Australian Shipowners Association

23 October 2003

Senate Rural & Regional Affairs & Transport Committee
Inquiry into Maritime Transport Security Bill 2003

Background

It is barely 2 years since the dramatic and tragic events of 11 September 2001, and international shipping is at a crossroads. In many respects, it is like the safety crossroads faced after the loss of vessels such as the Titanic, the Derbyshire or the Estonia. It is also like the environmental crossroads faced after the oil spill in Prince William Sound.

An open and focussed awareness on security is the new safety call and the new environmental consciousness.

The *Maritime Transport Security Bill 2003* introduced into Parliament on 18 September 2003 is the response to that newly focussed awareness, and seeks to implement an international code that has galvanized the efforts of the maritime industry worldwide through the International Maritime Organization. However, it should not be forgotten that many of the proposed new measures exhibit a pragmatic and realistic response to a heightened threat that has existed in the commercial shipping industry, under the guise of piracy, for almost as long as shipping itself.

The ISPS Code and the *Maritime Transport Security Bill 2003* are largely practical documents, focussing on such day-to-day activities as:

- Ensuring the performance of all ship security duties
- Controlling access to the ship and areas surrounding the ship, and
- Controlling the embarkation of persons and their effects and the handling of cargo and ship's stores

These are activities that any operator, Australian or otherwise, that has effectively implemented a safety culture (under the tenets of the International Safety Management Code or ISM Code) would already be undertaking. In many respects therefore, the requirements of the *Maritime Transport Security Bill 2003* could already be taken to be largely satisfied by effective operators.

However, the ISPS Code requires quite a considerable consolidation of security-related contingency and avoidance planning procedures and documentation. This should not be overlooked. This will come at a substantial implementation cost. This was certainly experienced by operators in Australia and abroad during the implementation of the ISM Code, which largely consolidated existing safety, OH&S and risk management procedures.

Basis of introduction of the legislation

In the introduction of any legislation that seeks to implement international convention-based obligations, regulators have a philosophical consideration to weigh up – on the one hand, word-for-word implementation of the terms of the international instrument[1] and on the other, regulating to provide a desired domestic outcome[2].

In this circumstance, the domestic solution has been favoured. Neither direction would have been completely satisfactory. Both approaches have their merits.

It has to be said that DoTaRS have been mindful of ship operator concerns:

- that the potential exists for dual certification requirements – to satisfy DoTaRS for certification, with separate requirements to satisfy foreign administrations in port State control circumstances, although all attempts are being made to avoid this
- that the likely finalisation of the legislation and regulations may leave a mere 3 to 4 months to formally approve all port facility and ship security plans
- that the language of the Bill has moved away in many areas from the ISPS Code.

Departures from the ISPS Code

Over and above the specific requirements of the ISPS Code, the Bill also incorporates provisions (among others) relating to:

- Australian and foreign regulated vessels. Rather than apply the ISPS Code application, the Bill (ASA believes rightly) also applies to many foreign vessels when in Australian waters and vessels travelling within and between States
- Screening officers for passengers and goods
- Maritime security guards
- Port, ship and on-board security zones, largely modelled on those prevalent in the aviation sector
- Broader notions of 'port facility' and 'port facility security officer', referred to in the Bill as 'maritime industry participants'
- A demerit points system, as an alternative to penal provisions
- Significant penalties, as a consequence of the application of the *Criminal Code* in relation to failures/breaches of security obligations
- Provision for review of decisions and injunctions

Most significantly, the US port and maritime policing model upon which the ISPS Code was based does not readily align with Australia's varied port control models, nor with the Federated jurisdiction that applies between the Commonwealth and the

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[1] In the manner of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983 Cth* which implements the obligations contained in the MARPOL Convention Annexes.
[2] In the manner of the *Ozone Protection Act 1989 Cth* which implements the relevant provisions of the Montreal Protocol

States. It has also been argued that a broader definition than 'port facility' was required. This was ultimately adopted. This broader definition encompasses the related maritime fields where there is a direct interaction with a ship that is subject to security measures eg. Towage, pilotage and bunkering.

Ship operator concerns

Of concern is the seeming double-standard of application in the Bill. Whilst foreign regulated vessels fall within the ambit of the legislation (when in Australian waters), matters which are strict liability offences for Australian operators only generate compliance directions, or injunctions for regulated foreign ships presently. In some circumstances (eg weapons on board) there are no equivalent provisions applying to regulated foreign ships.

This is a different question to the sensitive control provisions referred to in the ISPS Code. Australian has seen fit to adopt a domestic solution to security that does not directly mirror the ISPS Code. As is the case in pollution matters, arguably, security matters for any vessel in Australian waters should be comparable, irrespective of flag.

The operators of Australian controlled shipping are acutely mindful of the onerous impact of a range of other legislative measures on their ability to compete in the international market and, increasingly, in the domestic market. Satisfaction of sound security should not unnecessarily further that divide.

Further, provisions previously protecting the security/use of security compliance information have been omitted. It was intended in early discussions that the principles applied in s.64 *Transport Safety Investigation Act 2003 Cth* would be applied, which states that:

> 'A person is not subject to any liability, action, claim or demand for anything done or omitted to be done in good faith in connection with the exercise of powers under this Act.'

Similar provisions existed in early drafts of the Bill in relation to the provision of security compliance information. Where safety is seen as the ultimate winner from this approach, heightened security was seen as the beneficiary from a regime that protected those who forwarded information regarding security compliance failings. These protective provisions are noticeably absent in the final product submitted to Parliament and ought to be incorporated.

Impact of the ship/port interface & cost

It is at the interface between a port facility and a vessel (and on the information shared between these two entities) that the new security environment will be best effected. A change in the maritime security culture of the industry and wider public may be at the core of an effective implementation. The impact of the appropriate regulatory authorities (in the language of the ISPS Code, the Recognised Security Organisation and Designated Authority) will largely be pre and post any genuine security threat – these threats are most likely going to be identified from the exchange of information between ship and shore prior to arrival.

Further, payment for any increased measures or time consuming exchanges and procedures remains a vexed question.

Australian operators have costed the new IMO security requirements at potentially $700,000 per vessel, or approximately $39.2M for the Australian flag fleet – cost estimates which DoTaRS have not refuted. This includes the requirements contained in the Bill. ASA suspects that the high levels of competition exhibited in freight rates in the bulk trades, and the dominance of consortia in the liner trades will force a healthy proportion of the implementation costs to be absorbed by operators. There is an argument that suggests that good security is good business and the additional measures are for the protection of company assets and the well being and safety of employees.

However, an equally compelling argument can be mounted that the benefit from raising the security of a facility and/or vessel has a broader reach, that the real benefit is in securing facilitation of trade (eg ensuring that channels aren't blocked for extended periods of time), in securing the safety of critical infrastructure (bridges, or shore based water or power production) and in securing Australian communities. As a community benefit, therefore, ought not the community bear the cost of any additional security measures?

Implications of the 2003 Budget

Along with defence, education and health, the 2003 Federal Budget saw significant attention provided to implementing the new maritime security regime. In total, $411M was allocated to upgrade existing domestic security arrangements, including:

- $148M to upgrade critical infrastructure at airports, ports and nuclear research facilities
- $152M to enhance the capacity of Australia security intelligence agencies to respond to security threats, and
- $111M to upgrade protective services

Of these funds, $15.6M was specifically allocated to the DoTaRS Transport Security Division over 2 years to fully fund the regulatory implementation of the new maritime security arrangements and additional staffing required for that implementation. At that time, the Deputy Prime Minister and Minister for Transport & Regional Services, John Anderson said that 'Australia's port and maritime sector is critical for our domestic and international trade.'

It is of great to concern then to ship operators, that 7 months from the coming into force of the new security regime, and in an apparently fully funded situation, DoTaRS are yet to recruit, or otherwise avail themselves of the maritime operational and seagoing expertise that will be critical in the assessment of ship and port facility security plans, and in the broader understanding of the operational capabilities of ships, ports and port facilities. ASA would suggest that this could not be in the best interests of Australia's domestic and international trade.

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Consultation with industry

Broad concern was expressed by participants in the maritime industry at the opportunity to consult on the early drafts of the Bill. DoTaRS' Transport Security Division ought to be commended at its efforts to consult on the drafting of the accompanying Regulations, through a process undertaken over the past week. That process will continue. The integration of direct industry input into the drafting process has to improve the final Regulations and the implementation of new measures.

For practical reasons, ASA is unable to attend the hearings of the Senate Rural & Regional Affairs & Transport Committee *Inquiry into Maritime Transport Security Bill 2003* on 27 October 2003, but would welcome any questions from the Committee for subsequent reply.