



## **Maritime Transport and Offshore Facilities Security Amendment (Maritime Security Guards and other Measures) Bill 2005**

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### **Contents**

Purpose. . . . .	2
Background. . . . .	2
Maritime Security Guards . . . . .	2
Main Provisions . . . . .	3
Schedule 1 – Maritime Security Guards . . . . .	3
Schedule 2 - Miscellaneous Amendments . . . . .	5
Concluding Comments. . . . .	5
Endnotes. . . . .	6
Appendix A - Maritime Security Guards training and qualifications . . . . .	7

## **Maritime Transport and Offshore Facilities Security Amendment (Maritime Security Guards and other Measures Bill 2005)**

**Date Introduced:** 23 June 2005

**House:** Senate

**Portfolio:** Transport and Regional Services

**Commencement:** Sections 1-3 commence on Royal Assent. However, the operative provisions of the Bill generally only commence once both Royal Assent has been received and the relevant part of the *Maritime Transport Security Amendment Act 2005* has come into force.

### **Purpose**

The main purpose of the Bill is to increase the statutory powers of maritime security guards.

### **Background**

The *Maritime Transport and Offshore Facilities Security Act 2003* (the Act) introduced a comprehensive maritime security framework for Australian ports, Australian shipping and foreign shipping in Australian waters. That security framework was subsequently extended to oil and gas facilities in offshore Australian waters by the *Maritime Transport Security Amendment Act 2005*,<sup>1</sup> although the operative sections of this latter Act will not come into force until December 2005, unless proclaimed sooner. General background on recent maritime security initiatives can be found in the [Digest](#) for the *Maritime Transport Security Amendment Act 2005*.

### **Maritime Security Guards**

Existing section 163 of the Act provides for what are called ‘maritime security guards’. 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 the Act; and
- 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.

The guard may detain the person ‘until the person can be dealt with by a law enforcement officer’. The Act sets no explicit time limit on detention, nor any requirement as to when

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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’. Regulations made under the Act set out the training and qualification requirements for maritime security guards, and related matters such as the use of identity cards. The training and qualification requirements are set out in Appendix A of this Digest.

The existing powers of maritime security guards are identical to those of aviation security guards under section 92 of the *Aviation Transport Security Act 2004*. However, the Bill proposes to substantially expand the powers of maritime security guards. Briefly, the proposed powers are:

- to require production of identification by a person in a maritime security zone<sup>2</sup>
- to require persons to state reasons for being in a maritime security zone
- to direct persons to leave a maritime security zone, and
- to remove persons, vehicles and vessels from a maritime security zone.

These powers are accompanied by a fairly standard set of safeguards and restrictions, which are discussed in the main provisions section (**new subsections 163A(1)-(3)**) of this Digest. By way of comparison, in the *Aviation Transport Security Act 2004*, aviation security guards do not have the proposed additional powers. In that Act, similar powers are exercised by law enforcement officers.<sup>3</sup> According to the second reading speech, the Government considered that difference in the powers of security guards in the two Acts<sup>4</sup>

...acknowledged a key difference between airports and ports. Where persons can be prevented from unauthorised access to airports through traditional access control arrangements, such as fences and monitored gates, ports are, by their very nature, open on at least one side—the waterside. Providing maritime security guards with the means to request that waterside intruders move-on or else face removal and potential fines for non-compliance will address this natural weakness in port security.

## Main Provisions

### Schedule 1 – Maritime Security Guards

**Item 3** inserts **new sections 163A-E**. As mentioned in the background section of this Digest, these confer additional powers on maritime security guards.

**New subsections 163A(1)-(3)** allow a maritime security guard to ‘request’ a person in a maritime security zone to ‘produce identification’. In exercising this power the guard must identify themselves as a maritime security guard.<sup>5</sup> They must also advise the person of their statutory power to require the information, and tell the person that non-compliance is an offence. Failure to do these things means no **new subsection 163A(2)** offence can occur. However, if an offence is committed, it carries a maximum penalty of 20 penalty

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units (\$2 200).<sup>6</sup> No offence occurs if a person has a ‘reasonable excuse’ for non-compliance: **new subsection 163A(3)**. Presumably this would include a situation where a person had forgotten or lost any relevant identity card, or was simply not carrying any identification with them. As noted in the Explanatory Memorandum, if a person gives a maritime security guard false or misleading information the person may commit an offence under Division 137 of the *Criminal Code Act 1995*.<sup>7</sup> Such an offence carries a maximum penalty of 12 months imprisonment.

**New subsections 163A(4)-(6)** allow a maritime security guard to ‘request’ a person to state their reason for being in a maritime security zone. This power can only be exercised in relation to persons who are not law enforcement officers, Defence Force personnel and a range of other authorised persons listed in **new subsection 163A(4)**. The guard must identify themselves, and inform the person of the various matters mentioned above in relation to **new subsections 163A(1)-(3)**. The offence provisions are also the same.

**New subsection 163B** allows a maritime security guard to ‘request’ that a person leave a maritime security zone if the guard ‘reasonably suspects’ that the person does not have ‘proper authorisation’ to be in the zone. Again, the guard must identify themselves, and inform the person of the various matters mentioned above in relation to **new subsections 163A(1)-(3)**. The offence provisions are also the same, with the exception that it is a strict liability offence: **new subsection 163B(4)**. The Explanatory Memorandum comments that ‘the offence is a strict liability offence because the offence carries physical elements on which a maritime security guard can make a reliable assessment of guilt or innocence.’<sup>8</sup> Presumably this means it is an open or shut case as to whether a person leaves the maritime security zone or not.

If a maritime security guard has requested that a person leave a maritime security zone under **new subsection 163B(1)** and the person fails to comply with the request, the maritime security guard may remove the person from the zone: **new subsection 163C(1)**.<sup>9</sup> In removing a person, a standard set of limitations apply – namely that the guard must not use more force, or subject a person to greater indignity, than is necessary and reasonable to remove the person: **new subsection 163C(2)**.

**New sections 163D-E** allow maritime security guards to remove vehicles and vessels<sup>10</sup> from maritime security zones where they reasonably suspect they are in the zone without proper authorisation. Where the vessel or vehicle is under the control of a person, the guard must first make a ‘reasonable effort’ to have that person remove it from the zone: **new subsections 163D-E(2)**. If the guard does exercise the power of removal, a standard set of limitations apply – no more force than necessary and reasonable is to be used in removing the vehicle or vessel, and reasonable efforts must be taken to avoid damaging the vehicle or vessel. A person in or around the vehicle or vessel must also not be subjected to greater indignity than is necessary and reasonable in the removal process.

Once they have removed a vessel or vehicle, a maritime security guard must make reasonable efforts to notify the owner (and any other person prescribed in regulations)<sup>11</sup> of

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its removal and new location: new subsections 163D-E(4). Where a person reasonably incurs costs or expenses in relation to the removal, relocation and/or storage of the unauthorised vehicle or vessel, its owner is liable to reimburse the person for these: new subsections 163D-E(5). Any such cost or expenses ‘must not be such as to amount to taxation’ – that is, they should fairly reflect the actual cost or expenses. Regulations may be made concerning the disposal of ‘unclaimed vehicles and vessels, including what happens to the proceeds of any sale’: new subsections 163D-E(6). It is notable that the Bill does not give a person the statutory ability to seek reimbursement for removal etc costs from the person in control of the vessel or vehicle who was not the owner. Thus in cases where an owner could not be said to be reasonably responsible for the vessel or vehicle being in maritime security zone without authorisation – say a leased vehicle being unlawfully parked in a port security zone – the owner might either have to bear the entire cost of reimbursing a towing firm if they cannot recover the amount from the person in control of the vehicle.

## Schedule 2 - Miscellaneous Amendments

The amendments in **Schedule 2** are generally designed to make minor technical corrections, clarifications or to improve consistency between related provisions of the Act. They are adequately explained in the Explanatory Memorandum. None of them appear to impose any new major obligations or confers significant powers.

## Concluding Comments

The Bill gives significant new powers to maritime security guards. These guards are likely to be mainly employees of private security firms. Existing regulations do impose minimum training and qualification standards on such guards, and the Bill also contains what seems to be an appropriate set of safeguards and restrictions on the exercise of the additional powers. However, there is no explicit accountability provision in the Bill in relation to the possible unjustified or excessive use of the more coercive powers (for example, forced removal from a maritime security zone). In this context, it might useful to consider including something that would give a statutory avenue to allow a person to formally complain to the Secretary of the administering Commonwealth Department about any alleged unjustified or excessive use.

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## Endnotes

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- 1 This also changed the name of the Act from the *Maritime Transport Security Act 2003* to the *Maritime Transport and Offshore Facilities Security Act 2003*.
- 2 Maritime security zones are areas in and around ports, ships or offshore facilities that are considered to require heightened security arrangements. The zones are declared by the Secretary of the Commonwealth Department of Transport and Regional Services (DOTARS).
- 3 Note that under the *Maritime Transport and Offshore Facilities Security Act 2003* law enforcement officers also have these powers.
- 4 Second reading speech tabled by Senator the Hon Kay Patterson, *Senate Debates*, 23 June 2005, p. 8.
- 5 Regulations require that guards must carry and display an identity card, so presumably they must show a person being challenged this card.
- 6 Due to **item 4** of **Schedule 1**, a person alleged to have committed this offence may be issued with a section 187 infringement notice as an alternative to prosecution. The maximum fine would then be \$440.
- 7 At p. 5.
- 8 At p. 5.
- 9 In exercising this power, the guard must have complied with the requirements of identifying themselves, informing the person of their statutory authority etc.
- 10 As noted by the Explanatory Memorandum, security regulated ships, or ships regulated as offshore facilities, are not subject to the **new subsection 163E** ‘move-on power’ as other arrangements apply to these classes of ships under the Act.
- 11 The Explanatory Memorandum suggests that such a person might include a Harbourmaster.

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## Appendix A - Maritime Security Guards training and qualifications

### Maritime Transport Security Regulations 2003 - Regulation 8.50

For paragraph 162 (2) (a) of the Act, the following are prescribed as training and qualification requirements for maritime security guards:

(a) the person:

- (i) must hold at least a Certificate II in Security Operations that is in force; or
- (ii) must hold a certificate or qualification that is in force and that is equivalent to at least a Certificate II in Security Operations (for example, a Certificate II in Security (Guarding)); or
- (iii) must have undergone training and acquired experience while working as a security guard that is sufficient to satisfy the requirements for obtaining a security guard license in the state or territory where the person intends to work as a maritime security guard (the *relevant state or territory*);

(b) the person must hold a licence to work as a security guard, being a licence that was issued or recognised by the relevant state or territory and that is in force;

(c) the person must have a working knowledge of the Act and these Regulations, including knowledge about how to restrain and detain persons in accordance with section 163 of the Act.

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