Port of Melbourne

Port of Melbourne Operations Pty Ltd

Submission to the Cyber and Infrastructure Security Centre at the Department of Home Affairs

Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

Security of Critical Infrastructure (Application) Rules 2021

and

Transport Security Amendment (Critical Infrastructure) Bill 2022

1 February 2022

INTRODUCTION

The Port of Melbourne supports the Australian Government's commitment to protecting the essential services all Australians rely on by uplifting the security and resilience of our critical infrastructure, which include the port of Melbourne.

We are pleased to provide a submission to the Cyber and Infrastructure Security Centre at the Department of Home Affairs (**Department**) on the exposure drafts of:

1. the Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022 (**SLACIP**);
2. the Security of Critical Infrastructure (Application) Rules 2021 (**SOCI Application Rules**); and
3. the Transport Security Amendment (Critical Infrastructure) Bill 2022 (**TSACI**).

The Port of Melbourne is Australia's largest container, automotive and general cargo port handling more than one-third of the nation's container trade and is an essential component of the Victorian, Tasmanian and south-eastern Australian economies. We operate as a landlord port and are responsible for planning, development and management of port land and shipping channels. A significant proportion of the port's activities are carried out by our tenants under leasing arrangements. Our tenants are responsible for the handling of the import and export trade that flows through the port.

Port of Melbourne remains committed to working collaboratively with the Department to realise the collective ambition of enhancing the protection of Australia's critical infrastructure. We would be happy to provide further explanation or information if it would assist in consideration of the matters raised below.

SUMMARY

We set out below specific details of the amendments the Port of Melbourne would like considered in the consultation process.

The key themes of concern to Port of Melbourne are:

(a) reducing and managing duplication of obligations on Port of Melbourne and its tenants; and
(b) reducing duplication of obligations between SOCI, MTOFSA and the EMA (Vic).

SOCI and MTOFSA place an operational burden on critical ports. In addition to SOCI and MTOFSA Victorian ports are subject to the EMA (Vic). While Port of Melbourne understands and supports the need for appropriate measures to protect essential services and critical infrastructure the imposition of multiple regulatory regimes, addressing the same issues, can place an undue burden on businesses, and through them on the Australian economy.

We submit that further consideration should be given to avoiding duplication between regimes, and to making this clear in the primary legislation and not subject to secondary legislation or the making of Ministerial declarations. We set out below specific submissions on how this might be addressed in the draft Bills for consideration.

DEFINTIONS AND ACRONYMS

EMA (Vic)	Emergency Management Act 2013 (Vic).
MTOFSA	Maritime Transport and Offshore Facilities Security Act 2003.
SLACI	Security Legislation Amendment (Critical Infrastructure) Act 2021.
SLACIP	Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022.

SOCI	Security of Critical Infrastructure Act 2018 (as amended by SLACI).
SOCI Application Rules	The proposed Security of Critical Infrastructure (Application) Rules 2021
TSACI	Transport Security Amendment (Critical Infrastructure) Bill 2022

SLACIP

We set out in the below table Port of Melbourne's specific submission in relation to the exposure draft of the SLACIP Bill.

Clause	**Request**	**Explanation**
Clause 37 Proposed section 30AB	Amend so that Part 2A will not apply to responsible entities which are maritime industry participants under MTOFSA.	This is the stated intention in section 2 of the Guide to the exposure draft TSACI which states: *'Aviation and maritime industry participants will not be required to complete a RMP under the SOCI Act, as the amended security program obligations will fulfil this requirement using the existing processes under the Aviation and Maritime Acts'* This is also recognised in paragraph 11 of the Explanatory Document to SLACIP. Under section 45 of MTOFSA maritime industry participants (which includes port operators and port facility operators) are required to have a maritime security plan (**MSP**). MTOSFA has provisions to address the situation where multiple MSPs apply. SLACIP does not contain provisions to address the situation where more than one risk management plan may apply to an asset. SLACIP also does not recognise that some information required for a risk management plan will only be held by one particular responsible entity. For example, a freight asset operator will hold all relevant cyber hazard information for their organisation, their landlord port will not, and should not for commercial and security reasons, have access to this information. As a result the landlord port would be unable to comply with the obligation in section 30AH to identify all relevant hazards in relation to the asset. MTOFSA is the more appropriate regime and we ask that the intent not to duplicate the existing MTOSFA regime is expressly included in SOCI (as the primary legislation), and not reliant on a Ministerial declaration or rules under the Act.
Clause 48	Amend so that an asset whose responsible entity is a critical	We request this to avoid duplication of the regulatory regimes.

Proposed section 52B	maritime industry participant under MTOFSA cannot be declared to be a system of national significance (**SONS**).	As above, MTOSFA is the more appropriate regime as it recognises there may be multiple maritime industry participants with control over port areas. The obligations imposed on a SONS are not flexible to suit the port situation. For example, it is not clear how an exercise under s30CM would be carried out across a port with multiple tenants on different IT systems. MTOFSA is the more appropriate regime to manage the overlap between port operators and port facility operators. This should be clear in the primary legislation and not subject to Ministerial declaration or rules under the Act.
New clause To amend s30BB	Amend so that once TSCAI is passed Part 2B will not apply to critical ports that are subject to TSACI. This could be by: (a) having the part automatically cease to apply on passing of TSCAI; or (b) allowing a critical infrastructure asset to apply to the Department for revocation of the rules declaring the critical port subject to this Part.	In section 1.1 of the Guide to the exposure draft TSACI the Department has stated there is no intention to duplicate obligations requiring entities to report the same incident under two legislative frameworks. The SOCI Application Rules proposes to "turn on" the cyber incident reporting obligations for ports, and there is no express mechanism to turn these off once the duplicate obligations under TSACI take effect. We ask that the intent not to duplicate regimes is expressly included in SOCI to avoid the need for positive action to be taken to "switch off" the SOCI requirements once TSACI is passed.
New clause To amend s18A and s30BB	Amend to address the situation where the relevant critical infrastructure asset is both part of a critical port and another critical infrastructure asset. In these circumstances, responsible entity of the other critical infrastructure asset should have the reporting obligation for their asset not the responsible entity for the critical port.	With the expansion of SOCI to further industries many port tenants are now themselves critical infrastructure assets (for example, as freight or fuel assets). The responsible entities for such assets hold the information needed to report under this section and are not obliged under law to provide this information to their landlord port. Accordingly, the regulatory intent is best met by imposing this obligation on the entity that has the relevant information, the responsible entity for the particular asset.
New clause: To amend ss30BC and 30BD of SOCI	Add exemption for reporting obligation where: (a) the responsible entity believes, on reasonable grounds that the person to be notified is already aware of the incident; or (b) the responsible entity has a reasonable excuse	This is consistent with sections 171(2), 175(2) and 176(2) of MTOFSA and we request these exemptions are considered for inclusion in SOCI.

SOCI APPLICATION RULES

We set out in the below table Port of Melbourne's specific submission in relation to the exposure draft of the SOCI Application Rules.

Rule	Request	Explanation
5	Add end date for the declaration of critical ports for the purposes of 30BB(1)(a) so that the rule ceases to apply once TSACI is passed.	See above comments in relation to s30BB. We request this amendment to avoid the need for positive action by the Department and the Minister to "switch off" the duplicate obligation once TSACI is passed.

TSACI

We set out in the below table Port of Melbourne's specific submission in relation to the exposure draft of the TSACI Bill.

Clause	Request	Explanation
Sch 2, clause 24	We request that a transitional provision is added so that once section 47(1)(a) is amended a participant required to have a maritime security plan is no longer subject to Part 2A or 2B of SOCI.	See above comments on clause 37 of SLACIP. We would prefer this is addressed in SLACIP.
Sch 2, clause 26/27	We request a further amendment to section 51 to provide for the automatic extension of an expiring maritime security plan where: (a) the Secretary extends the consideration period to a date beyond the expiry date of the existing maritime security plan; or (b) a maritime security plan is rejected to allow a reasonable time for the maritime industry participant to relodge its maritime security plan.	It is an offence under s43 for a maritime industry participant to operate without a maritime security plan. A maritime industry participant may submit the new plan for approval with plenty of time, but once submitted the timeframe for approval is outside the control of the maritime industry participant, yet the consequence of non-approval is an offence. We note a consequential amendment would be needed to section 52(3).
Sch 2, clause 69	With the removal of terrorism from the definition of maritime transport or offshore facility security incident, we request clarification of the term "unlawful interference with maritime transport or offshore facilities".	We support the removal of the reference to terrorism from the definition. However in the absence of a materiality threshold for non-cyber security incidents the incidents captured will increase significantly, and with it the operational burden.

	We note the amendment in Sch 2 of clause 16 of TSCAI links unlawful interference for cyber security incidents to a relevant impact. We request similar provisions are be added for non-cyber security events so that the reporting and other obligations in relation to new section maritime transport or offshore facility security incidents do not apply to minor incidents.	The obligation to report maritime transport or offshore facility security incident is placed on port operators and personal responsibility is placed on persons with incident reporting responsibility and employees who commit an offence if they fail to report. It is not appropriate for ports or their staff to be subject to such significant consequences for failure to report minor incidents that the ordinary person would not consider material to the Secretary. For example, illegal parking of truck trailers on port roads or a member of the public who makes their way to a restricted port to fish. The Department might also consider amendments to sections 171(2)(b), 175(2)(b) and 176(2)(b) so that the offences in the preceding subsections only apply to material incidents. A similar amendment would be needed to: • clause 72, new section 171(5)(b); • clause 81, new section 175(3B)(b); and • clause 83, new section 176(5)(b)
Sch 2, clause 90	Section 182E (2) – we request an amendment so that the Secretary's right to require reports is reasonable for example: (a) so only a certain number of reports can be required in a particular timeframe, such as one per year; and (b) so that only one report can be required for a specific time period.	Port of Melbourne accepts that at times the Secretary will need a report for a specific period. However we request checks and balances to ensure that this does not become overly burdensome, noting periodic reporting is also required. .
Sch 2, clause 118	We request that section 17CA is amended so that once a port is declared a critical maritime industry participant any declaration of that port operator as a system of national significance under SOCI is deemed revoked.	See comments on clause 48 of SLACIP. We would prefer this is addressed in SLACIP.