: **clause 201**, which sets out the decisions made by the Secretary which can be reviewed by the Administrative Appeals Tribunal, being decisions:

- refusing to approve a maritime security plan or a ship security plan
- directing a maritime industry participant or ship operator to vary a plan
- directing a maritime industry participant or ship operator to revise a plan
- cancelling a maritime security plan or ship security plan
- refusing an interim International Ship Security Certificate
- declaring a particular port, or part of a particular port, as a security regulated port
- designating a person as a port operator
- establishing a port security zone
- declaring a ship security zone around a security regulated ship, or
- establishing an on-board security zone.

## Part 13—Miscellaneous

**Clause 202** provides that the Secretary may delegate all of his powers and functions under the Act to a Senior Executive Service (SES) officer, or acting SES officer, in the Department. The Secretary may delegate his powers, except the power to make enforcement orders under Division 3 of Part 11 of the Act, to an Australian Public Service employee who holds, or is acting in, an Executive Level 2, or equivalent, position in the Department.

**Clauses 203-204** are standard provisions dealing with compensation for damage to electronic equipment (see **proposed sections 139, 141 and 148**) and compensation for the acquisition of property (where the acquisition is invalid because of paragraph 51(xxxi) of the Constitution).

**Clause 205** requires the Commonwealth to pay compensation if, in complying with a control direction under **proposed section 99**<sup>35</sup> or a ship enforcement order under **proposed section 195**<sup>36</sup>, a ship is delayed to an extent that ‘is unreasonable in the circumstances’. The entitlement to compensation for undue detention or delay is contained in Regulation XI-2/9.3.5.1 of the SOLAS Convention.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**Clause 206** requires a person or a ship operator to pay compensation to the Commonwealth if the Commonwealth incurs costs for the detention or inspection of a ship due to a failure by the person or ship operator to comply with the Act *and* the detention or inspection is reasonable in the circumstances.

Proceedings may be taken in the Federal Court for the recovery of such reasonable amount of compensation as the Court determines: **subclauses 205(2) and 206(2) and 206(4)**.

**Clause 207** provides that various listed Acts that give effect to various diplomatic immunities and privileges are not affected by the Act (when passed).

**Clause 208** deals with the effects of the Act if it is found (or if parts of it are found) to be beyond the limits of the Commonwealth's law-making power (see section 51 of the Constitution). For example, **subclause 208(2)** would operate to limit the operation of the Act (when passed) to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' (being the Commonwealth's power under paragraph 51(xx) of the Constitution). Likewise, **subclauses 208(3) to (7)** would operate to limit the operation of the Act (when passed) to other heads of Commonwealth power, including trade and commerce, Territories and external affairs. These provisions have the effect of severing unconstitutional provisions from the Act (when passed), rather than invalidating the whole Act.

**Clause 209** provides the Governor-General with the power to make regulations. The regulations may prescribe matters required or permitted by the Act to be prescribed (including offences). They may prescribe penalties 'of not more than 50 penalty units' (\$5,500) unless the Act provides for the regulations to prescribe higher penalties.

## Concluding Comments

According to the statistics set out in the Explanatory Memorandum to the Bill, a very high proportion of Australian trade, whether measured in weight or value, travels by ship. The purpose of the Bill is to introduce a comprehensive security framework for Australian ports, Australian shipping and foreign shipping in Australian waters, based on recent amendment to the SOLAS Convention and the ISPS Code.

However, the submissions made to the Senate Committee, and to the Joint Standing Committee on Treaties, by State governments and key industry stakeholders express concern over:

- the lack of consultation over the specifics of the Bill
- the fact that many details about implementation are left to regulations
- the fact that the Bill, which is largely based on the Aviation Transport Security Bill 2003 and the aviation industry, fails to pay proper regard to maritime operations

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- who should bear the cost of implementing the security measures
- the fact that there are key differences between the Bill and the SOLAS Convention, and
- possible inconsistency between the Bill and existing State/Territory law (particularly in relation to the statutory functions performed by key personnel in ports and harbours).

Some of these issues may be resolved or highlighted when the Senate Committee and the Joint Committee present their reports, but the Bill is problematic for other reasons.

For example, the Commonwealth Government appears to have given no explanation about why the Bill contains the relatively unusual provision in **subclause 7(1)** which allows State and Territory governments to be prosecuted for offences under the Act.

Further, many of the offences created by the Bill are strict liability offences. Some offences are expressed not to apply if the person has a reasonable excuse. However, subsection 6.1(1) of the [Criminal Code](#) provides that the defence of mistake of fact (which may be part of the defence of reasonable excuse) is available where a person is prosecuted for a strict liability offence.

Also, while the Explanatory Memorandum provides some explanation in relation to **clause 88** (which permits the Secretary to delegate his powers and functions in relation to the regulation and inspection of regulated Australian ships to a person engaged by a ‘recognised security organisation’), it may be inappropriate for Australia to delegate its security responsibilities to private bodies.

In some cases, the provisions applying to foreign ships operating in Australian territorial waters without visiting Australian ports are beyond the measures contained in the amendments to the SOLAS Convention. However, they may be allowable under Article 25 of UNCLOS.

Some of the observations contained in the Bills Digest for the Aviation Transport Security Bill 2003 also apply here. For example, whether the very substantial ‘stop and search’ powers of some security personnel (accompanied by prison terms for hindering the exercise of these powers) are warranted; and whether the width of the definition of ‘unlawful interference with maritime transport’ is appropriate.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Endnotes

---

- 1 'Enhancing Maritime Safety' <http://www.imo.org/home.asp>
- 2 At paragraph 9. See <http://www.aph.gov.au/house/committee/jsct/solas/treaties/solasnia.pdf>
- 3 The Hon John Anderson, House of Representatives, *Debates*, [18 September 2003](#), p. 20446.
- 4 Explanatory Memorandum to the Maritime Transport Security Bill, pp. 8–12.
- 5 Explanatory Memorandum, p. 16.
- 6 The Australian Shipowners Association submitted that Australian operators have costed the new IMO security requirements (including the requirements contained in the Bill) at 'potentially \$700,000 per vessel, or approximately \$39.2M for the Australian flag fleet'. The Association asserted that DOTARS has not refuted these estimates. See the Association's submission to the Senate Committee dated [23 October 2003](#), p. 4.
- 7 Steve Bredhauer, Minister for Transport and Minister for Main Roads (Queensland), submission to the Rural and Regional Affairs and Transport Legislation Committee, [20 October 2003](#), p. 3.
- 8 Submission of the Maritime Union of Australia and the Australian Institute of Marine and Power Engineers to the Senate Rural and Regional Affairs and Transport Legislation Committee Inquiring into the Maritime Transport Security Bill 2003, [undated](#).
- 9 House of Representatives, *Debates*, [8 October 2003](#), p. 20763.
- 10 Due to the meaning of Australia in the *Acts Interpretation Act 1901* and *Criminal Code Act 1995*, 'Australia' includes both external territories and the 12 nautical territorial sea surrounding Australia.
- 11 Explanatory Memorandum, p. 24.
- 12 See **clause 10**.
- 13 See for example regulation XI-2.3 of the SOLAS Convention.
- 14 Also included in the definition are the waters between the anchoring / waiting area and the port itself.
- 15 See for example regulation XI-1.9 of the SOLAS Convention.
- 16 The second reading speech seems to indicate that about 70 ports may be declared as security regulated ports.
- 17 Paragraph 22(1)(a) of the *Acts Interpretation Act 1901* provides that 'expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual'.
- 18 See **clauses 33–40**.
- 19 See **clauses 99–100**.
- 20 The ISPS Code, section 2.11.
- 21 This only applies to maritime industry participants required to have a maritime security plan.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- 22 Subsection 4AA(1) of the *Crimes Act 1914* (Cth) provides that in ‘a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears, “penalty unit” means \$110’.
- 23 Explanatory Memorandum, p. 36.
- 24 This requirement does not apply if the ship is of a kind prescribed in the regulations: see **proposed paragraph 16(1)(d)**.
- 25 Explanatory Memorandum, p. 45.
- 26 Explanatory Memorandum, p. 47.
- 27 The term ‘vessel’ is defined in **clause 10** to mean ‘any craft or structure capable of navigation’ and has a slightly wider meaning than ‘ship’ (which is defined in **clause 10** to mean ‘a vessel that is capable of navigating the high seas but does not include a vessel that is not self-propelled’).
- 28 Explanatory Memorandum, p. 56.
- 29 There are some differences depending on whether the security regulated ship is Australian or not: see **proposed subparagraph 139(2)(e)(iv)**.
- 30 See section 3C of the *Crimes Act 1914* for a definition of these types of searches.
- 31 See subsection 100.1(3) of the *Criminal Code*.
- 32 Sections 137.1 and 137.2 of the *Criminal Code* relate to giving false or misleading information.
- 33 Explanatory Memorandum, p. 68.
- 34 *ibid.*
- 35 This applies to regulated foreign ships only.
- 36 These apply to regulated Australian ships only.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*