



DEPARTMENT OF HOME AFFAIRS

Exposure Draft Transport Security Amendment (Critical Infrastructure) Bill 2022 & Exposure Draft Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

Ports Australia is pleased to provide a submission to the Department of Home Affairs regarding the *Exposure Draft Transport Security Amendment (Critical Infrastructure) Bill 2022 (TSACI)* and *Exposure Draft Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022 (SLACIP)*. Ports Australia's submission seeks to support the ongoing efforts of the Department to develop and implement enhanced risk identification, mitigation, management, and treatments for critical infrastructure within Australia.

Australia's ports are essential with over 98% of international trade by weight conducted via the country's ports.¹ Ports import commodities that the population rely on, including for health and welfare such as pharmaceuticals and fuel, and export commodities that the population rely on, including for economic welfare such as iron ore and steel. It is therefore sensible that ports are examined as part of an assessment of what entities should be determined as critical infrastructure; and that where a port is deemed critical, appropriate risk strategies for both physical and operational assets are adopted.

Ports Australia supports the Department of Home Affairs in their objective to better secure critical infrastructure in Australia from all hazards including cyber security incidents. Predominantly Ports Australia perceives that the proposed reforms being undertaken to achieve this objective are sensible; however, several aspects are *absolutely* necessary to revise to ensure the reforms are as effective and efficient as possible.

From the early drafting of the infrastructure reforms, the Department of Home Affairs has engaged with Ports Australia and its members in the development of the reforms as they relate to the maritime sector. This has been appreciated and been valuable for the appropriateness of the reforms. It is necessary that this engagement and co-design continues; and that the key concern consistently raised by the maritime sector be addressed. This concern being the entity which is deemed the responsible entity for critical ports.

Currently in the *Security of Critical Infrastructure Act 2018 (SOCI)*, the port operator is the default responsible entity for a critical port. It is of significant concern that the port operator is the default responsible entity and suggests that the port operator is the most appropriate entity to implement the positive security obligations under the SOCI regime, a regime which in part duplicates the regime under the *Maritime Transport and Offshore Facilities Security Act 2003 (MTOFSA)*, as proposed to be amended by TSACI.

The SLACIP and TSACI Bills present an opportunity to revisit the allocation of obligations between responsible entity for critical ports under SOCI and maritime industry participants under MTOFSA. Doing so will benefit government, industry and ultimately Australia and its people should any risks be realised. Ports Australia requests that consideration is given to circumstances where the *port facility operator* should be the default responsible entity as opposed to the *port operator* under SOCI and the allocation of obligations to maritime industry participants under MTOFSA. This is imperative as it determines which entity will be assigned positive security obligations and associated accountability.

¹ Bureau of Infrastructure, Transport and Regional Economics (BITRE) 2014, Containerised and non-containerised trade through Australian ports to 2032–33.



Ports Australia is the peak industry body representing both publicly and privately owned port authorities and corporations across Australia. Ports Australia is governed by a Board of Directors comprising the Chief Executive Officers of 12 port corporations from across Australia.

Key recommendations

1. Revision of the default responsible entity for critical ports and reconsideration of which entity (port operator or port facility operator) is the appropriate entity for the relevant SOCI and MTOFSA obligations;
2. Amendment to ensure reporting obligations are only for those incidents which meet a certain threshold;
3. Assessment and elimination of any duplication in overlapping:
 - federal and state regulatory requirements; and
 - SOCI and MTOFSA obligations; and
4. Assessment of the opportunities and risks related to Government Assistance powers through tabletop exercises.

I. Responsible entity for critical ports

A responsible entity needs to be the entity that is best placed to identify, manage, report and act on hazards to physical and operational assets. At present, the default responsible entity related to critical ports is the *port operator*. For a number of obligations it would be more appropriate for a *port facility operator* to be responsible. It is of *significant* concern that the port operator is the default responsible entity and suggests that the port operator is the most appropriate entity to implement the positive security obligations. Importantly, a substantial risk lies in an entity being responsible for obligations that are outside of their control.

The ownership and operation of port land, infrastructure and facilities differs across the port sector. Some ports are landlord ports which own the land and lease out areas of the land to port facility operators which undertake the day-to-day site management and operations, whilst others own and operate the land and facilities, and others are variations of these. The current SOCI and MTOFSA regime does not recognise or appropriately manage this variation.

As stated in Ports Australia's previous submissions, landlord ports particularly may not have the level of insight on risk exposure and accordingly would be unable to adequately address the positive security obligations and keep the Australian Government informed of changes at the port facility owner and operator level. This may undermine the intent of the legislation, to protect Australia's critical infrastructure, if not recognised and rectified prior to enacting the reforms. It may also carry an unnecessary impost on other entities named as the responsible entity who do not have access to tenant/port facility operator information needed to comply with the obligation.

Due to the different operational models of the ports, it is Ports Australia's position that the responsible entity needs to be determined on a case-by-case basis and should have consideration to the structure and operations of the port. In Table I, information is given on the benefits and risks related to maintaining the current method of determining a responsible entity with what is proposed by Ports Australia.

The issue of the responsible entity related to critical ports has been a continual concern and issue, and is now heightened given:



- risk management has been extended to adopt an all hazards approach and include enhanced cybersecurity obligations;
- some critical ports may be declared a 'system of national significance' under SLACIP and/or a critical industry participant under TSCAI; and
- advanced Government Assistance powers exist to intervene and assist responsible entities in the treatment of issues.

It is *absolutely* necessary that the correct delineation between port owners, port operators, facility owners, and facility operators is made and that each has their own tailored set of reporting obligations that best reflects their risk profile – their internal characteristics and the external environment within which they operate. This will better enable the objectives of these reforms to be achieved in the ports sector. That is, the accuracy and quality of reporting to the Australian Government will improve; the application of any positive security obligations will be assigned to the appropriate entity, should they be required; the appropriate entity will be provided with the up-to-date security and risk information, and best practice advice; and any unnecessary regulatory burdens on entities that are not best placed to address these obligations will be eliminated.

Ports Australia recommends the Department of Home Affairs:

- draft a new approach to determining the default responsible entity for critical ports, based on the above suggestions;
- engage port operators and port facility operators in a workshop to agree upon this approach; and
- progress the approach to revising the default responsible entity.

Table 1. Current and proposed considerations to determine the responsible entity of a critical port

Critical Ports – Responsible Entity	Determination considerations	Risks	Benefits
<p>Current</p>	<p>The <i>port operator</i> is currently the default responsible entity.</p>	<p>For 'landlord ports', government will receive risk management plans and reporting from the port operator. Government will <i>not</i> directly receive risk management plans and reporting from the source that is managing the operational environment i.e. the port facility operator, unless that tenant has also been identified as critical under SOCI. Due to this potential lack of direct oversight, risks to government include:</p> <ul style="list-style-type: none"> • lack of reporting; • time lag in reporting; • reduced reporting detail; and • reporting inaccuracies. <p>Should these reporting risks be realised, critical infrastructure is more susceptible to:</p> <ul style="list-style-type: none"> • exacerbation of issues (realised risks); • delays in receipt of Government Assistance; and • delays in other critical infrastructure entities being informed of industry breaches and hence less prepared to address new risks. <p>Alternatively, a lot of port tenants may be subject to SOCI as they are critical liquid fuel assets, critical freight infrastructure assets or critical freight services assets. This means they will have the obligation to provide a risk management plan (if switched on), the issue is that the responsible entity for the port will also have an obligation to provide a risk management plan (if switched on).</p>	<p>Maintain status quo. <i>Note: Ports Australia does not endorse this position.</i></p>

Critical Ports – Responsible Entity	Determination considerations	Risks	Benefits
<p>Proposed</p>	<p>It is recommended that the responsible entity for critical ports be determined on a case-by-case basis with the option to have the default entity being the port facility operator. As part of a case-by-case approach, consideration should be given to:</p> <ul style="list-style-type: none"> • whether the port operator or port facility operator undertakes the day-to-day operations at the port; and • whether the port operator has the ability to impact the confidentiality, integrity, availability or reliability of the port facility operator’s operations. 	<p>Short-term risks related to the transfer of the responsible entity for some critical ports.</p>	<ul style="list-style-type: none"> • Application of any positive security obligations will be assigned to the appropriate entity. • Appropriate entity will be provided with the up-to-date security and risk information, and best practice advice. • More prompt receipt of up-to-date and relevant details on port operations by government. As a result, reduced risks to government and responsible entities, and in turn Australia and its peoples. • Unnecessary regulatory burdens on entities that are not best placed to address these obligations will be eliminated.



2. Reporting obligations

While TSACI adds a definition of “relevant impact” (as under SOCI) to what incidents are required to be reported, this only applies to cyber security incidents. Accordingly, it is suggested that a similar approach is taken to non-cyber security incidents. This would result in entities being required to only report incidents that are of “relevant impact” to the Department of Home Affairs, not every minor incident. Benefits of this would include reduced administrative burden on entities and the Department of Home Affairs, as well as the ability for the Department of Home Affairs to more readily identify incidents that are of significance.

3. Overlapping regulatory requirements

Ports Australia recommends that the Department of Home Affairs conducts a regulatory mapping exercise to understand potential or actual duplication in overlapping federal and state regulatory requirements that relate to the security of critical infrastructure. It would be of benefit to industry to have this shared, and to work on an approach to remove any duplication in reporting requirements.

At the same time it would also be helpful to map the regulatory obligation across SOCI and MTOFSA (as amended by SLACIP and TSACI) and to consider how to ensure that ports are not subject to two similar regimes at the same time, or if they are that compliance under one regime is treated as compliance under the other.

To the extent that there is a duplication of obligations between POs and PFOs it is requested that consideration is given to the appropriateness of the consequences that flow from non-compliance. For example, if a PFO is best place to report a security incident, a PO might have the same obligations (should it become aware) but it might not be appropriate to make them subject to an offence for not reporting the PFO incident.

4. Government Assistance powers

Government assistance powers as they relate to critical infrastructure will be new, and as highlighted in previous Ports Australia submissions, there are associated risks with these powers. As there is yet to be significant detail on how these powers would function, it is suggested that the Department of Home Affairs conducts tabletop exercises with industry to understand opportunities and risks related to the government assistance powers, and how these can be maximised and minimised respectively. Ports Australia would be willing to approach its members for such a collaborative exercise, should the Department of Home Affairs decide it is interested in undertaking this with port industry participants.

Critical infrastructure needs appropriate all hazard risk management, and through this submission Ports Australia aims to assist the Australian Government in their revision of the current critical infrastructure framework for the maritime sector, to safeguard the health and welfare of Australia and its people. Ports Australia appreciates this opportunity for industry feedback and emphasises the importance of the Department of Home Affairs’ consideration of its input. Should further information from a port industry perspective be required, Ports Australia would be more than pleased to assist.



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REFERENCES

Bureau of Infrastructure, Transport and Regional Economics (BITRE) 2014, *Containerised and non-containerised trade through Australian ports to 2032–33*, BITRE, Canberra, viewed 27 September 2020, <https://www.bitre.gov.au/sites/default/files/report_138.pdf>.