

# **The ISPS Code & Beyond**

**Russell Kilvington**

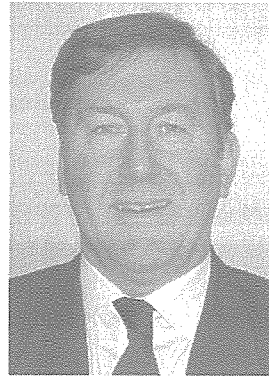
Director Maritime Safety,  
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**Russell Kilvington**

**Director of Maritime Safety**

## MARITIME SAFETY AUTHORITY OF NEW ZEALAND

RUSSELL KILVINGTON, Director of Maritime Safety, joined MSA shortly after its creation, on 1 November 1993.

For the previous seven years he was a Director of both UK and New Zealand based international transport planning consultants, Steer Davies Gleave. Between 1990 and 1994 he was an International Vice President of the Chartered Institute of Transport and subsequently was Chairman of the New Zealand National Council for a two year period between 1997 and 1999.

He has tertiary and professional qualifications in transport, economics and planning.

Other previous experience includes five years as Deputy Director of the Transport Studies Unit at Oxford University and the establishment, in the United Kingdom, of the first undergraduate degree in transport studies at Loughborough University.

## **THE ISPS CODE AND BEYOND**

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Director of Maritime Safety  
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The International Ship and Port Security Code represents a concerted international initiative to mitigate risks to shipping from the worldwide escalation and changing nature of terrorism. The Code requires governments to administer ship and port facility security regimes, with private sector participation as appropriate, rather than relying solely on commercial imperatives, which naturally exist in the private sector, to minimise security risks.

Despite the dire predictions internationally, 1 July and the introduction of the ISPS Code around the world, has come and gone without the sky falling in; trade has not ground to a halt; and port and shipping companies have not been driven to the brink of bankruptcy!

No one is doubting the enormous effort that port and shipping companies have had to put in to reach this point but neither should anyone doubt the proportional effort that contracting governments have also had to undertake.

At the outset in New Zealand early last year, it would be fair to say that the prospect of the ISPS Code was met with some howls of derision and many of the wild claims that were being echoed within the industry around the world. Early dealings with industry were at times tempestuous. However, for a country like New Zealand the task was made somewhat easier by the fact that there is no real New Zealand international (SOLAS) shipping registry to speak of. Unlike many states, New Zealand flagged vessels to which the Code was to apply was ultimately limited to a grand total of two! New Zealand, at least at this stage, has not decided to extend the Code's discretionary provisions to domestic (only) operators. Thus by far the greatest effort required was in the area of port security.

In its deliberations, and ultimately directions, the New Zealand government conveyed the clear expectation that the implementation of the ISPS Code was to be done on a whole-of-government basis. That is to say that, while the Maritime Safety Authority (MSA) was charged with the overall responsibility for implementing the Code, Cabinet required that this be done in close consultation and coordination with the many government departments and agencies with interests in the maritime sector.

One of the first things to be done was the formation of a National Ship and Port Security Committee. This committee was comprised of representatives from Customs, the Quarantine Service, intelligence and security agencies, the Prime Minister's department, Police, Aviation Security Service, Foreign Affairs and Trade and Immigration. The terms of reference for this Committee were established by Cabinet and included consideration of the requirements for and outcomes of port facility security assessments; consideration of recommendations in respect of identifying those ports required to develop security plans; determining procedures for



moving from one security level to another; and consideration of security standards and procedures in ports.

In considering suitable terms of reference for the National Committee, Cabinet had also noted the need for consultation with shipping and port industries. As a consequence, a national consultative committee was established, with representation from a wide range of industry stakeholders, and the aim of facilitating consultation. The first meetings attracted 30 attendees. Perhaps a testament to the success of this consultative approach is the fact that the last meeting, which was scheduled for August, was cancelled due to a lack of agenda items and an indicated zero attendance from industry!

Port Facility Security Officers also have a national forum for the coordination of port security matters, which is known as the National Port Facility Security Officers Committee.

While the committee structure in its entirety has been important, by far the most critical committee in this process has been the Local Port Facility Security Committees that were established at each port facility. These committees generally consist of representatives from across every interest group in the port. These include: the port company itself; stevedores; ships agents; road and rail transport; unions; other employee groups; lessees; oil companies; shipping companies; Police; Ministry of Agriculture and Forestry (MAF); Customs; and Immigration. Their purpose was initially to focus local resources and interested parties in the development and implementation of the Port Facility Security Plan. Beyond the July 1 implementation date, these committees continue as a focus forum for port security issues that affect stakeholders. It is possibly an understatement to say that they have played a critical part in the risk assessment process and the development of robust and effective port security plans. What is clear is that they will remain integral to the implementation and ongoing effectiveness of port security measures within the new framework.

The involvement of the border control agencies at all levels, particularly the local level, was critical to the task of giving the greatest effect to the implementation of the Code. From New Zealand's perspective the ISPS measures represent but one element of the maritime border security equation. Running in parallel with the ISPS implementation, the New Zealand Customs Service was, and still is, implementing the Customs-Trade Partnership against Terrorism (C-TPAT) and the Container Security Initiative (CSI) to meet the expectations of the United States. C-TPAT is intended to improve security along the entire transport chain encompassing manufacturers, warehouse operators and shipping lines. CSI is designed to prevent terrorists from concealing personnel or weapons of mass destruction in US bound cargo. Those countries that do not implement CSI are disadvantaged because their shipments are subject to more complex examinations and thus are cleared more slowly.

One of the five objectives of the New Zealand Transport Strategy is to assist economic development. Viewed in the context of this objective, it is clear that taken together, the above security measures have trade facilitation benefits separate from, and additional to, their counter terrorism task, that is they enhance trade efficiency and thereby promote overall economic growth. By having the agencies driving the



initiatives forward involved at all levels, including the local port security committees, the MSA was able to ensure that the port security plans did not conflict with these other security measures but rather that they were complementary to, and supported, these equally important initiatives. To this end, some ports used their local committees to greater effect than others in developing their plans. In a number of cases, where they initially did not involve the local committee to the extent recommended, resultant plans were submitted to the MSA that had clearly not been subjected to scrutiny by Customs or the other agencies. This engendered major flaws in such plans, and flaws that would have been counter-productive to CSI for example. As a specific illustration of this, it can be imagined that there was some significant consternation on the part of Customs, for instance, when they were shown plans that required gate staff to open sealed containers for inspection in the absence of Customs Officers.

Legislative effect has been given to the ISPS Code in New Zealand through the Maritime Security Act 2004. The Act sets out the respective roles and responsibilities of the government and the merchant shipping and port industries to fulfil these requirements. It also includes regulated offences and penalties and regulation making powers that have seen the introduction of Maritime Security Regulations covering matters of detail. The Act provides for the appointment of a Designated Authority, and sets out the principal objectives, functions and duties of the Designated Authority. These include undertaking the activities considered necessary for the effective implementation of the ISPS Code; carrying out port security assessments; and ensuring the development, implementation and maintenance of approved port security plans. The Designated Authority in New Zealand is the MSA.

Further functions include specifying the appropriate security level for port facilities and New Zealand ships; exercising control measures in respect of international ships entering New Zealand ports; and publishing standards and codes of practice.

Beyond the implementation of the necessary structures and plans required nationally, the size of the ongoing task of managing maritime security compliance in New Zealand is represented by the 2,500 foreign ships that call annually. This includes approximately 40 passenger vessels with a combined total of around 50,000 passengers. Since 1 July every one of these vessels has been subject to port State control inspections during a three-month-long concentrated inspection campaign as requested of all members of the Tokyo Memorandum of Understanding to which Australia is, of course, also a signatory. Again against international predictions, the campaign has revealed a very high level of compliance.

In respect of the port State control function, and particularly in the case of non-compliance, the Maritime Security Act provides for a number of measures in relation to the control of ships in ports. For example, where a vessel entering New Zealand is unable to produce a legitimate Security Certificate, issued by its flag State, then the vessel may be delayed, detained or expelled. These measures can also be applied where a certificate is produced, but the (MSA) Chief Executive has clear grounds to believe that a ship is not in compliance with New Zealand maritime security law. No doubt case law will, over time, clarify the meaning of "clear grounds".

In similar vein, a recent decision by the Canadian Federal Court in respect of detention has raised interesting questions around what a further aspect of this type of action may bring about. Here the focus is on the meaning of “unduly detain” or “unduly delay”. This was noted recently in an article by David O’Connor of Wilson Harle in Auckland. In the article, Mr O’Connor points out that there is no New Zealand case law on this point. He suggests that if the MSA reaches its views on the grounds for detention negligently and detains and delays a vessel as a result, this may be sufficient to show that a vessel had been unduly delayed or detained by the MSA and may trigger the compensation provisions in the Act. While, in the Canadian example given, the provisions related to would be those in the New Zealand Maritime Transport Act, the situation can also be envisioned under the similar provisions in the Maritime Security Act.

Maritime Security has been, and will likely remain, an exercise in risk management. The Code itself is reasonably explicit in recognising that risk can be mitigated but not eliminated. Much of our effort beyond implementation will be focussed on ensuring that we have in place ongoing risk management and audit processes and ensuring that we keep our eye on the ball. To achieve this we have implemented an annual audit plan that will see all port facilities audited on at least two occasions each year. One of these audits will be notified to the port in advance but the second audit will be carried out on a completely unalerted basis. A similar regime is also being applied to the limited number of applicable New Zealand registered vessels. Ports and ships are also required by Regulation to carry out exercises that test their plans, at least quarterly. MSA staff will be involved in these exercises and will also coordinate an annual exercise that tests the wider capability of government agencies to respond to a heightened security level or actual incident.

The Code states, and indeed the economy requires, that security measures and procedures must be applied at port facilities in such a manner as to cause a minimum of interference with, or delay to, passengers, ships, their personnel and visitors, goods and services. As it is axiomatic that increases in security level beyond level 1 will involve commensurate increases in that disruption, minimising interference at level 1 ‘normal’ operations is clearly an important principle.

Decisions to declare (by myself as MSA Chief Executive) higher security levels must be based on robust assessment of the threat environment and will therefore most likely be intelligence driven. Accordingly, the MSA has signed a Memorandum of Understanding with the New Zealand Police on the sharing of intelligence and has arrangements in place with the national intelligence agencies along the same lines. In addition to these arrangements, the MSA has recently employed a staff member to work alongside New Zealand Customs counterparts in a manner that will see risk profiling of arriving vessels carried out jointly by the MSA and Customs Service from within the Customs shipping intelligence office located in Christchurch.

As I have alluded to earlier, implementation of the ISPS Code along with other security initiatives is seen as being critical to New Zealand’s status as a trading nation. From the outset, it was always anticipated that New Zealand’s efforts would likely be subject to international scrutiny at some point. The United States Maritime Transportation Security Act (MTSA) of 2002 directs the Secretary (Department of Homeland Security) to assess the antiterrorism measures maintained by foreign

ports that are served by vessels that also call on the United States. To satisfy this the United States Coast Guard (USCG) has established the International Port Security Program under which it intends to visit countries that are called on by United States vessels; have a last port of departure for any vessel coming to the United States; or originate/tranship cargo going to the United States. This clearly includes New Zealand and as I speak such a team has arrived in New Zealand to carry out this very exercise.

It is understood that the USCG is planning on visiting 135 ports (globally) in the first year post 1 July. Country visits will involve inspecting the arrangements in a selection of ports. In cases where ISPS deficiencies are found a 10-step sliding scale will be implemented. The lowest level of action would be a letter from the USCG to the agency responsible for ISPS compliance within the country. The most severe form of action would be the denial of entry of a vessel coming from a port found to be in non-compliance with the code. The implications of the visit are potentially profound. To us, it represents an opportunity for New Zealand to demonstrate its generally high level of effective compliance with the ISPS Code and in doing so can help serve to reinforce New Zealand's position as a secure trading partner. The outcome is inextricably linked to other trade security initiatives that the New Zealand Customs Service is leading which collectively have the potential to cement secure trade partner recognition with the United States. Should New Zealand ports be deemed to fail to meet international standards, the economic consequences for New Zealand trade would be significant.

While the ISPS Code addresses risk around a number of specific vessels it does not apply to all. Specifically the Code does not capture foreign fishing vessels, many of which have far larger crews than cargo vessels; nor does it apply compulsorily to domestic passenger ferries. New Zealand border control agencies are increasingly aware of irregularities pertaining to foreign fishing vessels and this is an area that has been highlighted by the National Ship and Port Security Committee as requiring further thinking. Although it is of concern to us that the International Maritime Organization (IMO) is merchant shipping focussed, New Zealand is considering whether to advocate extension/amendment to the Code to incorporate 'international' fishing vessels.

In addition to security drivers there are environmental, enforcement and economic drivers pointing to the need to know what is happening within the New Zealand Exclusive Economic Zone (NZEEZ) and the littorals. These requirements, and the information gathered from them, need to be shared with other government agencies and merged to form a consolidated maritime picture. The MSA is currently contributing to multi agency work that will seek to achieve this in the future and has identified the ability to be able to contribute a very significant amount of data gained for maritime security and search and rescue (SAR) purposes. Other sources include military, Customs and MAF data which once merged, will significantly enhance operational responsiveness on the part of the agencies involved, provide early indication of vessels bound for New Zealand and enable better utilisation of assets conducting maritime surveillance and SAR.

At the same time the IMO is in the process of mandating the requirement for commercial vessels to report for maritime security reasons when closer than 2000



miles (or 96 hours steaming) from a coastal State, when bound for that State; or when transiting through a coastal State's territorial waters.

Known as Long Range Identification and Tracking (LRIT), the reporting medium (International Maritime Satellite – INMARSAT) and data proforma are expected to be similar to the SAR focused Ship Reporting System and the two systems are expected to be complementary. From New Zealand's perspective, for obvious geographical reasons, this development is seen to be of far greater significance than the (coastal VHF driven) Automatic Identification of Ships (AIS) system currently required of ISPS compliant vessels.

The target ships for LRIT are SOLAS ships – that is generally ships engaged in international commercial voyages. Again, it does not include, at this stage, fishing vessels or recreational craft.

As with information gathered for a SAR reporting regime, the cost of gaining information for security purposes is borne by the receiving country. Although it is difficult to estimate the annual cost of collecting LRIT data above that required for SAR purposes, an estimate of NZ\$100,000 per annum for INMARSAT fees is probably a good starting point.

At this point in time it is expected that the IMO will mandate LRIT next year and depending on the timing may make it effective by mid 2006.

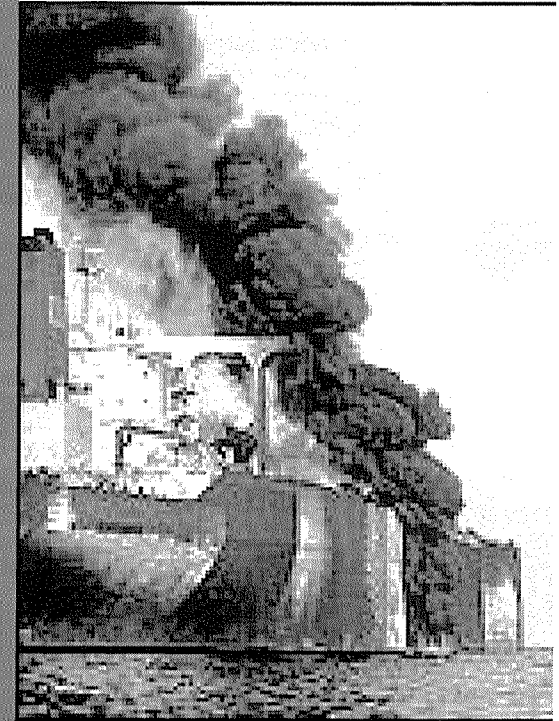
In conclusion, it is clear that the task of effectively implementing and maintaining these new measures is a significant one. It is important to acknowledge that the ISPS Code work is but one aspect of security aimed at providing defence in depth at the gateways to our borders and the strengthening of our position as a trading nation. To this end, the MSA is working closely with other departments and agencies such as Customs and MAF to ensure that the implementation of the ISPS Code is complementary to the needs of bio-security and container security.

It has been particularly rewarding to have the early howls of derision from stakeholders replaced with positive and favourable comments across the board. Most ports have acknowledged the considerable benefits that have been derived in the area of health and safety and a number have achieved operational efficiencies out of the ISPS implementation. The implementation has not been without cost and in many instances these have been considerable. Our relationships with the stakeholders remain very, very good and a strong partnership has been formed with industry that will undoubtedly make the ongoing regulatory task that much easier.

September 11 has ushered in a new era. There is no war as we used to know it but neither is there peace. Continuous vigilance against a constant threat now haunts our transport sector just as it has done for aviation in particular over many previous years. We must be prepared.

# Maritime Security

## Presentation to the Maritime Law Association of Australia and New Zealand



*Russell Kilvington*  
*Chief Executive*  
*Director of Maritime Safety*

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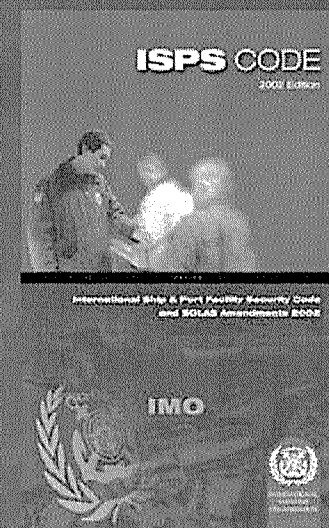
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# ISPS Code

Governments must administer ship and port facility security regimes with private sector participation

Despite predictions –  
the sky has not fallen in!



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# Whole of Government Approach

- National Port and Ship Security Committee
- National Consultative Committee
- Port Facility Security Officers Forum
- Local Port Security Committees

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# Maritime Border Security Equation

- Border Control Agencies involved at all levels
- Parallel Programs – C-TPAT & CSI
- Additional trade facilitation benefits are evident
- Port security measures complementary
- Plans subjected to scrutiny by stakeholders

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# New Zealand's Maritime Security Task

- 25 port facilities, Maui offshore platform and 2 New Zealand flagged ships
- Over 2,500 foreign ships call annually
  - Including 40 passenger ship visits carrying 50,000 passengers

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# Control of Ships

- Vessels may be delayed, detained or expelled
- “Clear grounds” required
- Interesting legal questions
- Compensation provisions

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# Risk Management Exercise

- Risk can be mitigated but not eliminated
- Ongoing risk management and audit task
- Ports will be audited twice a year
- Security drills and exercises required by legislation

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# Intelligence Driven

- Measures must be applied with minimum interference
- Increases in security level will increase disruption
- Decisions based on robust assessment based on intelligence
- Cooperative arrangements with Police, Customs and others

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# The Future

- USCG International Port Security Programme
- ISPS does not capture all
- What is happening in the EEZ and littorals?
- Long Range Tracking



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# Conclusion

- Task is significant
- ISPS but one aspect of security
- Relationships are good
- Health and safety improvements and operational efficiencies evident

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