

FEDERAL COURT OF AUSTRALIA

**MARITIME LAW SEMINAR
12 December 2006**

**A COMMENTARY UPON RECENT NATIONAL AND
INTERNATIONAL PROVISIONS RELATING TO MARITIME SECURITY**

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Introduction

1 As a result of the events that occurred in the United States of America on 11 September 2001 the international community turned its attention to the vulnerability of the maritime industry to terrorist attack and to the need to take steps to address that risk. It was recognised that an attack directed at a maritime target could inflict great harm on global trade. Approximately 80% of the world's traded goods are moved by sea.¹ Australia's engagement in international trade is almost entirely dependent upon marine transport and the cargoes carried to or from Australia represent more than 12% of the world's seaborne trade.²

2 This paper discusses the steps taken internationally and nationally to attempt to provide greater security for the maritime industry against terrorist assault.

Terrorism and Piracy

3 In recent times the meaning of the word terrorism may have become somewhat elastic. The ordinary meaning of the word is the pursuit of a political objective by coercing or intimidating people through violent acts that inflict harm upon persons or property.³ It is, however, the broader definition of "terrorist act" that is provided in s 100.1 of the *Criminal Code Act 1995* (Cth) ("Criminal Code") that applies to the Commonwealth maritime security legislation discussed later in this

¹ Alderton, P. "Port Management and Operations" LLP (2nd Edn) p.225.

² The Hon. J. Anderson, "Maritime Security as Part of a Co-ordinated National Security Plan" Port & Maritime Security and Counter-Terrorism Summit (Melbourne, 28-29 April 2005) p.2; Explanatory Memorandum (House of Representatives) Maritime Transport Security Bill 2003 (Cth), p.6.

³ Shorter Oxford English Dictionary (5th Edition) Oxford University Press – "terrorism".

paper.

4 The risk of terrorist attack against ships and maritime facilities existed well before the events of 11 September 2001. Numerous maritime incidents involving terrorist connections took place before and after that date.

5 The attack on the “Rainbow Warrior” in Auckland Harbour New Zealand in July 1985, which caused the loss of the vessel and the death of a crew member, was carried out by a nation State, France, to intimidate the Greenpeace movement then engaged in raising political opposition to policies of the French government.⁴ In October 1985 the cruise vessel “Achille Lauro” with 400 passengers on board was seized in the Mediterranean Sea near Egypt by a militant group making demands on behalf of the people in the Palestinian territories occupied by Israel. One passenger was killed before the hijackers gave up the vessel in return for safe-passage to Tunisia.⁵ In July 1988 in a well-planned assault in Greek waters three heavily-armed men attacked the Greek ferry “City of Poros” as the vessel approached Athens in the Saronic Gulf. A number of passengers jumped overboard in panic and were dismembered by the ship’s propeller. At least nine passengers were killed and more than 100 injured. The terrorists escaped on a speedboat brought alongside the ferry.⁶ In January 1996 a group of Chechen rebels hijacked the ferry “Avrasya” as it left the Turkish port of Trabzon. They threatened to set off explosive devices but after 4 days gave up their demands and surrendered.⁷ In 2000 the southern Philippine terrorist organisation Abu Sayyaf claimed responsibility for the detonation of a bomb that caused the deaths of 45 passengers and crew on a Philippine inter-island ferry.⁸ In October 2000 the USS “Cole” was seriously damaged whilst being refuelled in the Port of Aden in Yemen. A small craft engaged in the refuelling operation had been packed with explosives and was used as a floating bomb as it was brought alongside the warship. Seventeen crew members lost their lives and 39

⁴ Glass, C. “The New Piracy” Vol 25, London Review of Books No. 24 (18 Dec 2003) <www.lrb.co.uk/v25/n24/glas01_.html> p 7.

⁵ Glass, C. (supra fn 4) p.7.

⁶ 1988 Anti-Shipping Activity Messages Ref No. 1988 – 20 <www.fas.org/irp/world/para/docs/ASAM-1988.htm>

⁷ 1996 Anti-Shipping Activity Messages Ref No. 1996 – 5,22 <www.fas.org/irp/world/para/docs/ASAM-1996.htm>

⁸ Blanche, E. “Terror Attacks Threaten Gulf’s Oil Routes” Vol 14 Jane’s Intelligence Review No 12, (Dec 2002) p.8 <jir.janes.com>

were injured.⁹ In August 2001, in an attack said to have been carried out by Gerakin Aceh Merdeka, (“GAM”), an independence movement in the Indonesian province of Aceh, the vessel, MV “Ocean Silver”, carrying a cargo of coal, was seized in the Straits of Malacca and the crew of six taken hostage. Five days later Indonesian security forces engaged the rebels in a gun battle in which one soldier and three insurgents were killed. The military action failed to free the crew. To date the fate of the crew and of the vessel has not been disclosed.¹⁰

6 Frequent attacks on vessels off the coast of Sri Lanka have been carried out by the Sri Lankan independence movement Liberation Tigers of Tamil Eelam (LTTE) from the early 1990s. Some crew-members of the hijacked vessels have been killed in those attacks, either at the hands of the LTTE or as a result of counter-attacks by Sri Lankan government forces. Ships seized by the LTTE – “Irish Mona” (August 1995), “Princess Wave” (August 1996), “Athena” (May 1997), “Misen” (July 1997), “Morong Bong” (July 1997), MV “Cordiality” (September 1997), “Princess Kash” (August 1998), MV “Sik Yang” (May 1999) – have, in some cases, become “phantom ships” used by the LTTE for the transport of weapons under the cover of the commercial carriage of maritime cargo.¹¹ In pursuing its political objectives in Sri Lanka the LTTE has become a skilled operator in maritime terrorism and up to 3000 personnel and 100-200 vessels have been employed by the LTTE in attacks on commercial shipping. The knowledge obtained by the LTTE in those activities may now be available to groups such as al-Qaeda.¹²

7 In May 2002 an Indonesian passenger vessel, MV “Oyo Star”, was attacked by gunmen whilst it was underway in waters off the Indonesian island of Ambon in the South China Sea. Four passengers were killed and 12 injured.¹³ In October

⁹ “Terrorist Attack on the USS Cole”, The Jewish Institute for National Security Affairs, Washington DC (13 October 2000) <www.jinsa.org/articles/print.html/documentid/1047>

¹⁰ Bruyneel, M. “Reports in 2001: July-September” p 2 <home.wanadoo.nl/m.bruyneel/archive/modern/2k1repc.htm>

¹¹ Dr V Sakhuja “Sea Piracy in South Asia”, South Asia Analysis Group (Paper No 1259, 18 February 2005) <www.saaq.org> p 2-3.

¹² Pelkofski, Capt. J. “Al Qaeda’s Maritime Campaign” 27 December 2005 p.2 <www.military.com/Content/Printer_Friendly_Version/1,11491,,00.html?passfile=&page>

¹³ International Chamber of Shipping Piracy Reports – Indonesia (25 May 2002) <www.marisec.org/piracy/spec2002.htm>; Reports On Acts Of Piracy And Armed Robbery Against Ships – May 2002, International Maritime Organisation MSC4/Circ. 18 Ref. No 9; Jegathesan, M. “Indonesian seas worst for piracy, maritime terrorism looms: watchdog” Agence France-Presse (30 November 2003).

2002 the French super tanker, MV “Limburg”, was disabled in the Gulf of Aden off the coast of Yemen by an attack similar to that which damaged the USS “Cole”, namely, by an explosives-packed craft being driven into the tanker amidships. The explosion penetrated the double hull of the “Limburg”, set the cargo alight and released 90,000 barrels of burning oil into the Arabian Sea. One crew-member was killed and four were injured.¹⁴ In February 2004, Abu Sayyaf exploded a bomb on the “Superferry 14” soon after it left Manila harbour, setting the vessel on fire and causing the deaths of 116 passengers.¹⁵ In August 2005 Abu Sayyaf exploded a bomb on the ferry “Dona Ramona” as it was about to leave the port of Lamitan in the southern Philippines. Thirty passengers were injured.¹⁶

8 In August 2003 a suspected al-Qaeda militant was arrested in Turkey on suspicion of planning to attack a cruise ship carrying Israeli passengers as it approached the port of Antalya. It is alleged that the proposed method of attack was to follow that used to attack the USS “Cole” and the MV “Limburg”.¹⁷

9 Assessment of the likelihood of the occurrence of a terrorist assault on a maritime target must take into account the fact that many of the serious acts of piracy that have been carried out in this region in recent years, a number of which are described below, could easily have been converted to a terrorist purpose.

10 In September 1995 a freighter MV “Anna Sierra” on a voyage from Thailand to the Philippines, carrying 12000 tonnes of sugar worth approximately US\$4m- US\$5m, was hijacked by 25-30 armed pirates in the South China Sea. The vessel was repainted and re-named the “Artic Sea” (sic) and an Honduran flag hoisted. The crew was held on board for several days and then cast adrift on rafts. After a day at sea the crew was rescued by a Vietnamese fishing vessel and authorities were alerted to the act of piracy that had occurred. A reward for information on the whereabouts of the vessel was posted immediately by the International Maritime Bureau (“IMB”), part of the International Chamber of Commerce responsible for

¹⁴ Howland, J. “Hazardous Seas – Maritime Sector Vulnerable to Devastating Terrorist Attacks” The Jewish Institute for National Security Affairs, Washington DC (1 April 2004) p 4

<www.jinsa.org/articles/articles.html/function/view/categoryid/1701/documentid/2426/history/3>.

¹⁵ “The Return of Abu Sayyaf” TIME Asia Magazine (30 August 2004) <www.time.com/time/asia/magazine/article/0,13673,501040830-686107,00.html>

¹⁶ Hand, M. “Thirty injured as terror blast hits Philippines ferry” Lloyds List (30 August 2005).

suppressing maritime crime and for maintaining a 24-hour piracy reporting centre in Kuala Lumpur, Malaysia. In October 1995 the ship was located at the Chinese port of Beihai. Part of its cargo had been sold under false bills of lading. Chinese officials arrested the 14 pirates on board, 2 of whom were of Malaysian nationality and the remainder Indonesian. The cargo remaining on the ship was confiscated by Chinese authorities and sold to offset outstanding port fees and charges. The vessel was then detained by authorities against a balance of unpaid port charges. In due course, and no doubt as a result of inadequate care and maintenance, the ship developed a list at its berth and was towed away and beached. It became a total loss to its owner. Ten of the fourteen pirates were repatriated to Indonesia without facing charges. The fate of the other four is unknown.¹⁸

11 In April 1998 a tanker, the “Petro Ranger” valued at US\$16m, carrying diesel and aviation fuel worth US\$2.3-US\$3.00m from Singapore to Vietnam, was hijacked by heavily armed Indonesian pirates in the Straits of Malacca 3 hours out of Singapore. The crew was bound and held below decks. The leader of the pirates told the captain that he was employed by a syndicate, the five principals of which resided in Singapore, Malaysia, Indonesia, Hong Kong and China and were “well-connected”. The pirates renamed the vessel the “Wilby”, ran up an Honduran flag, and sailed on to Chinese waters with the crew still on board, apparently intending to use the crew to assist in discharging the cargo on to other vessels. Whilst at sea two tankers were brought alongside and took approximately half the cargo. A third tanker was due to take the balance but it could not locate the hijacked vessel. The pirates broke radio silence to give their position to the tanker and to arrange a rendezvous for the transfer of the remaining cargo. That transmission from the hijacked vessel was monitored by a Chinese patrol boat which assumed that a smuggling operation was underway. Accordingly, the hijacked vessel was kept under surveillance. When the third tanker arrived the Chinese patrol boat apprehended both vessels and escorted them to port. The captain of the “Petro Ranger” was able to make contact with Chinese authorities on board and inform them that his vessel had been hijacked. Chinese police took both the crew and the

¹⁷ Osler, D. “Cruise ships in terrorists’ sights despite Turkey arrests” Lloyds List (16 August 2005).

¹⁸ Bruyneel, M. “Tale of a Modern Pirate Gang” 21 November 2000 <home.wanadoo.nl/m.bruyneel/archive/modern/gang.htm>; Chalk, P. “Contemporary Maritime Piracy in Southeast Asia”, *Studies in Conflict and Terrorism* (1998) Vol 21 Issue 1 p.87.

pirates into custody and confiscated the remainder of the cargo. Eventually in late May 1998 the crew was released and the vessel returned to its owner in Singapore. The pirates were repatriated to Indonesia without facing charges.¹⁹

12 In August 1998 a cargo vessel, the MV “Fu Tai”, was hijacked whilst at anchor at the Indonesian island of Batam. Most of the crew escaped by jumping overboard and swimming to shore. The pirates took the ship to sea and neither the vessel nor any of the remaining members of the crew has been seen since.²⁰

13 In September 1998 a Japanese-owned cargo vessel “Tenyu” on a voyage from Indonesia to South Korea carrying 3000 tonnes of aluminium ingots worth approximately US\$3.5–US\$4.00m was hijacked in the South China Sea. The crew of 15 was not seen again and is presumed to have been murdered. In December 1998, as a result of inquiries made by Hong Kong insurance agents, the ship was located in a Chinese port carrying a crew of 16 Indonesians, bearing the name “Sanei-I” and flying an Honduran flag. No part of the hijacked cargo remained. The IMB ascertained that two of the crew found on board had participated in the hijack of the “Anna Sierra” in 1995. No charges were laid against the crew found on board and all 16 were released and returned to Indonesia.²¹

14 Also in September 1998 a Singapore-registered chemical tanker, the MV “Louisa”, was hijacked in the South China Sea off Taiwan whilst on a voyage from Singapore to China. The assault on the ship was carried out by men in army camouflage uniforms who appeared to have been transported to the site by a naval vessel. The name of the ship was changed to the “Holly” and a Panamanian flag hoisted. The crew was locked in a cabin whilst the pirates attempted to find a buyer

¹⁹ Glass, C. (supra fn 4) pp 1-3; Howland J. (supra fn 14) pp 2-3; “Captain Tells of Piracy Ordeal” <riau-islands.org/batamnews/documents/123.html>; 1998 Anti-Shipping Activity Messages Ref No. 1998-93; <www.fas.org/irp/world/para/docs/ASAM-1998.htm>; “South Sea Piracy - Dead Men Tell No Tales” *The Economist* (Hong Kong) 16 Dec 1999; Hitt, J. “Bandits in the Global Shipping Lanes” p.6 <www.powmadeak47.com/china/ch00820pirates.html>

²⁰ 1998 Anti-Shipping Activity Messages Ref No. 1998-49 (supra fn 19); Harsano, H. “Dark Alliance Rules the High Seas” *The Centre for Public Integrity* (13 April 1999) <www.public-i.org/report.aspx?aid=627&sid=100>.

²¹ “South Sea Piracy – Dead Men Tell No Tales” (supra fn 19); “Crew Feared Dead as Another Missing Ship Found in China” <riau-islands.org/batamnews/documents/123.html>; 1998 Anti-Shipping Activity Messages Ref No. 1998-71 (supra fn 19); Sullivan, K and Jordan, M. “High Tech Pirates Ravage Asian Seas” *Washington Post ForeignService* (5 July 1999) <www.washingtonpost.com/wp-srv/inatl/daily/july99/pirates5.htm>

for the cargo. After 8 days without a sale the pirates abandoned the vessel, cargo and crew. Information obtained from the interception of the "Petro Ranger" in April 1998, and from the account provided by the crew of the "Louisa", suggested that the pirate gang which attacked the "Petro Ranger" was also involved in the attack on the "Louisa".²²

15 In November 1998 a general cargo vessel, the MV "Cheung Son", carrying a cargo of coal cinders and furnace slag from Malaysia to China was boarded by pirates in waters outside Hong Kong. The value of the cargo was said to have been no more than US\$750,000. The crew of 23 was murdered and their bodies thrown overboard. Six bodies were recovered in the nets of Chinese fishing vessels some days later. In January 1999, in the course of a raid on a brothel, Chinese authorities apprehended a person who carried in his possession a "trophy" photograph of one of the murdered crew members of the "Cheung Son"²³. From the information that followed the authorities were able to arrest 12 other members of the pirate gang. The pirates stated that the cargo had been sold for US\$300,000. The whereabouts of the "Cheung Son", however, remains unknown. It has been surmised that the vessel has been used as a "phantom" ship in the illegal export of arms from China.²⁴ All pirates arrested - 12 Chinese and 1 Indonesian - were tried, convicted, and sentenced to death. They were executed in January 2000.²⁵ Several of the condemned pirates claimed that they acted on instructions from two prominent Indonesian businessmen. Acting on that information one of the named men was arrested by authorities in Indonesia, tried for his involvement in recruiting the pirates and sentenced to a term of 6 years imprisonment.²⁶

16 In March 1999 in the South China Sea off Thailand 14 Burmese nationals hijacked the "Marine Master" carrying a cargo of soda ash valued at approximately US\$700,000. Six days later the crew of the vessel was found by Thai fishermen

²² 1998 Anti-Shipping Activity Messages Ref No. 1998-59 (supra fn 19); Sweeney, J. "Ships vanish as piracy rules" Observer (27 Aug 2000) <www.classaxe.com/discus/messages/14/33.html?969194856>

²³ The Nippon Foundation Library – International Conference Paper <nippon.zaidan.info/seikabutsu/2003/00156/contents/0026.htm> at [26]; 1998 Anti-Shipping Activity Messages Ref No. 1998-93 (supra fn 19).

²⁴ Glass, C. (supra fn 4) pp 3-4; "South Sea Piracy – Dead Men Tell No Tales" (supra fn 19).

²⁵ "China executes 'Cheung Son' 13" Lloyd's List (29 January 2000) p.4; "Pirates go to their deaths in full voice" Lloyd's List (1 February 2000) p.18.

adrift in a small lifeboat. The pirates renamed the ship the “Nuovo Tierra”, hoisted a false flag and took the vessel to China where the cargo was offloaded and sold. In June 1999 the vessel entered another Chinese port for repairs where, with IMB assistance, it was identified as the “Marine Master”. The crew on board was arrested. All were put on trial in a Chinese court and convicted of piracy. The organiser of the group was sentenced to death and the other 13 were sentenced to terms of imprisonment.²⁷

17 In October 1999 a Panamanian-registered cargo vessel, the “Alondra Rainbow”, left an Indonesian port bound for Japan with a cargo of 7000 tonnes of aluminium ingots worth US\$8-US\$14m. As with the attack on the “Tenyu” one year earlier the ship was hijacked in the South China Sea by Indonesian pirates soon after it left the Indonesian port of Kuala Tanjung. In November 1999, the Indian Coast Guard was alerted by other vessels in the area to the suspicious behaviour of a vessel in Indian waters and it engaged the vessel in a “hot-pursuit”. The chase by the Coast Guard, and by the Indian Navy, continued for two days and the ship was not brought to a halt until the Navy fired on the vessel. The apprehended ship was bearing the name “Mega Rama” and was flying a Belize flag. Indian officers boarded the ship and were able to save the vessel before the crew completed an attempt to scuttle it. Part of the hijacked cargo remained on board. It is suspected that the missing cargo was applied to the acquisition of arms for the LTTE.²⁸ The following account of the incident illustrates the degree of organisation that lay behind the attack:

“On 22 October 1999, the ALONDRA RAINBOW loaded a cargo of 7000 [tonnes] of aluminium ingots and sailed from Kuala Tanjung in Indonesia for Miike in Japan. Shortly after her departure, a gang of pirates armed with swords and guns hijacked the ship. The 17-crew members were threatened with death and transferred to MV SANHO, which came alongside at sea. They were held captive for a week and eventually set adrift in a life raft on 29

²⁶ Glass, C. (supra fn 4) pp 3-4; “South Sea Piracy – Dead Men Tell No Tales” (supra fn 19).

²⁷ “Myanmar pirate sentenced to death in China” Reuters News Service (1 Feb 2000); “14 Men Sentenced For Piracy by Chinese Court” Fairplay International Shipping Weekly <www.porttechnology.org/industry.news/2000/0116.shtml>; “China arrests alleged Burmese pirates” BBC News (5 Aug 1999) <news.bbc.co.uk/1/hi/world/asia-pacific/412416.htm>; 1999 Anti-Shipping Activity Messages Ref No. 1999-37 <www.fas.org/irp/world/para/docs/ASAM-1999.htm>;

²⁸ The Nippon Foundation Library – International Conference Paper (supra fn 23) at [22]-[23]; “South Sea Piracy – Dead Men Tell No Tales” (supra fn 19); 1999 Anti-Shipping Activity Messages Ref No. 1999-114 (supra fn 28); “Capture of Pirated Ship MV Alondra Rainbow In A Joint Operation By the Coast Guard and Navy” <www.indiancoastguard.nic.in/indiancoastguard/sar/Rainbow.html>

October 1999. They were rescued by a Thai fishing boat 10 days later on 8 November 1999, off the North East Coast of Sumatra.

On 28 October 1999, the IMB Piracy Reporting Centre commenced broadcasting a message to ships at sea via safetyNET service of Inmarsat-C with a request to report any ship, which matched the description of the ALONDRA RAINBOW. The excellent response from various masters at sea helped locate the missing ship. On 14 November 1999, the master of a Kuwaiti tanker reported sighting a ship matching the profile of the ALONDRA RAINBOW heading into the Arabian Sea. The IMB Piracy Reporting Centre passed this information along with a photograph of the ALONDRA RAINBOW to the Indian Coast Guard and requested their assistance.

The response of the Indian authorities was swift. The Coast Guard immediately despatched a patrol aircraft to search the area. Upon sighting the suspect ship, the Coast Guard advised that her profile matched the photograph of the ALONDRA RAINBOW. However, the suspect ship had a name MEGA RAMA and was flying the Belize flag. Quick checks by the IMB Piracy Reporting Centre revealed that no such ship was registered in Belize. The patrol aircraft then attempted radio contact with the ship but she maintained radio silence. Thereafter a coast guard patrol vessel was sent to intercept the ship, 70 miles west of Ponnani. Despite warning shots fired across her bow, the ship increased speed and continued her path. It was only when a missile carrying Corvette, INS PRAHAR, was called into action that the high seas chase was brought to an end. The naval ship deployed a graduated use of force to bring about the suspect ship's capture on the 16 November 1999, approximately 300 miles south west of Mumbai. The 15 Indonesians found on board allegedly attempted to destroy the evidence by setting fire to and scuttling the ship. The naval boarding party put out the fire, brought the flooding under control and towed the ship to Mumbai.

Investigations showed that Mr Burham Nanda, chief engineer along with Christinous Mintando, master, met an employment agent at a coffee shop in Batam, Indonesia on 4 October 1999. They finalised the plans to hijack a ship and boarded MV SANHO which was anchored in Jakarta. SANHO sailed with about 35 persons on board. Twelve of these were armed with weapons. The person in charge was referred to as "boss". SANHO's first port of call was Batam where she took bunkers, water and provisions. On 17 October 1999, she left for Kuala Tanjung, Indonesia arriving there on 22 October 1999. One member of the gang had already boarded the ALONDRA RAINBOW while she was loading her cargo. In the late evening of 22 October 1999, about 10 to 12 persons armed with pistols and lethal weapons were transferred from SANHO to a speedboat. When the ALONDRA RAINBOW was sighted, the speedboat reached behind her stern. The member of the gang who had hidden on board the ALONDRA RAINBOW, lowered ropes for his accomplices to climb on board. The crew of the ALONDRA RAINBOW were captured and their hands tied. At this stage SANHO came alongside and Mintando and 14 other "crew" climbed aboard and took charge of the ALONDRA RAINBOW. The original crew of the ALONDRA RAINBOW were transferred to SANHO.

On 23 October 1999, Mintando and the 14 crew changed the name of the ALONDRA RAINBOW to GLOBAL VENTURE and proceeded to Miri in East Malaysia, arriving there on 26 October 1999. Black paint was supplied at Miri and her hull was repainted in from original blue to black.

On 27 October 1999, about 3,000 [tonnes] of aluminium ingots were transhipped on to another ship called BONSOON II, which came alongside. After this, the employment agent instructed Mintando to sail toward Karachi in Pakistan. At some stage the name of the ALONDRA RAINBOW, alias GLOBAL VENTURE was changed again to MEGA RAMA.

In the meantime BONSOON II proceeded to Philippines and discharged the stolen 3,000 [tonnes] of cargo there. ... At least two of the 15 Indonesians found on board had featured in the hijacking of TENYU in September 1998 ...²⁹

18 In February 2003, 14 of the 15 who had been on board the vessel at the time of its capture (one died in the course of the trial) were convicted in an Indian court of piracy offences and sentenced to seven years imprisonment.³⁰ In April 2005 the High Court in Mumbai set aside the convictions and acquitted all of the accused.³¹

19 In February 2000 a Japanese-owned tanker, the MT "Global Mars", 'en route' from Malaysia to India, carrying a cargo of 6000 tonnes of palm oil worth approximately US\$3m was hijacked in the Straits of Malacca by heavily armed pirates. The crew of 17 was transferred to a large fishing boat where they were held on board for 13 days and then set adrift in a small boat. After 4 days at sea they landed on a small island in southern Thailand and were able to inform the owner's agent of the hijack of the vessel. The IMB offered a reward of US\$100,000 for information leading to the recovery of the ship. The pirates sold the vessel's cargo and then used the vessel as a "phantom" ship, changing its name and flag frequently. In May 2000 the ship was boarded by Chinese authorities in Hong Kong waters bearing the name "Bulawan" and false Honduran registration papers. About 2500 tonnes of the cargo remained on board. The vessel was returned to its owner.

²⁹ Abhyanker, J. (ICC International Maritime Bureau) "Piracy and Armed Robbery and Terrorism At Sea" Observer Research Foundation Workshop on Maritime Counter Terrorism. (Delhi, 29 November 2004) p 4-5.

³⁰ "Indonesians convicted for hijacking Japanese ship" Asian Tribune (26 Feb 2003) <www.asiantribune.com/show_news.php?id=2761>

³¹ Commodore R.S.Vasan IN (Retd) "Alondra Rainbow revisited, A study of related issues in the light of the recent judgment of Mumbai High Court" South Asia Analysis Group Paper No. 1379 (13 May 2005) <www.saag.org/%5Cpapers14%5Cpaper1379.html>

The crew (11 Filipino, 9 Burmese) was arrested but later released.³²

20 In August 2000 a cargo ship, the “Julianna”, failed to complete a voyage from Indonesia to the Philippines carrying a cargo of 2000 tonnes of steel coils worth US\$50m. The IMB issued an alert and reward for any information that led to the recovery of the vessel. Later in August a vessel lying at anchor near an island off the Thailand coast bearing the name “Mariana” and seeking a customs clearance for a cargo of steel, was identified as the “Julianna”. However, before Thai authorities could board the vessel it set sail. Further investigations then undertaken by Thai authorities revealed that the vessel bearing the name “Suwanmanee” under an Honduran flag had been used for several years by the “Thai mafia” to smuggle goods. In September 2000 the ship was found at anchor in Thai waters under the name “Verona” and carrying false Honduran registration papers. The crew of 16, led by a Burmese, was taken into custody. None of the hijacked cargo, however, remained on board.³³

21 In March 2002 a Belize-registered tanker, the MV “Han Wei”, carrying a cargo of 2000 tonnes of fuel oil, worth US\$400,000, from Singapore to Yangon, Myanmar, was hijacked soon after leaving Singapore and the cargo transferred to another tanker. The crew of 13 was set adrift in a small boat and later found marooned on the coast of Sumatra. As a result of information received from the IMB Thai authorities located the “Han Wei” at anchor in the Gulf of Thailand near Bangkok in May 2002. The ship had been repainted and renamed the “Phaeton”. When boarded and seized by Thai marine police and naval forces there was no crew on board. Thai police later arrested 3 Burmese nationals believed to be connected to the vessel. They told Thai authorities that they were members of a pirate gang that hijacked the vessel and that their numbers included members of the Burmese army. They stated that they had been hired by a Taiwanese national to steal the tanker and

³² The Nippon Foundation Library – International Conference Paper (supra fn 23) at [25]; Hand, M. “Hijacked Global Mars is ‘found in Southern China’ ” Lloyd’s List (2 June 2000); Bruyneel, M. “MT Global Mars attack” (April 2000) <home.wanadoo.nl/m.bruyneel/archive/modern/global.htm>.

³³ Hand, M. “Piracy: Phantom of Julianna arrested in Thai port” Lloyd’s List (3 October 2000); “Hazardous Seas – Maritime Sector Vulnerable to Devastating Terrorist Attacks” (supra fn 13) p 2; Bruyneel, M. “Reports in 2000: October-December” (4 January 2001) <home.wanadoo.nl/m.bruyneel/archive/modern/2krepor4.htm>.

had been paid approximately US\$235,000.³⁴

22 Another disturbing trend in the Straits of Malacca and the South China Sea has been the boarding of vessels to kidnap members of the crew and hold them for ransom. The pirates carrying out these acts appear to be well-trained and organised. In August 2003 in the Straits of Malacca gunmen who claimed to be members of the Aceh separatist movement GAM boarded a Malaysian-registered tanker, "Penrider" carrying 1000 tonnes of fuel oil from Singapore to Penang. The boarding party was heavily armed, carrying not only automatic weapons but also a rocket-propelled grenade launcher. The vessel was forced into Indonesian waters where the master and 2 crew members were taken from the vessel and held as hostages for the payment of a ransom of US\$100,000. The ship with its remaining crew was allowed to resume the voyage to Penang, the pirates showing no interest in the cargo. Subsequently the ship's owner paid US\$53,000 to obtain the release of the hostages.³⁵

23 In January 2004 off the coast of Sumatra in the Straits of Malacca pirates boarded a tanker, the MT "Cherry 201", carrying 1000 tonnes of palm oil worth approximately US\$500,000. The crew of 13 was held hostage on the vessel for 5 weeks. The master was released to inform the ship's owner of a demand for ransom of US\$50,000. The owner negotiated down the amount of ransom to US\$8,750. After several weeks had passed and the ransom had not been paid four of the crew were executed by the hijackers. The rest of the crew escaped by jumping overboard.³⁶

24 In May 2004 a general cargo vessel MV "Berjaya II", was boarded by pirates whilst under way in the Straits of Malacca. The master and chief engineer were

³⁴ Hand, M. "Hijacked Han Wei is found in the Gulf of Thailand", Lloyd's List (16 May 2002) p 5, Hand, M. "Thailand holds three for Han Wei hijack", (29 May 2002) p 3; Commercial Crime International (June 2002) p.1, 5; Bruyneel, M. "Reports in 2002: April-June" (10 July 2002) p 3 <home.wanadoo.nl/m.bruyneel/archive/modern/2k2repub.htm>; "IMB search leads Thai authorities to hijacked tanker" (21 May 2002) <www.iccbo.org/icccafe/index.html?cookies=no>.

³⁵ "Piracy and maritime terrorism in Southeast Asia", The International Institute for Strategic Studies Vol. 10 Issue 6 (July 2004) <www.iiss.org/stratcom>; Hand, M. "Pirates seek ransom for kidnap crew" Lloyd's List (14 August 2003) p.16, "Penrider owner ready to pay ransom" Lloyd's List (15 August 2003) p.3, "Penrider crew free after ransom paid" Lloyd's List (19 August 2003) p.3; "Pirates free crew members" Fairplay International Shipping Weekly (21 August 2003).

taken hostage and payment of a ransom demanded. In June 2004 the master and chief engineer of the MV "Ika Murni" suffered a similar fate in the same waterway. The remainder of the crew jumped overboard as the pirates boarded and were saved by fishing vessels operating in the area. The pirates abandoned the unmanned vessel and in due course it was towed to port. Later in June 2004 the master and chief engineer of a tug "Britoil 29" were kidnapped for ransom as the tug was making its way through the Straits of Malacca.³⁷

25 A major hazard that arises from the kidnapping of senior crew members of large vessels is the risk of collision or stranding that follows. There have been occasions where pirates have taken senior members of the crew and left fully laden tankers to continue underway with an unmanned bridge in the narrow waterway of the Straits. An environmental catastrophe has been averted only by good fortune.³⁸

26 To combat the threats of piracy some vessels have accepted "armed riding crews" offered by private security services.³⁹ Such a step however, runs the risk of the arrest of vessel and crew for contravention of the laws applying to the territorial waters entered by the vessel.⁴⁰ Another device employed has been the installation of a high voltage fence around the deck of a vessel. Obviously this is not an option where the vessel is carrying a volatile cargo. Strong lights, high pressure water jets and high decibel noise have been used to repel or disable boarders and to deter the small vessels brought alongside. The master of a vessel attacked by pirates, however, is in a difficult position. If the pirates overcome the resistance offered it is likely that once on board the pirates will attack and harm the crew.

³⁶ "Murder of four sailors marks violent start to shipping year 2004" ICC Commercial Crime Services – Weekly Piracy Report (3-9 February 2004).

³⁷ Fairplay International Shipping Weekly, (14 October 2004) p. 12; Reports On Acts Of Piracy And Armed Robbery Against Ships – June 2002 IMO MSC4/Circ. 54 Ref. Nos 2,3.

³⁸ Warren, J.F. "A Tale of Two Centuries: The Globalisation of Maritime Raiding and Piracy in Southeast Asia at the end of the Eighteenth and Twentieth Centuries". Asia Research Institute, Working Paper Series No 2 (June 2003) at p.20-21; Hand, M. "IMB warns of collision catastrophe threat in wave of pirate attacks" Lloyd's List (6 November 2003); "Concern grows as tankers are targeted in the Malacca Straits" Commercial Crime International (September 2003) p.1,4; "IMB issues piracy warning after fresh attacks in Malacca Strait" Lloyd's List (3 September 2003).

³⁹ See: <www.gotridentgroup.com>; <www.maritimesecurity.com>; <www.aegisdef.com>. Chung, V.K. "Shipping Firms Offered Ghurkas for Protection" 25 February 2000 <www.geocities.com/glen_crippen/00-03/PIR-ghurkas.html?20064>

⁴⁰ "Malaysia furore fails to deter Malacca escort security firm" Lloyd's List (4 May 2005) p.3.

27 It is not difficult to see how some of the serious acts of piracy that have been carried out may be precursors to a significant terrorist attack.⁴¹ The ease with which pirates are able to board large vessels carrying dangerous cargoes or cargoes of great value suggests that a terrorist organisation could either recruit such personnel or adopt similar methods to set in train a major maritime incident.

28 On some occasions when very large crude carriers have been boarded by pirates in the Straits of Malacca it has been reported that the pirates took command of the bridge with the apparent intent of obtaining experience in navigating a vessel of that size through the narrow waterway of the Straits, conduct consistent with a purpose beyond mere piracy.⁴²

29 Proceeds obtained from ransom demanded for the release of kidnapped crew members, or from the sale of hijacked cargo or a hijacked vessel, or from the use of a hijacked vessel as a “phantom” ship in maritime trade, may provide finance for terrorist activities. In its 1998 report on piracy the IMB reported that international piracy syndicates claimed that ships could “be hijacked to order in the Philippines for about \$300,000 and delivered within three days”.⁴³ It has been suggested by intelligence agencies that al Qaeda may have at least 20 “phantom” ships under its control already.⁴⁴

30 It must be accepted that shipping and maritime facilities present themselves as prime targets for any terrorist group seeking to cause harm on an international

⁴¹ McMillan, S. “Terrorism adds to worries about piracy” National Business Review (NZ) (11.06.2004) <www.nbr.co.nz>;

Schoen, J. “Ships and ports are terrorism’s new frontier” (21.06.2004) <msnbc.msn.com/id/5069435/>;

Cordner, L. “Maritime Terrorism: The Next ‘Soft Target’?” <[www.futuredirections.org.au/write/MaritimeTerrorismSpeech\(1\).pdf](http://www.futuredirections.org.au/write/MaritimeTerrorismSpeech(1).pdf)>;

Dillon, D.R. “Southeast Asia and the Brotherhood of Terrorism” (19.11.2004) <www.heritage.org/research/asiaandthepacific/hl860.cfm>;

Korin, A. and Luft, G. “Terrorism Goes to Sea” Council on Foreign Relations (Foreign Affairs November/December 2004) <www.cfr.org>;

Chen, J. “Time to evaluate the likelihood of terrorism at sea” Lloyd’s List (19 July 2005);

Koknar, A.M. “Piracy and terrorism are joining forces and creating troubled waters for the maritime industry” Present Security Management Magazine (June 2004) <www.securitymanagement.com/library/001617.html>

⁴² Korin, A. and Luft, G. (supra fn 41) p 4; Glass, C. (supra fn 4) p 6-7; “Piracy and maritime terrorism in Southeast Asia” (supra fn 35); “Asia pirates ‘training for terror attack’” Lloyd’s List (15 October 2003) p.8; Howland J. (supra fn 14) pp. 1-2, 13-14.

⁴³ Hitt, J. (supra fn 19) p.6.

scale. An explosives-laden “phantom” vessel could be taken into a major port and detonated or a hijacked Liquid Natural Gas (LNG) carrier rammed into a wharf or loading terminal to release and ignite the cargo.⁴⁵ An attack such as that carried out on the USS “Cole” or the “Limburg” could also be directed at an LNG carrier or other vessel carrying dangerous cargo, or at an international passenger ship. A shore-based attack using missiles or heavy armaments could be launched against a maritime facility used for the loading, or unloading of oil or LNG. An attempt to disrupt world trade in a significant respect, or to create an environmental catastrophe, could be made in a narrow waterway such as the Straits of Malacca by sinking, or grounding, a hijacked vessel such as an ultra large crude oil carrier. A recent assessment of the risk of such an event occurring in this region has underlined the extent of Australia’s dependence on maritime transport.⁴⁶

31 The transport of LNG in purpose built vessels presents significant risks, particularly when the vessels enter a port, or berth at a receival facility, to discharge the cargo. LNG is non-flammable whilst held in liquid form in cryogenic containers but the rupture of such containers by explosives or by damage to the vessel would release the gas and may produce a dangerous vapour cloud if the escaped gas is confined in a port area and not dispersed.⁴⁷

32 The following account exemplifies the level of security that must be applied when such a vessel enters a port:

“The arrival of LNG shipments at Boston Harbor triggers an elaborate security procession that includes maritime patrol boat escorts, helicopters, police divers, firefighting tugs, and the closing of the Tobin Bridge – the U.S. Route 1 commuting expressway, which LNG ships clear by less than 10 feet. In addition, Massachusetts State Police cruisers are placed strategically along the shore to watch for possible land-based missile attacks.

Despite the intricate security precautions, concerns regarding the vulnerability of LNG tankers and the potential for a terrorist strike persists. Although a handful of other ports in the United States take delivery of liquefied natural gas via ship, Boston is especially

⁴⁴ Howland J. (supra fn 14) p 1; Blanche, E. (supra fn 8) p 10-11.

⁴⁵ Blanche, E. (supra fn 8) p.2; Howland J. (supra fn 14) pp 4-5.

⁴⁶ Australian Strategic Policy Institute Ltd, “Future unknown: The terrorist threat to Australian maritime security” (April 2005) Ch.2, <www.aspi.org.au/21139maritimesecurity/chapter02.html>

⁴⁷ Howland J. (supra fn 14) pp.3-5.

*vulnerable because it is the only such port located in a commercial or residential harbour.”*⁴⁸

33 A stark illustration of the harm that could be caused by a terrorist incident within a port is to be found in the destruction wrought upon the port of Halifax, Nova Scotia, in December 1917 when the small vessel “Mont Blanc”, whilst leaving port with a cargo of munitions and explosive ingredients, collided with a vessel entering the port and caught fire and exploded within 20 minutes of the collision. The blast killed approximately 2000 people, injured 9000 and laid to waste 130 hectares of the town of Halifax. Amazingly all of the crew of the “Mont Blanc” survived the holocaust by taking to lifeboats immediately after the collision and reaching the far side of the harbour before the explosion occurred.⁴⁹

34 Of course since 1917, and particularly since World War II, the size of cargo-carrying vessels has increased markedly and the range of dangerous cargoes carried has multiplied and merchant vessels undertaking legitimate transport of explosive materials are commonly at sea. In April 1947 a similar event occurred in the United States in the port of Texas when the French freighter “Grandcamp” loading ammonium nitrate caught fire and exploded. Nearly 600 people were killed and 3500 injured and much of the city was destroyed.⁵⁰

35 In June 2003 a merchant vessel “Baltic Sky” carrying fictitious registration documents, was intercepted by Greek authorities in Greek territorial waters. It was carrying a cargo of 750 tonnes of ammonium nitrate and 800,000 detonators. The manifests stated that the cargo was to be delivered in Sudan. The delivery address was found to be non-existent. Ammonium nitrate is commonly used in the mining and construction industries as an explosive and in the agriculture industry as a fertiliser and its availability has made it the explosive of choice for terrorists. Approximately 2 tonnes of the explosive was used to destroy the federal government building in Oklahoma City in the United States in 1995, a domestic act of terrorism.⁵¹ The same explosive was used to destroy the US Embassies in Kenya and Tanzania

⁴⁸ Howland J. (supra fn 14) p.4.

⁴⁹ Halifax Regional Municipality: <www.halifax.ca/community/explode.html>.

⁵⁰ “The Explosion 50 years later, Texas City still remembers” <www.chron.com/content/chronicle/metropolitan/txcity/index.html>

⁵¹ Glass, C. (supra fn 4) p.8.

in 1998, said to have been delivered to al-Quaeda operatives by a “phantom” merchant ship such as the “Baltic Sky”.⁵²

36 If the cargo carried on the “Baltic Sky” had been exploded within the confines of a port it would have dwarfed the impact of the “Mont Blanc” disaster. Such an explosion within one of the world’s busiest ports, for example Singapore, would cause massive loss of life and great disruption to world trade.⁵³ The prospect of such an event in Singapore is not far-fetched. It has been alleged that the 13 Singaporeans arrested in Singapore in December 2001 belonged to the Jemaah Islamiya organisation and had planned to bomb targets in Singapore harbour, including US warships. Six of those arrested were members of the Singapore military reserve. It is alleged that those arrested had intended to obtain 21 tonnes of ammonium nitrate to carry out the attacks. It is said that before the arrests 4 tonnes had been brought into Singapore but at the time of arrest had been placed beyond the reach of Singapore authorities.⁵⁴

37 Many of the waters in which piracy is rampant are also adjacent to countries in which terrorist groups operate. For example, the coasts of Yemen and Somalia border the Bab al Mandab Straits at the mouth of the Red Sea where a major increase in piracy has occurred in recent years. It is accepted that terrorist organisations are present in Yemen and it is claimed that a “new and ruthless cell with links to al Qaeda has grabbed a foothold in [Somalia]”.⁵⁵ Piracy is a common event in the South China Sea off the coast of the Philippines where, as noted above, the terrorist group Abu Sayyaf has already been involved in terrorist attacks upon ships in Philippine waters. One of the most dangerous areas for piracy is in the Straits of Malacca, particularly off the coast of Indonesia, where insurgent or terrorist groups, such as GAM and Jemaah Islamiyah, are known to be active. Whilst the political aims of groups such as LTTE, and GAM, and, perhaps Abu Sayyaf may be focussed on a local outcome, the assessment of the risk of the occurrence of an act of terrorism against a maritime target for the purpose of causing damage to world trade must give due weight to the fact that wherever conditions of deprivation or

⁵² Howland J. (supra fn 14) pp.3, 14.

⁵³ Howland J. (supra fn 14) p 3.

⁵⁴ Glass, C. (supra fn 4) p.8.

⁵⁵ “New terror group in Somalia: report” The West Australian (13 July 2005) p.22.

repression exist those circumstances may foster support and assistance for a terrorist group with international objectives.⁵⁶ As one commentator has said:

“[Indonesia] has experienced decades of repression by a kleptocratic military, communal violence and the degradation of a once vibrant economy. Radical Islamists have made it the focus of their activity and recruitment in Asia.

Poor Indonesians who want money may become thieves on land or sea, while those who want change become Muslim fundamentalists – Indonesia put an end to secular dissent in 1965 when General Suharto massacred at least half a million suspected Communists and leftists. There are already indications that a major terrorist incursion against the West or one of its satellites will come from the sea. The use of machine-guns, mother ships and attack craft suggests that modern pirates are either in the military or have had military training. Naval patrols from Indonesia’s more remote islands, where the Navy has traditionally complained that the Army takes all the spoils, have participated in pirate attacks. Some pirates have abseiled down from helicopters onto ships. The business has become too lucrative to leave to amateurs, and the targets are too tempting for anyone to assume terrorists will ignore them.

. . .

More poverty would push people to robbery, on land or sea, or awaken them to the Islamist call to redress the balance of power with the secular West.”⁵⁷

38 The London marine insurance market, through the Joint War Committee of Lloyd’s Market Association, has defined the Straits of Malacca as a “war risk” area, the principal factor considered in making that assessment being the possibility of the occurrence of an act of terrorism against a maritime target in that locality.⁵⁸ The Joint War Committee relied upon a report provided by security consultant Aegis Defence Services (ADS), which stated that it was likely that there would be an al-Qaeda attack upon a significant maritime target in the region.⁵⁹ In October 2003 ADS reported that it believed that an alliance between piracy and terrorism already existed.⁶⁰ That assessment has been subject to widespread criticism. The littoral States of the Straits of Malacca, the Asian Shipping Forum, IMB, and the International Chamber of Shipping have all questioned whether frequency of piracy

⁵⁶ Dillon, D.R. (supra fn 41) p 2-4.

⁵⁷ Glass, C. (supra fn 4) p 6, 11

⁵⁸ “Grim Warning on Piracy – Attacks force insurer to declare Malacca Strait terrorism risk area” The West Australian (21 July 2005) p.28; Brewer, J. “ ‘Bin Laden effect’ prompted Malacca war risk rating” Lloyd’s List (12 August 2005).

⁵⁹ “Aegis 2005 Terrorism Report” <www.aegisdef.com/reports.aspx>.

⁶⁰ Howland J. (supra fn 14) p 1.

in the region has any connection with the degree of risk of a terrorist attack. Since July 2005 Indonesia, Malaysia and Singapore have conducted joint maritime patrols, and more recently joint air patrols, in the Straits of Malacca which may have had the effect of reducing pirate attacks although no pirate gangs have been apprehended or prosecuted.⁶¹

39 Pirates based in the Indonesian archipelago have descended on international shipping with little risk of apprehension. Vessels navigating the narrow waterway of the Straits of Malacca have been particularly vulnerable to pirates. Large vessels such as very large crude carriers travel at reduced speed with restricted manoeuvrability. They cannot turn within the width of the channel allotted to them in the Straits thereby restricting their ability to take evasive action by sharp turns or zig-zags to foil pirates attempting to board at the stern. The consequence of a blockage of the Straits by a terrorist incident would have great significance for world trade. Any alternative route for shipping would involve much longer voyages and markedly increased costs. Approximately 30% of all world trade and 50% of world energy requirements pass through the Straits of Malacca each year including, importantly, 80% of the annual crude oil and liquid natural gas requirements of Japan, China, Taiwan and South Korea.⁶²

40 The piracy that has occurred with increasing frequency over the past decade is not limited to opportunistic incidents in which indigent inhabitants of third world littoral States take advantage of ships lying at anchor or travelling at reduced speed in coastal waters to board them and rob crew members of their personal property or ransack the contents of the safe in the Master's cabin.

⁶¹ "Hong Kong owners criticise Joint War Committee on Malacca" Lloyd's List (2 August 2005); Grinter, M. "Joint War Committee urged to review Malacca terror risk status" Lloyd's List (3 August 2005); "Asia Reacts to Joint War Committee's War Risk Decision" Bow Wave, Issue 298 (7 August 2005). Turner, T. "Is marine insurance daylight piracy" Lloyd's List (12 August 2005); Hand, M. "Asian owners add to Malacca Strait fury" Lloyd's List (15 August 2005); Brewer, J. "Joint war committee stands by Strait ruling" Lloyd's List (17 August 2005); Grinter, M. "Disgruntled ASF rejects Malacca Strait risk listing" Lloyd's List (22 August 2005) "Piracy and terrorists 'not linked'" Lloyd's List (9 September 2005); Brewer, J. "Owners set for battle over piracy cover" Lloyd's List (15 November 2005); Hand, M. "Bid to end Malacca Strait war risk ruling fails" Lloyd's List (23 January 2006); Grinter, M. "Asian owners hit out at Malacca war listing" Lloyd's List (5 April 2006). Hand, M. "keep up pressure on pirates, urges IMB" Lloyd's List (12 May 2006).

⁶² Y. Bhg. Datuk Mohd Sidik Bin Shaik Osman "The Costs of a Blockage in the Straits of Malacca" Port & Maritime Security and Counter-Terrorism Summit, (Melbourne, 28-29 April 2005) p.1.

41 A significant amount of recent piracy has seen the use of brutal force and the terrorising of the crew in the hijacking of a vessel and appropriation of its cargo. The pirates in these incidents have been heavily armed with machine guns and grenade launchers. They have been well-organised, and appear to be supported by, or acting for, international crime syndicates.⁶³ It is the degree of training and support in the conduct of major maritime crime that suggests that there is a real risk that internationally organised pirates and terrorists could find common purpose in the planning and execution of a maritime incident of major significance. Indeed pirate and terrorist groups may already have a potential link in that the heavy weapons carried by some pirate gangs are likely to have been supplied by personnel who provide similar weaponry to terrorist organisations.

42 The following account of the availability of major armaments on the world market shows how serious the problem of pirates and terrorists working together may become:

“One factor that has had an important bearing on the increased lethality of international piracy is a ready supply of black market weapons, many of which emanate from unregulated munitions stocks left over from wars in Afghanistan and Cambodia. These armaments are truly extensive and can be expected to include anything from pistols and machine guns to assault rifles, rocket-propelled grenades (RPGs) and heavy calibre cannons. The increased availability of munitions such as these has been reflected in pirate assaults that are now both more sophisticated and lethal than was previously the case. Gone are the days of sporadic, and largely ineffectual, incidents simply involving petrol bombs, knives, axes and machetes. Today, attacks can be expected to involve well-equipped armories that are able to take on, defeat and, if necessary, destroy the very largest ocean-going vessels.⁶⁴”

43 It may be accepted that any terrorist group seeking to inflict major harm on the international economy would have already identified the maritime industry as a place to strike. Crude oil and LNG supplies are the lifeline of the world economy and marine transport provides the principal means of distribution. If it is assumed that a terrorist organisation exists that has the means and capacity to carry out a major attack there is good reason, therefore, to expect that such an attack will be directed

⁶³ The Ministry of Foreign Affairs of Japan “Diplomatic Blue Book 2001 – Ch. II Sect.4 Item D – Piracy and Armed Robbery against Ships” <www.mofa.go.jp/policy/other/bluebook/2001/chap2-4-d.html>; Esaki, T. (Senior State Secretary for Foreign Affairs, Japan) “Regional Conference on Combating Piracy and Armed Robbery against Ships” (27.04.2000) <www.aseansec.org/7860.htm>.

at a maritime target. Such an assault may entail co-ordinated attacks on various targets.

44 It is to be noted, of course, that each terrorist attack that has taken place in Indonesia, Morocco, Saudi Arabia, Spain and the United Kingdom since 11 September 2001 has at the same time assisted the cause of counter-terrorism. The arrest and interrogation of people connected with these events has revealed methods of operation; provided information on the organisation involved and its terrorist objectives; and has identified personnel who may have been, or may be, recruited for future attacks thereby allowing those people to be monitored. It can be anticipated, therefore, that if there is a terrorist organisation that intends to carry out a major attack it may feel compelled to attempt that assault on a suitable target sooner rather than later, in particular before further counter-measures can be taken to neutralize its capacity to act.

45 On the day the “Limburg” was attacked on 6 October 2002, al-Qaeda proclaimed to the world that it was preparing events that would cause terror in the “crusader community” and target its economic lifeline.⁶⁵ Events of that description would include attacks on major ports, shipping routes or upon oil or LNG loading terminals. In October 2002 Saudi Arabian authorities disclosed that they had thwarted an attempt by al-Qaeda to attack the Ras Tanura offshore oil loading facility on the Persian Gulf,⁶⁶ through which 10% of the world’s oil supply flows every day. In May 2004 al-Qaeda operatives employed at the Saudi Arabian Yanbu oil refinery and loading terminal on the Red Sea attacked and killed 5 refinery employees.⁶⁷ In February 2006 the world’s largest oil-processing facility, Abqaiq situated close to Saudi Arabia’s main export terminals on the Persian Gulf was the target of an attack when two vehicles bearing the refinery logo and packed with explosives attempted to enter the refinery. When the vehicles were challenged by guards one vehicle was exploded at the gate. The remaining militants were only overcome after an intense

⁶⁴ Chalk, P. (supra fn 18) p.86.

⁶⁵ Blanche, E. (supra fn 8) p.7.

⁶⁶ Blanche, E. (supra fn 8) p.7; Luft, G. and Korin, A. “Terror’s Next Target” (30 May 2004) Institute for the Analysis of Global Security p.2 <www.iags.org/n053004a.htm>

⁶⁷ Booth, J. “London link to Saudi massacre” <www.timesonline.co.uk/article/0,,1-1097973,00.html>

gun battle.⁶⁸ In Yemen in September 2006 two separate but co-ordinated attacks on an oil storage and an oil exporting terminal by four bomb-laden vehicles were thwarted by security forces.⁶⁹

46 The vulnerability of such facilities is shown by the impact on the Arun LNG processing terminal operated by Exxon Mobil in the Aceh province of Indonesia which was closed for a period of 5 months in 2001 after the security of the operation was put at risk by the activities of GAM separatist rebels in the area.⁷⁰

47 Another possibility is the prospect that a merchant vessel carrying reprocessed nuclear fuel could be hijacked and plutonium extracted to make a nuclear device, or the vessel set with explosives and converted to a floating bomb capable of creating a major nuclear hazard. Ships carrying spent nuclear fuel from Japan to Europe for reprocessing and return use the Straits of Malacca for part of that voyage and they are not escorted by naval vessels.⁷¹

48 Another maritime-related terrorist risk, and in particular port related, is the use of scuba diving equipment or motorised underwater sleds to attack vessels with explosives in suicide missions. It has been reported that al-Qaeda may have begun training personnel for such attacks.⁷²

49 Awareness of the risk of the foregoing events caused the world's maritime nations to confer on the introduction of security measures to reduce the risk, for example by requiring ships to provide evidence of identification; prior notice of intended voyages; and provision of details of all cargo carried before a vessel is permitted to enter a port. The agreement reached by those nations on the steps to be taken to improve maritime security are now known as the International Ship and Port Facility Security Code ("ISPS Code").

⁶⁸ Gardner, F. "Saudi oil attack" BBC News <news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/4748978.stm>

⁶⁹ Ghobari, M. "Yemen foils attacks on oil, gas facilities" <www.swissinfo.org/eng/international/ticker/detail/Yemen_foils_attacks_on_oil_>

⁷⁰ Blanche, E. (supra fn 8) p.7; Howland J. (supra fn 14) pp.4-5; Osler, D. "Keeping the pin in oil and gas time bomb" *Lloyds List* (11 August 2005).

⁷¹ Howland J. (supra fn 14) p 5.

⁷² Howland J. (supra fn 14) p 14.

International Shipping and Port Facility Security Code (ISPS Code)

50 Historically the safe carriage of dangerous cargoes on vessels and the safe operation of ports has always been a matter of international concern reflected in international conventions codes and regulations to be implemented by national legislatures e.g. International Maritime Dangerous Goods Code; International Bulk Chemical Code; Bulk Chemical Handling Code; Gas-Carrier Code; and Convention for the Safety of Life at Sea (“SOLAS Convention”) done at London on 1 November 1974.

51 The United Nations Convention on the Law of the Sea made on 10 December 1982 (“the Treaty”) has been ratified by 145 nations and provides for international co-operation in the control of piracy by allowing any State to seize a vessel on the high seas that is under pirate control and to prosecute the pirates under the domestic law of that State. Although the United States of America was a principal party in the development of the Treaty that country has not acceded to the Treaty. The advice and consent of the Senate on ratification of the Treaty remains outstanding. The unwillingness of the United States to accept the Treaty arose from provisions relating to the control of deep seabed mining. Alterations to those provisions to meet the requirements of the United States, were introduced in 1994. In 2004 the Foreign Relations Committee of the Senate recommended approval of the Treaty. To this point, however, there has been no further action by the Senate.⁷³

52 As a result of the attack on the “Achille Lauro” members of the International Maritime Organisation (“IMO”), the principal international body representing the maritime industry, made the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation done at Rome on 10 March 1988.

53 Soon after September 2001 members of the IMO commenced work on a scheme to better secure the safety of ships, ports, and maritime facilities and installations. The work done by the IMO was adopted as the ISPS Code, incorporated in Chapter X1-2 of the SOLAS Convention by a conference of Contracting Governments held at London on 9-13 December 2002.

⁷³ “The UN Convention on the Law of the Sea” United Nations Association of the United States of America <www.unausa.org/site/pp.aspx?c=fvKRI8MPJpF&b=328817>.

54 The ISPS Code applies to vessels to which the SOLAS Convention applies, namely, ships of gross tonnage exceeding 500 tonnes engaged in international voyages, being passenger and cargo ships, high speed craft and mobile drilling platforms. The ISPS Code also applies to port facilities that serve ships to which the ISPS Code applies. In essence the ISPS Code provides a scheme for risk management under which Contracting Governments determine the manner of security measures to be implemented to counter any threat of harm to a maritime target, such threat of harm to be identified by an ongoing process of assessment of the risks faced by such targets.⁷⁴

55 The ISPS Code is in two parts, the first part accepted by the Contracting Governments as mandatory provisions to be given effect by 1 July 2004 and the second part as recommended provisions.

56 Australia as a Contracting Government to the SOLAS Convention gave effect to the mandatory provisions of the ISPS Code by enacting the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) (“the Act”) and the *Maritime Transport and Offshore Facilities Security Regulations* (“the Regulations”).

Maritime Transport and Offshore Facilities Security Act 2003

57 A summary of the salient provisions of the Act is set out below.

Section 3 of the Act states the general purpose of the Act:

S.3

“(1) The purpose of this Act is to safeguard against unlawful interference with maritime transport or offshore facilities.

(2) To achieve this purpose, this Act establishes a regulatory framework centred around the development of security plans for ships other maritime transport operations and offshore facilities.

(3) The implementation of a security plan should make an appropriate contribution to the achievement of the maritime security outcomes.

(4) The *maritime security outcomes* are as follows:

⁷⁴ International Maritime Organisation “IMO 2004: Focus On Maritime Security”, p.4.

- (a) Australia's obligations under Chapter XI-2 of the SOLAS Convention and the ISPS Code, including those with regard to the rights, freedoms and welfare of seafarers, are met;
 - (b) the vulnerability to terrorist attack of Australian ships, ports and other ships within Australia and offshore facilities is reduced without undue disruption to trade;
 - (c) the risk that maritime transport or offshore facilities are used to facilitate terrorist or other unlawful activities is reduced;
 - (d) security information is communicated effectively among maritime industry participants and government agencies with security responsibilities for maritime transport or offshore facilities.
- (5) It is not the purpose of this Act to prevent lawful advocacy, protest, dissent or industrial action that does not compromise maritime security.” (*Emphasis added*)

58 The phrase “unlawful interference with maritime transport or offshore facilities” is exhaustively defined in s 11 as follows:

S.11

- “(1) Any of the following done without lawful authority is an *unlawful interference with maritime transport or offshore facilities*:
- (a) 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;
 - (aa) committing an act, or causing any interference or damage, that puts the safe operation of an offshore facility, or the safety of any person or property at the offshore facility, at risk;
 - (b) taking control of a ship or offshore facility by force, or threat of force, or any other form of intimidation;
 - (c) destroying a ship that is being used for maritime transport;
 - (ca) destroying an offshore facility;
 - (d) causing damage to a ship that is being used for maritime transport that puts the safety of the ship, or any person or property on board or off the ship, at risk;
 - (e) doing anything on board a ship that is being used for maritime transport that puts the safety of the ship, or any person or

property on board or off the ship, at risk;

- (f) placing, or causing to be placed, on board a ship that is being used for maritime transport anything that puts the safety of the ship, or any person or property on board or off the ship, at risk;
- (g) putting the safety of ships at risk by interfering with, damaging or destroying navigational aids, communication systems or security systems;
- (h) putting the safety of ships at risk by communicating false information.

- (2) However, *unlawful interference with maritime transport or offshore facilities* does not include lawful advocacy, protest, dissent or industrial action that does not result in, or contribute to, an action of a kind mentioned in paragraphs (1)(a) to (h)."

59 In its terms s.11 would apply to any of the acts of piracy described earlier in this paper if such an act occurred in "Australian waters" or in respect of an "offshore facility".

60 The terms "terrorist attack" and "terrorist activities" used in s.3(4)(b,c) of the Act are not defined. Section 10 states that the term "terrorist act" has the same meaning in the Act as in Part 5.3 of the Criminal Code. Sub-section 100.1(1) of Part 5.3 of the Criminal Code defines "terrorist act" as follows:

"terrorist act means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public."

61 Subsections 100.1(2), (3) read as follows:

- "(2) Action falls within this subsection if it:
 - (a) causes serious harm that is physical harm to a person; or
 - (b) causes serious damage to property; or

- (c) causes a person's death; or
 - (d) endangers a person's life, other than the life of the person taking the action; or
 - (e) creates a serious risk to the health or safety of the public or a section of the public; or
 - (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system.
- (3) Action falls within this subsection if it:
- (a) is advocacy, protest, dissent or industrial action; and
 - (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking the action; or
 - (iv) to create a serious risk to the health or safety of the public or a section of the public."

62 The foregoing definitions of "unlawful interference with maritime transport or offshore facilities" and "terrorist act" are used by s.170 of the Act to define a "maritime transport or offshore facility security incident" as follows:

- "(1) If a threat of unlawful interference with maritime transport or offshore facilities is made and the threat is, or is likely to be, a terrorist act, the threat is a *maritime transport or offshore facility security incident*.
- (2) If an unlawful interference with maritime transport or offshore facilities is, or is likely to be, a terrorist act, the unlawful interference is a *maritime transport or offshore facility security incident*."

63 Sections 171-176 of the Act prescribe the persons who must report a "maritime transport or offshore facility security incident" and ss.177-181 set out the manner in which the reports must be made.

Security Regulated Ships

64 The Act applies the ISPS Code to a "security regulated ship" (s.15-s.17) and

to that part of a “port” (s.12) that is a “security regulated port”, being the area intended for use in connection with the provision of services to a “security regulated ship” that is declared by the Secretary of the Department (“the Secretary”) to comprise a “security regulated port” (s.13(1),(2)). Any area controlled exclusively by the Australian Defence Force cannot be included as part of a “security regulated port” (s.13(3)).

65 It is to be noted that the Act extends the application of the ISPS Code beyond the SOLAS Convention by not restricting the definition of a “security regulated ship” to ships of more than 500 gross tonnage engaged in international voyages.

66 A “security regulated ship” is either a “regulated Australian ship” (s.16) or a “regulated foreign ship” (s.17). A “regulated Australian ship” is defined in s.16 as an “Australian ship” (s.10) that is a “cargo ship” (s.10) of 500 or more gross tonnage, or “passenger ship” (s.10), used for “overseas or inter-State voyages” (s.10), a “mobile offshore drilling unit (s.10) (other than a unit that is attached to the seabed)” that is on an “overseas or inter-State voyage”. Section 16 also provides for the definition of a “regulated Australian ship” to include other ships of a kind prescribed in the Regulations but at this date no such additional ships have been prescribed.
(Emphasis added)

67 A “passenger ship” is defined in s.10 by the number of passengers it carries, namely, more than 12, and not by its gross tonnage. Pursuant to s.16(2)(b) of the Act and r.1.75 a “passenger ship” used for “overseas or inter-State voyages” (whether or not it is also a “cargo ship”) is excluded from the definition of a “regulated Australian ship” if it is a “pleasure craft that is not engaged in trade”. A “pleasure craft” is defined in r.1.03 as a ship “used, or intended to be used, wholly for recreational or sporting activities”. Given that a “passenger ship” is a vessel that carries 12 or more passengers and is a vessel used for overseas or inter-State voyages, it may be difficult to determine when a vessel is being used wholly for recreational or sporting activities or is engaged in trade. *(Emphasis added)*

68 A “regulated foreign ship” is defined in s.17 as a “foreign ship” (i.e. “a ship that is not an Australian ship” (s.10)), that is either a “passenger ship”; “cargo ship of 500 or more gross tonnes”; or “mobile offshore drilling unit (other than a unit that is

attached to the seabed)” that is in “Australian waters” (s.10) and is in, or is intending to proceed to, a port in Australia. Section 17 permits the Regulations to prescribe other kinds of ships to be defined as “regulated foreign ships”. Again as at this date no other ships have been so prescribed by the Regulations.

69 Pursuant to s.17(2)(b) and r.1.80 a “foreign ship” that would otherwise be a “regulated foreign ship” under s.17(1) is excluded from the application of that subsection if it is a ship owned or operated⁷⁵ by a Contracting Government (r.1.03) and used, for the time being, only on government non-commercial service, or is a ship that is a “pleasure craft” not engaged in trade.

70 “Australian waters” are defined in s.10 as:

- “(a) the territorial sea of Australia; and
- (b) the waters of the sea on the landward side of the territorial sea of Australia; and
- (c) the territorial sea of each external Territory; and
- (d) the waters of the sea on the landward side of the territorial sea of each external Territory; and
- (e) inland waters prescribed in regulations.”

71 The Act does not apply the ISPS Code to “passenger ships”, or “cargo ships” of more than 500 gross tonnage, used for intrastate voyages, nor to other substantial seagoing vessels of less than 500 gross tonnage, such as fishing and research vessels, that move into, about, and out of Australian ports. Section 9(1) of the Act states that the Act does not apply to ships operated for defence, customs or law enforcement purposes by Australia or by a foreign State, nor to a ship owned, leased or chartered by, or otherwise in the operational control of, the Commonwealth, State or Territory and used wholly for non-commercial activities. The term “operational control” is not defined in the Act.⁷⁶

⁷⁵ Cf. *ASP Ship Management Pty Ltd v Administrative Appeals Tribunal* [2006] FCAFC 23 at [92]-[93].

⁷⁶ See fn 75.

Security Regulated Offshore Facilities

72 The Act provides for the ISPS Code to be applied to an “offshore facility”, being a facility that is located in an “offshore area” and is used in the extraction of petroleum from the seabed or from its subsoil (s.17A). Such a facility becomes a “security regulated offshore facility” if the Secretary declares it so to be (s.17B). It appears that a ship that is a “Floating Product, Storage and Offtake” (“FPSO”) (s.10) or “Floating Storage Unit” (“FSU”) (s.10), that is located in an “offshore area” is itself an “offshore facility” (s.17A(2),(3)) that may be declared by the Secretary to be a “security regulated offshore facility” (ss.17B, 16(3)) and thereby cease to be a “security regulated ship” if it is a ship to which ss.16 and 17 apply.

73 An “offshore facility”, “FPSO” or “FSU” is located in an “offshore area” if it is in “Australian waters” or in the exclusive economic zone of Australia (including its external Territories) or in the sea over the continental shelf of Australia (including its external Territories) (s.17A(7)).

Enforcement Action

74 The Act also provides that “enforcement action” may be taken against a foreign ship that is neither a “regulated foreign ship”, nor a “foreign ship regulated as an offshore facility” and against “a person travelling (whether as a passenger or crew) on [such] a ship” (ss.17D, 17E).

75 The term “enforcement action” as defined in the Act (ss.10, 17D(4)) may be loosely described as the exercise of search and inspection powers. The inclusion of “making an enforcement order under Division 3 of Part 11” in the definition of “enforcement action” appears to be excessive in that neither “a person travelling on a foreign ship” nor a “foreign ship” as described in ss.17D, 17E is likely to be a “maritime industry participant” (s.10) against whom or which an “enforcement order” (s.189) may be made. (see [83] below).

76 The following vessels will be a foreign ship that is neither a “regulated foreign ship” nor a “foreign ship regulated as an offshore facility” for the purposes of ss.17D, 17E:-

- (a) a foreign ship that is in Australian waters to which s.17(1) does not apply, namely,
 - (i) a ship owned or operated by a Contracting Government that is used on government non-commercial service (s.17(2)(a); r.1.80(a));
 - (ii) a “pleasure craft” not engaged in trade (s.17(2)(b); r.1.80(b)); and
 - (iii) and a “passenger ship”, “cargo ship” of more than 500 tonnes, “mobile offshore drilling unit”, or “FPSO” or “FSU”, exercising innocent passage through Australian waters not intending to proceed to an Australian port.
- (b) a foreign ship that is outside Australian waters that is “involved in some activity in relation to a security regulated offshore facility” (ss.17, 17E).

77 The expression “involved in some activity in relation to a security regulated offshore facility” is not defined in the Act. In so far as s.17D purports to make a person travelling on a foreign ship that is not in Australian waters liable to “enforcement action” where that person, but not the vessel, is “involved in some activity in relation to a security regulated offshore facility”, the question of how “enforcement action” could be taken consistently with international law in such a circumstance would be a problem that would have to be addressed.

Maritime Security Levels

78 In s.21 the Act provides for a “maritime security level” to be in place at all times with respect to ports, ships and offshore facilities to which the Act applies. The expression “maritime security level” has three meanings, namely, “maritime security level 1”, “maritime security level 2” or “maritime security level 3” (s.10). The basic level, “maritime security level 1”, is to apply at all times to a “security regulated port” (including an area within it); a “security regulated ship” that is an Australian ship; a “security regulated offshore facility”; and to a “maritime industry participant”. Section 9(1)(c) of the Act excludes from the operation of the Act a “security regulated port”, or part thereof, that is at any time under the exclusive control of the Australian Defence Force.

79 The Secretary may declare that “maritime security level 2” or “maritime

security level 3” applies to one or more of the foregoing, or to operations conducted by a “maritime industry participant” within, or in connection with, a “security regulated port” or “security regulated offshore facility” (s.22). Such a declaration must not be made unless it is “appropriate for a higher level of security to be put into place ... because a heightened risk to maritime transport or offshore facilities has been identified” (s.22(3)). Section 22(3) makes it clear that the Secretary has no power to make a declaration unless first, a “heightened risk” has been “identified” and, second, that it is “appropriate” that a higher level of security be put in place. These requirements are set down as objective facts not as matters of opinion or satisfaction reached in the mind of the Secretary.⁷⁷

80 Under s.24 if a “maritime security level” is declared by the Secretary for a “security regulated port” that “maritime security level” applies to every area; every “security regulated ship”; and any operations conducted by a “maritime industry participant”, within the boundaries of the “security regulated port”. Section 24 also states that it applies to every “security regulated offshore facility” that is within the boundaries of the “security regulated port”, likely to be a rare circumstance.

81 If the Secretary makes a “maritime security level” declaration for a “security regulated offshore facility” that “maritime security level” applies to every “security regulated ship” in the vicinity of the facility engaged in any activity in relation to the facility and any operations conducted by a “maritime industry participant” within the boundaries of the facility (s.24A).

82 A principal provision of the Act is the requirement that “maritime security plans” (ss.41-59); “ship security plans” (ss.60-78) and “offshore security plans” (ss.100A-100T) be prepared for operation under the respective “maritime security levels”.

Maritime Industry Participant

83 A “maritime industry participant” was defined in s 10 of the Act as:

- (a) a “port operator”; [*i.e. a person designated by the Secretary as the “port operator” for a “security regulated port”*] (ss.10, 14(1));

⁷⁷ *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385 per Isaacs, Rich JJ at 403.

- (b) a “port facility operator” *[i.e. a person who operates a “port facility” being an area within a “security regulated port” that is used in connection with the loading or unloading of ships (s.10)];*
- (c) a “ship operator”; *[i.e. the owner of a “security regulated ship”, or person who has agreed with the owner to be the “ship operator” for that ship for the purposes of the Act (s.10)];*
- (d) an “offshore industry participant” *[i.e. an “offshore facility operator” designated by the Secretary for a “security regulated offshore facility”; or a contractor providing services to that person; or a person who conducts an enterprise connected with a “security regulated offshore facility” who is prescribed in the regulations (ss.10, 17C)];*
- (e) a person (other than a “maritime security inspector” or “duly authorised officer”) appointed by the Secretary to perform a maritime transport security function *[the term “maritime transport security function” is not defined in the Act but it may be assumed that a person appointed to perform such a function would include a delegate appointed by the Secretary under Parts 4, 5B of the Act to issue an International Ship Security Certificate to a “regulated Australian ship” or to an “Australian ship regulated as an offshore facility” and a “maritime security inspector” or “duly authorised officer” appointed by the Secretary under Div 2, 3 of Part 8 of the Act (ss.10, 88, 100ZE, 136, 147) – the foregoing redundancy in the definition was recognised and Item 3 of Schedule 2 of the Maritime Transport and Offshore Facilities Security Amendment (Maritime Security Guards and Other Measures) Act 2006 (Cth) repealed the paragraph];*
- (f) a contractor who provides services to a person mentioned in (a), (b), or (c);
- (g) a person who conducts a maritime-related enterprise and is prescribed in the regulations *[the term “maritime-related enterprise” is not defined in the Act. For the purpose of this item the Regulations (r.1.05) have purported to prescribe “kinds of operators” who provide “port services” to “security regulated ships” and have not prescribed “a person”. The prescribed “kinds of operators” are those defined in r.1.03 as “port service providers”].*

84 Section 9(2) of the Act provides that a “maritime industry participant” does not include the Defence Force, Customs Service or any Agency of the Commonwealth prescribed in the Regulations. At this date no Agency has been prescribed by the Regulations.

Security Directions

85 In addition to the power the Secretary has to declare a “maritime security level” the Secretary is empowered by the Act to give a “security direction” that requires “additional security measures be implemented or complied with” (s.33(1),(2)). The power, however, cannot be exercised unless an “unlawful interference with maritime transport or offshore facilities” (s.11) is “probable or imminent” (s.33(3)).

86 The purpose of a “security direction” appears to be to allow prompt action to be taken to augment or fill gaps not covered by “maritime security plans” and “ship security plans” discussed below. In effect a “security direction” may be given to anyone within, or operating within, the boundaries of a “security regulated port” (s.35); to the “ship operator” (s.10) or “master” (s.10) of a “security regulated ship” (s.36); or to the “offshore facility operator” (s.17C) or “master” of an “FPSO” or “FSU” that is a “security regulated offshore facility” (s.17A(2),(3); 17B) (s.36A).

87 It is an offence under the Act to fail to comply with a “security direction” or with a “confidentiality requirement” included in the direction (ss.34, 39, 40).

Maritime Security Plans

88 Section 42 of the Act requires the following “maritime industry participants” to have “maritime security plans”: “port operators” (ss.14(1), 42(a)); “port facility operators” (ss.10, 42(b)); and the “maritime industry participants” prescribed in the Regulations (s.42(c), (d)). As at 1 July 2004 approximately 400 “maritime industry participants” had in place approved “maritime security plans”.⁷⁸

89 A “port operator” is the person designated by the Secretary to be the port operator for a “security regulated port” (s.14(1)). Section 14(2) of the Act obliges the Secretary to take into account, inter alia, “the views of the person, or persons, responsible for managing the operation of the port” before designating a person to be a “port operator”. Presumably the Chief Executive Officer of a port authority

⁷⁸ Dr. A.Bergin, Dr. S. Bateman, “Future unknown: The terrorist threat to Australian maritime security” (April 2005) Ch. 4, Australian Strategic Policy Institute Ltd. <www.aspi.org.au/21139-maritimesecurity/chapter04.html>

would be designated as the “port operator”. According to the Explanatory Memorandum circulated when the legislation was introduced to Parliament it was anticipated that appropriate persons would identify themselves as port operators to the Secretary.⁷⁹

90 A “port facility operator” (s.10) is a person who operates “an area of land or water, or land and water, within a “security regulated port (including any buildings, installations, or equipment in or on the area) used either wholly or partly in connection with the loading or unloading of ships”. The most common example of such an operator would be a stevedoring enterprise.

91 The “maritime industry participants” prescribed for the purpose of s.42(c) are those prescribed in Regulation 3.175, being some of the “maritime industry participants” prescribed in Regulation 1.05. (see [83] above). The persons prescribed in Regulation 3.175 are described by the regulations as “port service providers” (r.1.03) that operate within a “security regulated port” or operate outside a “security regulated port” for the purpose of “ship/port interface between a security regulated ship and a security regulated port”. Examples of the former would be ship providers and freight forwarding agents and of the latter, pilot or towage service providers where those services are provided outside the boundaries of the “security regulated port” (s.13(2)).

92 Section 47 sets out that a “maritime security plan” must contain the following matters and demonstrate that implementation of the plan will make “an appropriate contribution” towards the achievement of “the maritime security outcomes” (s.3(4)). (see [57] above):-

- (a) a security assessment for the “maritime industry participant's” operation;
- (b) the security activities or measures to be undertaken or implemented by the participant for maritime security levels 1, 2 and 3;
- (c) designate, by name or reference to a position, all security officers responsible for implementing or maintaining the plan;

⁷⁹ Explanatory Memorandum, (House of Representatives), Maritime Transport Security Bill 2003 (Cth), p.30.

- (d) provision for the use of “declarations of security”. [*A “declaration of security” is defined in s.10 as:*
- “a) an agreement reached between a ship and another party (a ship or person); or*
 - b) an agreement reached between an offshore facility operator and another party (a ship or person);*
- that identifies the security activities or measures that each party will undertake or implement in specified circumstances.”]*

93 Section 48 provides for the Regulations to prescribe the detailed matters to be set out in “maritime security plans”. Those matters are prescribed in Part 3 of the Regulations as follows:- generally (rr.3.05-3.10); “port operators” (rr.3.30-3.90); “port facility operators” (rr.3.100-3.105; 3.110-3.165); “port service providers” (rr.3.185-3.190; 3.195-3.240).

94 In general terms the regulations direct “maritime industry participants” to identify:- (a) the possible risks or threats to their areas of operation; (b) the assets or infrastructure that need to be protected; (c) what security measures in these areas exist and what are their shortcomings; (d) the security personnel charged with implementation and maintenance of a “maritime security plan” and the training they have had, or will receive, in that regard.

95 Each “maritime security plan” must be approved by the Secretary (s.51) and be varied or revised by the “maritime industry participant” if so directed by the Secretary (ss.53, 55). Each “maritime security plan” expires after five years from the date of the Secretary’s approval (s.56) and must be replaced by another “maritime security plan” pursuant to the continuing obligation to maintain such a plan imposed by s.42. [*By Items 3-13 of Schedule 1 of the Maritime Transport and Offshore Facilities Security Amendment (Security Plans and Other Measures) Act 2006 (Cth) the operation of the foregoing sections has been amended to facilitate alteration or revision of “maritime security plans”.*]

96 It is an offence under the Act for a “maritime industry participant” not to have a plan if that person is a “maritime industry participant” required by s.42 to have such a plan (s.43(1)). In that regard the terms of s.45(3) must be noted. Under that

subsection if a “maritime security plan” of a “maritime industry participant”, (described as the “covering plan”) covers “the activities” of another “maritime industry participant” required by s.42 to have a “maritime security plan”, and if the latter participant has been given the “relevant parts of the covering plan” and has agreed in writing to “those activities” being covered by the “covering plan”, that participant “must take all reasonable steps to comply with the covering plan”.

97 Given that s.45(4) provides that it is not an offence if a “maritime industry participant” contravenes s.45(3) it would seem to follow that s.42 is intended to have a supervening operation and to continue to impose an obligation on the “covered” participant to have a “maritime security plan”. A “maritime security plan” is directed to more than the “activities” of a “maritime industry participant”. For example, it is unlikely that a “security assessment for the participant’s operation” (s.47(1)(a)), or the “contact details for the participant’s security officer” (s.47(1)(c)) (or the proposed amended provision – see [92] above), of a “covered” participant, necessary ingredients of a “maritime security plan”, will be matters “covered” by a “maritime security plan” prepared by another “maritime industry participant”. It may also be said to be unlikely that the “maritime security plan” of that participant would “cover” the steps and procedures to be undertaken by a “covered” participant to obtain a “declaration of security” from a ship or offshore facility operator (s.47(1)(d)). If a “maritime industry participant” has agreed to its “activities” being “covered” by the “maritime security plan” of another “maritime industry participant” that circumstance would satisfy the intention of the Act (s.45(1)) that “maritime security plans” not cause obstruction or conflict between “maritime industry participants” (cf. also: ss.46, 64, 65) but the words of s.45(3) do not appear to be sufficient to disclose an intention to remove the obligation imposed by s.42 on the “covered” participant to have a “maritime security plan”, although perhaps, it may not be necessary for the plan presented by that participant to the Secretary for approval to include matters “covered” by the “covering plan”.

98 To read s.45(3) as limiting the clear words used in s.42 would produce the strange result that a person who is otherwise required by s.42 to have a “maritime security plan” and would commit an offence by not complying with that plan, would commit no offence by failing to take all reasonable steps to comply with a “covering plan”. Not only would that present an inconsistent approach to the need for

compliance with the Act but, in addition, the absence of the further material information that would have been provided in a “maritime security plan” would produce a security gap and be inconsistent with a principal object of the Act.

99 Notwithstanding the foregoing r.3.180 purports to provide that where a “maritime industry participant” that is a “port service provider” to which r.3.175 applies (see [83], [91] above) has agreed to have its “activities” “covered” by a “maritime security plan” of another “maritime industry participant” the first-mentioned participant is not required to have a “maritime security plan”. Whether that provision is a regulation that has been made within power may be a question that will have to be addressed at a later date.

100 Where a “maritime industry participant” that is required to have a “maritime security plan” has agreed in writing to the “activities” of that participant being “covered” by the “maritime security plan” of another participant, the question whether that circumstance would constitute a “reasonable excuse” for not having a “maritime security plan” (s.43(2)), notwithstanding that the participant may not have taken “all reasonable steps to comply with the covering plan” under s.45(3), may be another issue that will arise from these provisions.

Ship Security Plans

101 The Act provides that a “regulated Australian ship” must have a “ship security plan” and that the “ship operator” for such a vessel commits an offence if the ship is being used for maritime transport without a “ship security plan” being in force for the ship, or if the ship is not operated in accordance with the “ship security plan” that is in force (ss.61-63).

102 Pursuant to the intent of the Act that “maritime security plans” and “ship security plans” not be a source of obstruction or conflict between maritime operators ss.64 and 65 of the Act provide that if compliance with a “ship security plan” is hindered by the operations of a “regulated Australian ship”, or by the conduct of a “maritime industry participant”, an “enforcement order” or injunction may be sought under ss.189 or 197 to eliminate the conflict (cf: ss.45, 46).

103 At the time of introduction of the Act it was anticipated that approximately “70 Australian registered trading ships” would be “regulated Australian ships” to which these provisions of the Act would apply.⁸⁰

104 The Act sets out similar requirements for a “ship security plan” (s.66) as for a “maritime security plan”, namely, a security assessment of a ship’s operations by the “ship operator”; details of the security measures to be implemented by the “ship operator” according to the “maritime security level” applied to it; and details of the security personnel on the ship responsible for implementation or maintenance of the “ship security plan”. The Act then provides for the details required to be included in the plan to be prescribed by the Regulations (s.67). Regulations 4.20-4.105 have prescribed specific matters to be dealt with in a “ship security plan”, some of which are as follows:-

- (a) means of identification of the ship;
- (b) matters to be taken into account in preparing the security assessment, in particular, possible risks or threats to the key shipboard operations and the likelihood and consequences of their occurrence;
- (c) details of security officers and of the training they are to receive;
- (d) measures taken to prevent unauthorised access to the ship and to “on-board restricted areas” (rr.1.03, 4.65);
- (e) procedures for responding to security threats or breaches of security including “procedures for maintaining critical operation of ship/port interface” [*presumably how contact with on-shore authorities will be protected or continued in the event of terrorist assault on the ship*];
- (f) maintenance of security levels in unsecure foreign ports;
- (g) procedures for giving the “pre-entry information” set out in Regulation 4.80(2), in particular, details of the last ten ports of call and whether a ship operated at a different security level than the level at which the ship usually operates whilst in any of those ports and details of the next four ports of call after entry from overseas into an Australian port.

105 It is to be observed that if a “ship operator” forms the view that disclosure of

⁸⁰ Explanatory Memorandum (House of Representatives) Maritime Transport Security Bill 2003 (Cth), p.13.

an unsecure port as a prior port of call may introduce a risk of delay, or the refusal of entry into Australian or foreign waters, there is nothing to prevent the operator from adding other ports of call to the voyage to remove the suspect port from the list of relevant ports.⁸¹

106 An important part of a “ship security plan” is the requirement that the ship provide information on (and, therefore, must have on board) its external and internal communication systems; surveillance, identification, monitoring and reporting systems; and tracking and positional systems (r.4.95).

107 Vessels to which the ISPS Code applies have been required to install Automated Identification Systems (“AIS”) and satellite-based positional and tracking systems. Although these requirements are intended to make ships more secure from terrorist attack by providing early information to monitoring authorities of the prospect that such an attack has occurred or may be taking place; the information transmitted from a ship’s transponder may also be accessed by any person with a receiver, a circumstance that may make a ship vulnerable to the tracking of its movements by persons intending to board it. The use of the data created by these systems for monitoring purposes remains a live issue between shipowners and controlling authorities.⁸²

108 The risk to port and ship safety posed by the presence in port areas of smaller vessels than those to which the ISPS Code applies (see [65] above) has been addressed by the Singapore Government to protect the port of Singapore, one of the world’s busiest ports. To provide greater security in the operation of that port, transponders must be installed, at government cost, on all licensed harbour small-craft, including pleasure craft, that are under 500 gross tonnes. The number of vessels to which that requirement applies is approximately 3,000. It is intended that the movements of all such vessels will be monitored by port and other authorities

⁸¹ Porter J, Reyes B. “Cargoship makes extra port of call to avoid US security ban”, Lloyd’s List, 21 February 2006.

⁸² Eason, C. “Freedom and security: the dilemma of vessel tracking”, Lloyd’s List, 21 April 2006. O’Mahony, H. “Debate still rages over coastal state vessel monitoring”, Lloyd’s List, 12 May 2006.

and any unusual movements by a small vessel will be identified promptly.⁸³

Offshore Security Plans

109 Section 100B of the Act provides that the persons required to have “offshore security plans” are those “offshore industry participants” (s.10) who are:

- (a) an “offshore facility operator” [*an “offshore facility operator” is a person so designated by the Secretary for a “security regulated offshore facility” (s.10, s.17C(1));*];
- (b) a participant of a kind prescribed in the Regulations;
- (c) a particular participant prescribed in the Regulations.

110 Regulation 5A.110(1) prescribes “offshore service provider” as the kind of “offshore industry participant” to whom s.100B(b) of the Act is to apply. Regulation 1.03 defines “offshore service provider” as a person prescribed by r.1.06. A person prescribed by r.1.06 [for the purpose of paragraph (c) of the definition of “offshore industry participant” in s.10] is “a person that manages a supply base”. Regulation 1.03 defines “supply base” as a place at a port or airport, where goods or passengers are loaded onto a vessel or aircraft for transport directly from the place to an “offshore facility”. It is to be noted that r.5A.110(2) provides that an “offshore service provider” is not prescribed as an “offshore industry participant” to whom s.100B(b) applies if the “activities” of that “offshore service provider” are covered by the “offshore security plan” (i.e. “covering plan”) of an “offshore facility operator” and the “offshore service provider” has agreed to be covered by that plan. Although it has not been stated in such terms perhaps r.3.180 was intended to operate upon r.3.175 in the same manner as r.5A.110(2) upon r.5A.110(1). (see [99] above).

111 At this time no “particular participant” has been prescribed by the Regulations for the purpose of s.100B(c).

112 In respect of the content and form; the need for approval by the Secretary; and the variation, revision and cancellation of “offshore security plans” the Act has similar provisions as those that apply to “maritime and ship security plans” (ss.100F-

⁸³ “Singapore unveils S\$3.5 million transponder scheme”, Maritime Asia Today, Issue 1606, 27 May

100T).

113 As with “maritime security plans” and “ship security plans” it is an offence for an “offshore industry participant” who is required to have an “offshore security plan” to fail to have such a plan, or to fail to comply with that plan (ss.100C, 100D).

114 The Act (s.103(3)) provides that an “offshore security plan” of an “offshore industry participant” may be a “covering plan” for another “offshore industry participant” required by the Act to have an “offshore security plan”. As in s.45(2),(3) failure to take all reasonable steps to comply with a “covering plan” is not an offence under the Act (s.100E(4)). As discussed in [96]-[100] above it is unlikely that the terms of s.100E(3) can be read as removing the obligation imposed by s.100B that nominated “offshore industry participants” have “offshore security plans”.

International Ship Security Certificates

115 Section 79 of the Act provides that a “regulated Australian ship” must have an International Ship Security Certificate (“ISSC”), as required by the ISPS Code. A “ship operator” of a “regulated Australian ship” commits an offence by using the ship for maritime transport without an ISSC (s.80).

116 The Secretary is responsible for the issue of an ISSC to a “regulated Australian ship” and must do so (s.82) where it is applied for by the ship operator and there is a “ship security plan” in force for the ship and the ship is “ISSC verified”.

117 A ship is “ISSC verified” if a “maritime security inspector” has inspected the ship and verified that it meets the requirements determined in writing by the Secretary. In determining these requirements the Secretary must have regard to the obligations set out in the ISPS Code (s.83).

118 A “maritime security inspector” is a person appointed by the Secretary pursuant to s.136 of the Act, or a person to be taken to be a “maritime security inspector” being a person “engaged by a recognised security organisation” whom the Secretary has authorised to conduct inspections of ships for “ISSC verification”

(ss.88,89).

119 The powers of the “maritime security inspector” in conducting an “ISSC verification” are set out in s.138 and include the right to inspect ship security records and “any other document relating to the security of the ship”.

120 Similar provisions as to the requirement to hold an ISSC, and for application to the Secretary for the issue of an ISSC, apply to an “Australian ship regulated as an offshore facility” (ss.100J-100ZF).

Security Obligations on “Regulated Foreign Ships”

121 The “ship operator” of a foreign ship that enters “Australian waters” and thereby becomes a “regulated foreign ship” must have a valid ISSC and must ensure that the ship carries the required “ship security records” (s.91). A “ship security record” is defined in s.10 as “a document or information relating to maritime security prescribed in regulations as a document or information to be kept on, by or for a ship of that kind”.

122 Regulation 1.56 prescribes the documents to be kept in relation to maritime security by a “regulated foreign ship”. The prescribed documents concern, inter alia, a record of the validity and continuing authority of the ISSC; a record of the security level at which the ship has operated; a record of the name of the person responsible for the employment of crew or other persons on the vessel; a record of the name of the person who decides how the vessel is used; and, if the vessel is the subject of a charter party arrangement, the names of the parties to that arrangement.

123 A “regulated foreign ship” must provide “pre-arrival information” before entering “Australian waters” (s.92(1)). “Pre-arrival information” is defined in s.92(3) as information of a kind prescribed in the Regulations. Regulation 5.10(2) prescribes the matters to be the subject of “pre-arrival information”, namely, details of the ISSC on board the ship, details of the security level at which the ship is operating and details of the last ten, and of the next four, ports of call.

124 A “regulated foreign ship” must allow a “maritime security inspector” to board

and inspect the ship and provide to the inspector any “ship security record” requested (s.93). Whilst it is a “regulated foreign ship” the vessel must implement the security measures required by the ISPS Code that are required by reason of a declaration made by the Secretary under s.22 or a “security direction” made by the Secretary under s.36 (ss.94, 96).

125 If a “regulated foreign ship” fails to comply with the foregoing obligations the Secretary may give a “control direction” to the “ship operator” or master, (s.99) which may include a direction that the ship be removed from “Australian waters” (s.99(4)).

126 A “foreign ship regulated as an offshore facility” is subject to similar obligations (ss.100ZH-100ZN).

Maritime Security Zones

127 The Act (Part 6) provides for specific security zones to be declared by the Secretary in respect of “security regulated ports”, “security regulated ships” and “security regulated offshore facilities”. The zones that may be declared are “port security zones”; “ship security zones”; “on-board security zones” and “offshore security zones”. Each zone is defined as a “maritime security zone” (s.10).

Port Security Zones

128 The Secretary is empowered to establish “port security zones” within a “security regulated port”, the purpose thereof being to subject those zones to additional security requirements than would otherwise apply under the “maritime security level” applying to that port (s.102).

129 The Act (s.103(1),(2)) provides that different types of “port security zones” may be prescribed in the Regulations and sets out the purposes for which the different “port security zones” may be prescribed, including:

- “(a) controlling the movement of people or ships or any other thing within security regulated ports;*
- “(b) restricting access to areas within security regulated ports;*

- (c) *providing cleared areas within security regulated ports;*
- (d) *preventing interference with ships;*
- (e) *preventing interference with people or goods that have been, or are to be, transported by ship;*
- (f) *ensuring the security of the following:*
 - (i) *fuel storage areas;*
 - (ii) *cargo and baggage handling facilities;*
 - (iii) *navigational aids;*
 - (iv) *critical installations.”*

130 Section 103(3) defines a “critical installation” as an installation that, if interfered with or damaged, could put the operation of a port or a ship at risk.

131 A “cleared area” is defined in s.10 as an area that under the Regulations may be entered only by persons, goods, vehicles and vessels that have “received clearance”. The manner in which a person or object “receives clearance” is set out in s.115(2) of the Act and is discussed further below.

132 Regulation 6.20 has prescribed the following types of “port security zones” as those that the Secretary may establish:

- (a) land-side restricted zones; [*“an area of land or a structure connected directly or indirectly to land, to which access is controlled, within the boundaries of a port facility or of land under the control of a port operator or port service provider” (r.1.03).*]
- (b) cleared zones; [*“an area of land or water to which access is controlled, for holding persons and goods, vehicles or vessels that have been screened and cleared” (r.1.03).*]
- (c) water-side restricted zones; [*“the area ... where a security regulated ship may berth, anchor or moor; and access to the area is controlled” (r.1.03, r.1.70).*]

133 It follows from the definition of a “land–side restricted zone” that necessarily a “cleared zone” that is an area of land would be within that definition but it does not follow from the definition of a “water-side restricted zone” that a “cleared zone” would be included within that definition if the “cleared zone” is an area of water.

134 The Act directs that before the Secretary establishes a “port security zone” regard must be given by the Secretary to the purpose of the zone and account taken of, inter alia, the views of the “port operator”; of each person who controls an area of land within the proposed zone; and of the “offshore facility operator” for any “security regulated offshore facility” within the zone (s.104).

135 A person aggrieved by the decision of the Secretary to establish a “port security zone” may apply to the AAT for a review of that decision (s.201(h)). Ground for review of the decision would arise if the Secretary failed to observe the directions given by s.104 of the Act.

136 The Act provides that the Regulations may prescribe requirements for each type of “port security zone” that safeguard against “unlawful interference with maritime transport or offshore facilities” including provision for security passes and identification systems that control access to a “port security zone”; movement management or operation of ships, vehicles and other things within the “port security zone”; management of goods in a “port security zone”, and sale or disposal of ships, vessels or goods abandoned in a “port security zone” (s.105(1),(2)).

137 Part 6 of the Regulations prescribe the requirements that apply to a “port security zone” for the purpose of s.105. The most important of the prescribed provisions, which apply to all “maritime security zones” and not “port security zones” alone, are those which prescribe a scheme under which “maritime security identification cards” (“MSICs”) are to be issued to, and displayed by, a person seeking entry to a “maritime security zone”. The MSIC scheme is discussed in more detail below. Other provisions prescribed in the Regulations for the purposes of s.105 are set out in r.6.25 - r.6.75 and require, inter alia, the provision of “security barriers” (rr.1.03, 6.25) to define the boundaries of “land-side restricted zones” and “cleared zones”. The Regulations do not nominate who is responsible for the erection of “security barriers” but state that the “port operator”, “port facility operator” and “port security provider” respectively must “monitor and control” access to any “land-side restricted zone” that is within the “security regulated port”, the boundaries of the “port facility”, or the boundaries of the area under the control of the “port service provider”, and that the “port facility operator” must ensure that persons and goods are “screened” and “cleared” before they are allowed to enter or remain in any

“cleared zone” established in that “port facility”.

138 In respect of “water-side restricted zones” r.6.65 imposes an obligation on the “port operator” to inform persons of the establishment of such a zone and of its boundaries and r.6.70 requires the “port operator” to monitor access to that zone. It is to be noted that the Regulation does not impose on the “port operator” an obligation to “control” access to the zones but states instead that the “port operator” must ensure that the security measures and procedures to control that access do detect and deter unauthorised access (r.6.70(5)).

Ship Security Zones

139 Section 106(2) of the Act provides that for the purpose of protecting “security regulated ships” from “unlawful interference with maritime transport or offshore facilities” (s.11) the Secretary may declare (s.106(1)) that a “ship security zone” operates around a “security regulated ship” whilst that ship is within a “security regulated port” or is in the vicinity of an “offshore facility” and engaged in any activity in relation to that facility (s.106(1A)).

140 The Act (s.107(1),(2)) provides that different types of “ship security zones” may be prescribed in the Regulations and that the purposes for which the “ship security zone” may be prescribed include:

- “(a) limiting contact with security regulated ships;*
- (b) controlling the movement of ships and other things in the vicinity of a security regulated ship;*
- (c) providing cleared areas around security regulated ships;*
- (d) preventing interference with security regulated ships;*
- (e) preventing interference with people or goods that have been or are to be, transported by security regulated ships.”*

141 Regulation 6.80 prescribes an “exclusion zone” as the type of “ship security zone” that may be declared by the Secretary. An “exclusion zone” is defined in r.1.03 as “an area of water within a security regulated port being an area surrounding a security regulated ship (at and below the water level) to which access is

controlled”.

142 The Act states that in declaring a “ship security zone” the Secretary must have regard to the purpose of the zone and certain features of the ship, the port, and of the offshore facility and of services to be used or provided by the ship (s.108). It is to be noted that contrary to provisions relating to other “maritime security zones” the Secretary is not directed to have regard to the views of a “port operator”, “offshore facility operator” or the “ship operator” in making that decision. The decision of the Secretary to declare a “ship security zone” may be reviewed by the AAT (s.201(i)).

143 Requirements of a similar nature and for the same purpose as those prescribed for “port security zones” (see [136] above) may be prescribed by the Regulations for “ship security zones” (s.109). The further requirements prescribed for the purposes of s.109 are set out in Regulations 6.85-6.100. As noted earlier the MSIC scheme prescribed in Part 6 of the Regulations applies also to a “ship security zone”.

On-board Security Zones

144 For the purpose of subjecting zones on a “regulated Australian ship” to additional security requirements the Secretary may, by written notice to the “ship operator”, establish one or more “on-board security zones” on the ship (s.110). The Act (s.111) provides for the Regulations to prescribe different types of “on-board security zones” for the purposes, inter alia, of controlling access to areas or parts of a “regulated Australian ship”; providing “cleared areas” on “regulated Australian ships” and preventing interference with the operation of, or with people or goods transported on, “regulated Australian ships”.

145 Regulation 6.105 prescribes an “on-board restricted area” as the type of “on-board security zone” that may be established by the Secretary. An “on-board restricted area” is defined in r.1.03 as “an area, to which access is controlled, on board a regulated Australian ship”.

146 The Act directs that in establishing an “on-board security zone” on a “regulated Australian ship” the Secretary must have regard to the purpose of the

zone and take into account the operational features of the ship and the views of the “ship operator”. A right to apply to the AAT for review of the Secretary's decision to establish an “on-board security zone” is provided by s.201(j).

147 Similar requirements, for the same purposes as those prescribed for “port security zones” and “ship security zones”, may be prescribed by the Regulations for “on-board security zones” (s.113). Those further requirements, in addition to the MSIC requirements discussed above, are set out in r.6.110-r.6.120.

Offshore Security Zones

148 For the purpose of subjecting “offshore security zones” to additional security requirements the Secretary is empowered by the Act (s.113A) to establish “offshore security zones” within and around a “security regulated offshore facility”.

149 The Act (s.113B) states that the Regulations may prescribe different types of “offshore security zones”, the purposes for which the types may be prescribed to include, inter alia, limiting contact with “security regulated offshore facilities”; controlling the movement of ships and other things around such a facility; and providing “cleared areas” around such a facility.

150 Regulation 6.125 prescribes “offshore facility zone” and “offshore water-side zone” as the types of “offshore security zone” that the Secretary may establish. Regulation 1.03 defines “offshore facility zone” as “the space occupied by an offshore facility” and defines an “offshore water-side zone” as “an area of water surrounding an offshore facility at the distance from the facility specified by the Secretary”.

151 The Act directs that in establishing an “offshore security zone” the Secretary must have regard to the purpose of the zone and take into account the features of the facility and the views of the “offshore facility operator” and must act consistently with Australia's obligations under international law (s.113C). A right to apply to the AAT for review of the Secretary's decision to establish an “offshore security zone” is provided in s.201(k).

152 Similar requirements, for the same purposes as those that may be prescribed for other “maritime security zones”, may be prescribed by the Regulations for an “offshore facility zone” (s.113D(1)). Those requirements are prescribed in rr.6.130 - 6.155. Section 113D(6) was added by Item 1 of Schedule 1 of the *Maritime Transport and Offshore Facilities Security Amendment (Maritime Security Guards and Other Measures) Act 2006* (Cth) to acknowledge that such regulations “must be consistent with Australia’s obligations under international law”.

Maritime Security Identification Card

153 Pursuant to ss.105(1),(2); 109(1),(2); 113(1),(2); 113D(1),(2) of the Act, the Regulations (r.6.07A-6.09A) have prescribed a scheme under which MSICs are to be issued and displayed as a means of controlling the entry and presence of persons in “maritime security zones”. According to r.6.07A the operation of the scheme involves the issue by an “issuing body” of a MSIC to identify a person who has been the subject of a “background check” and the obligation of a “maritime industry participant” not to allow a person to enter, or remain in, a “maritime security zone” unless that person displays a MSIC or is escorted by a person who is the “holder” of a MSIC.

154 Regulation 6.07B defines “background check” of a person as:

- “(a) a criminal records check of the person; and
- (b) ... security assessment of the person conducted by ASIO [Australian Intelligence Security Organisation].”

155 A security assessment is defined in r.6.07B as having the same meaning as that set out in Part IV of the *Australian Security Intelligence Organisation Act 1979* (Cth).

156 An “issuing body” is defined in r.6.07B as “a person or body authorised to issue MSICs” pursuant to r.6.07O. The bodies that may be authorised as “issuing bodies” are -

- (a) a “maritime industry participant” or agent engaged by a participant for that purpose;

- (b) a body representing participants;
- (c) a body representing employees of participants;
- (d) a Commonwealth authority.

157 Although a Commonwealth authority is included in the class of bodies that may be authorised by the Secretary as an “issuing body” it appears to be the intent of the Regulations that after 1 January 2007 bodies that are, or are related to “maritime industry participants” are to be responsible for the issuing of MSICs (see r.6.08C(2)). Pursuant to ss.105(5), 109(5), 113(5) and 113D(5) the Regulations authorise an “issuing body” to receive information from ASIO in respect of an applicant for an MSIC (r.6.08C(1)(d),(e)). Misgivings have been expressed by some participants in the maritime industry in respect of some elements of the operation of the MSIC scheme.⁸⁴

158 A body seeking authorisation as an “issuing body” must prepare and submit an “MSIC plan” to the Secretary. An “MSIC plan” is defined in r.6.07Q as one that sets out procedures to be followed for the following purposes:

- “(a) the issue and production of MSICs;*
- (b) the design, distribution and storage of sample MSICs for training purposes, if the issuing body proposes to issue such MSICs;*
- (c) the safekeeping, secure transport and disposal of MSICs and associated equipment;*
- (d) the recovery and secure destruction of issued MSICs that are no longer required;*
- (e) the security of records in relation to applicants for MSICs;*
- (f) lost, destroyed or stolen MSICs;*
- (g) ensuring that MSICs are returned to issuing bodies when they are no longer required.”*

159 The Secretary must not authorise a body as an “issuing body” unless the Secretary is satisfied that the “MSIC plan” is apparently adequate to give effect to the

⁸⁴ “Australian Ship Owners Association expresses its concern over MSIC regime”, 28 September 2005 <www.asa.com.au/news.asp> “ID changes prompt port access worries”, 13 July 2006 <au.biz.yahoo.com/060713/31/ssbk.html>

purposes thereof and the body would not be likely to be a threat to the security of maritime transport or an offshore facility (r.6.07P(4)).

160 If the Secretary refuses to authorise a body as an “issuing body” the applicant for authorisation may request the Secretary to reconsider that decision (r.6.08X(1)(a)) and if the Secretary refuses to vary the original decision the applicant may apply to the AAT for review of the decision (r.6.08Z).

161 A “criminal records check” is not defined in the Regulations but appears to be a task performed by the Australian Federal Police (AFP) which, apparently supplies a report to the “issuing body”. Unless the Secretary approves the issue of a MSIC to such a person the “issuing body” may not issue a MSIC to a person who has an “adverse criminal record” (r.6.08C(1)(e)(ii)). (See [163] below).

162 As the Regulations now stand, until 31 December 2006 the Secretary is to decide whether a “criminal records check” shows that a person has an “adverse criminal record” and after that date such a decision is to be made by the “issuing body”. It has been reported, however, that the Commonwealth has agreed to continue to retain responsibility for those decisions after 31 December 2006, such responsibility to remain with the Department of Transport and Regional Services until the 30 June 2007 and thereafter to be performed by the Department of the Attorney-General.⁸⁵

163 A person has an “adverse criminal record” if convicted of a “maritime-security-relevant offence” and sentenced to imprisonment (r.6.08A). The term “imprisonment” is given a broad meaning. It includes a direction that a person be held in “detention until the rising of the court”. Such a punishment, of course, would, on most occasions, be regarded as being at the bottom of the scale and to be a punishment more favourable to a convicted person than the imposition of a fine.

164 A “maritime-security-relevant offence” is defined in r.6.07C as follows:

*“In this division, a **maritime-security-relevant offence** means an offence of a kind mentioned in an item in Table 6.07C or a similar offence against a law of a State or Territory, or of any other country or*

⁸⁵ “MSIC Centralised Vetting Agency Confirmed” <www.asa.com.au/print:asp>

part of a country.

Table 6.07C Maritime-security-relevant offences

<i>Item</i>	<i>Kind of offence</i>
1	<i>An offence mentioned in Chapter 5 of the Criminal Code .</i> Note Offences for this item include treason, espionage and harming Australians.
2	<i>An offence involving the supply of goods (such as weapons or missiles) for a Weapons of Mass Destruction program as mentioned in the Weapons of Mass Destruction (Prevention of Proliferation) Act 1995</i>
3	<i>An offence involving the hijacking or destruction of an aircraft or vessel</i>
4	<i>An offence involving treachery, sabotage, sedition, inciting mutiny, unlawful drilling, or destroying or damaging Commonwealth property, mentioned in Part II of the Crimes Act 1914</i>
5	<i>An offence involving interference with aviation, maritime transport infrastructure or an offshore facility, including carriage of dangerous goods on board an aircraft or ship, or endangering the security of an aerodrome, a port or an offshore facility</i>
6	<i>An identity offence involving counterfeiting or falsification of identity documents, or assuming another individual's identity</i>
7	<i>Transnational crime involving money laundering, or another crime associated with organised crime or racketeering</i>
8	<i>People smuggling and related offences mentioned in Chapter 4, Division 73 of the Criminal Code</i>
9	<i>An offence involving the importing, exporting, supply or production of weapons, explosives or a trafficable quantity of drugs.</i>

Note 1 A person convicted of an offence mentioned in item 1, 2 or 3 of Table 6.07C is disqualified from holding an MSIC, but, under regulation 6.08X, is entitled to seek reconsideration of the disqualification decision.

Note 2 *An issuing body must not issue an MSIC to a person who has been convicted of an offence mentioned in item 4, 5, 6, 7, 8 or 9 of Table 6.07C unless the Secretary, acting under regulation 6.08F, decides that the person is unlikely to constitute a security threat and approves the issue of an MSIC to the person.*

Note 3 *Before 1 January 2007, a person who has been convicted of a disqualifying offence must not enter a maritime security zone: see regulations 6.07K and 6.08D.*

165 Only a person who has an “operational need” to hold the card may apply for the issue of an MSIC (r.6.08B(1)). Regulation 6.07F defines “operational need to hold an MSIC” as the requirement of the occupation or business interests of the applicant that the applicant have unmonitored access to a “maritime security zone” at least once each year.

166 It is to be remembered that an MSIC is concerned with vouching for the identity of a vetted entrant and is not in itself the grant of a right of access to a “maritime security zone”.

167 Regulation 6.05 provides that access to a “maritime security zone” is not to be denied to persons described in that Regulation which, in r.6.05(c), includes a person who is authorised by a law of the Commonwealth to enter the “maritime security zone”. However, r.6.07J(1) makes it an offence for any person in a “maritime security zone” to fail to display in the manner set out in r.6.07E a valid MSIC. The only exceptions to that requirement are set out in r.6.07J(2), r.6.07M and r.6.07N. Under r.6.07J(2)(a) a “visitor” to a “maritime security zone” is not required to display an MSIC if the person escorting the “visitor” displays an MSIC or is a person exempt under r.6.07M from carrying or displaying an MSIC. “Visitor” is defined in r.6.07I as a person entitled to be in a “maritime security zone” because he or she is being escorted or continuously monitored. Regulation 6.07J(2)(b) provides that a person who holds and displays an identification document issued by the Defence Force is not subject to r.6.07J(1). Regulation 6.07M authorises the Secretary to exempt a person from holding, carrying or displaying an MSIC. Regulation 6.07N(2) provides that members of the Defence Force responding to an “event” or threat of “unlawful interference with maritime transport or offshore facilities” are not required to display an MSIC. The word “event” is not defined in the Act or Regulations. Section 10 defines the verb “threaten” as follows:

“threaten: a person is taken to threaten to do an act if the person

makes a statement, or does anything else, showing, or from which it could reasonably be inferred, that it is his or her intention to do the act.”

Regulation 6.07N(2) also provides that ambulance, rescue or fire service officers responding to an emergency are not required to display an MSIC.

168 The Federal Court of Australia understands that the Admiralty Marshals appointed by the Court are persons authorised by a law of the Commonwealth to enter a “maritime security zone” and are not prevented from entering such a zone by the control provisions of the Regulations in respect of such zones.⁸⁶

169 On the occasions the Court authorises a State or Territory police officer to act as a Marshal of the Court it would seem that only the terms of r.6.05(c) may be relied upon for the right of the officer to enter a “maritime security zone”. Other provisions of r.6.05 which preserve a right of entry into a “maritime security zone” by a police officer are confined to entry for the purpose of a police investigation.

170 Of course, in the absence of appropriate exemption provided by the Regulations, or by the Secretary upon application under r.6.07M, a Marshal who enters a “maritime security zone” will be required to display an MSIC whilst within the zone.

171 If it is contended that the obligation on a Marshal or police officer deputed to act as Marshal to have, carry and display an MSIC unduly fetters performance of the Marshal’s duties perhaps that issue would have to be addressed by an application to the Secretary under r.6.07M for appropriate exemption.

Screening and Clearance

172 Section 119 of the Act enables the Regulations to prescribe requirements for screening, the receiving of clearances, and the circumstances which persons, goods, vehicles or vessels are required to be cleared “for the purposes of safeguarding against ‘unlawful interference with maritime transport or offshore facilities’”.

⁸⁶ Federal Court of Australia “Information for Marshals on the Maritime Transport Security Regime” (November 2005 – Version 4) p.4 <www.fedcourt.gov.au/how/admiralty>

173 Section 115(1) provides that a person is to be “screened” in accordance with the foregoing Regulations in preparation for (a) boarding a vessel; or (b) entering an area within a “security regulated port” or an “offshore security zone”. Under s 115(2) a person “receives clearance” (a) if that person is allowed by a “screening officer” (s 165(1)) to pass through the “screening point” (s 10) after being “screened” ; or (b) if that person passes through the “screening point” being a person whom the Regulations, or the Secretary by written notice, provide may pass through without being “screened”; or (c) if that person enters a cleared area or boards a cleared vessel other than through a “screening point” and the Regulations, or Secretary by written notice, provide may enter the area or board the vessel that way. Sections 116-118 make similar provisions for screening and receiving of clearance in respect of goods, vehicles and vessels respectively.

Inspectors and Enforcement Officers

174 Sections 146-149 provide for authorised officers to inspect operational areas of a “security regulated ship” or “security regulated offshore facility”. The persons who may be so appointed are customs, immigration and quarantine officers; members of the Australian Defence Force and Australian Maritime Safety Agency surveyors.

175 An appointed officer may board a “security regulated ship” or “security regulated offshore facility” and is to have access to any restricted area to observe and record the ship’s operating procedures, or inspect and copy the ship’s ISSC and security records. The Act instructs such officers not to exercise those powers in a manner that subjects a person to greater indignity that is necessary or reasonable.

176 Sections 150-160 provide authority for “law enforcement officers” (police officers (State and Federal) and prescribed customs officers) to stop and search people, vehicles and vessels in maritime security zones and to stop and search people on “security regulated ships” and “ships regulated as offshore facilities”.

The officer must explain why the search is to be made and limits the amount of force that may be used by the officer to that which is necessary and reasonable and instructs that the officer must not subject a person to greater indignity than is necessary and reasonable to effect the removal of a person, vehicle or vessel from

the zone.

177 In addition to the foregoing the Act (ss 161-163) provides for persons to act as “maritime security guards”. A “maritime security guard” is a person who is not a “law enforcement officer” who satisfies the training and qualification requirements prescribed in the Regulations. A “maritime security guard” is authorised by the Act to detain a person whom the guard suspects has committed an offence against the Act and believes that it is necessary to effect such detention to “maintain the integrity of a maritime security zone”.

Summary

178 The Act and Regulations effect a panoply of measures designed to raise awareness of the need for vigilance and the implementation of security systems in the maritime industry.

Notwithstanding the wide ranging provisions of the legislation and their place in part of an international scheme the threat of a major terrorist incident involving a maritime target can at best be reduced but not avoided.