

**Turning King Canute into
Lord Neptune: legal
aspects of the Joint
Offshore Protection
Command and Australia's
Maritime Identification
System**

Cameron Moore
University of New England

TURNING KING CANUTE INTO LORD NEPTUNE

Legal Aspects of the Joint Offshore Protection Command and Australia's Maritime Identification System

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Cameron Moore
Associate Lecturer
University of New England

Professor Stuart Kaye
Dean of Law
University of Wollongong



I also wish to thank Ms Ruth Baird, University of Tasmania, for her valuable assistance in sending me research material used in her own paper on the AMIS, 'The Australian Maritime Identification System: Practical Policy or Political Puff' Australian Strategic Policy Institute 2005.

What has been said about the AMIZ

“Defense Minister Juwono Sudarsono said Indonesia would deploy its naval forces to anticipate possible Australian penetration into its territorial waters. Juwono said, with a surveillance reach of 1,000 nautical miles from the Australian coastline, the AMIZ concept would cover two-thirds of Indonesian waters specifically the Java Seas, Halmahera Wea and Sulawesi Sea.”

19 December 04



News in Brief “Indonesian Legislators Oppose Australia’s Plan to Declare AMIZ”
Embassy of the Republic of Indonesia in Canberra 19 December 2004
[<http://www.kbri-canberra.org.au/brief/2004/des/19des04.htm> at 11 March 2005].

What the AMIZ Proposal Was

Based on co-operative international arrangements, including with neighbouring countries, the Australian Government also intends to establish a Maritime Identification Zone. This will extend up to 1000 nautical miles from Australia's coastline. On entering this Zone vessels proposing to enter Australian ports will be required to provide comprehensive information such as ship identity, crew, cargo, location, course, speed and intended port of arrival.



Prime Minister of Australia "Strengthening Offshore Maritime Security" (Media Release of the Prime Minister, 15 December 2004).

Comparable to Air Defence Identification Zone, which may be where the original AMIZ title came from

Australia' s Maritime Identification System

Commonwealth Government officials now
refer to Australia's Maritime Identification
System



See Andrew Metcalfe, Deputy Secretary , Department of Prime Minister and Cabinet, 'Advancing the Coordination of National Security in Australia' (Paper presented at the National Security Australia 2005 Conference, Sydney, 21 February 2005), and Department of Transport and Regional Security, *Strengthening Australia's Offshore Maritime Security* [<http://www.dotars.gov.au/transsec/docs.html> at 11 March 2005].

OUTLINE

- AMIS and the ISPS Code
- AMIS outside the ISPS Code
- Australian domestic law relating to offshore protection (not ports)



Focus of presentation is on offshore, not ports, because that is the focus of the AMIS and the Joint Offshore Protection Command.

AMIS and the ISPS Code

What is the ISPS Code? A legal view:

- Law of the Sea Convention
- International law and domestic law
- The *Maritime Transport and Offshore Facilities Security Act 2003*



What is the ISPS Code?

All SOLAS members party as of 1 July 2004 through tacit acceptance procedure [see Conference Resolution 1, 12 December 2002, *Adoption of amendments to the Annex to the International Convention for the Safety of Life at Sea, 1974*]

155 States now party, being 98.52% of global tonnage

[see Status of Conventions at http://www.imo.org/Conventions/mainframe.asp?topic_id=247 at 26 April 2005]

Status of ISPS Code Part B? Not technically binding but provides more detailed standards for the implementation of the binding Part A and SOLAS Chapter XI-2 amendments. It is authoritative and persuasive.

Form of coastal State control under LOSC Articles 25(2)

Form of flag State control under LOSC Article 94

Form of port State control generally

Not really an extension of coastal State jurisdiction as it does not establish any new maritime zones or powers within any maritime zones

Commonwealth Parliament is not obliged to legislate consistently with international law. From a domestic law point of view, Government not obliged to act consistently with international law. There can still be international law consequences though. International law does not accept inconsistent domestic law as a defence to a breach of international law.

Note, for example, that sections 139 and 148 of the MTOFS Act, concerning boarding to inspect operational areas of ships, are less restrictive than the ISPS Code, see Slide 9.

AMIS and the ISPS Code

Obligation to provide information in international waters:

- When and where? Upon request for inbound vessels
- What? ISPS status, last 10 calls, location, ETA, crew, passengers, cargo, etc.
- Transiting vessels not directly covered



Obligation to provide information

Inbound vessels:

When? Upon request of officers duly authorised [Regulation 9.2.2], there may be standing arrangements and a minimum time period for reporting of 24 hours before entering port, (see MSC 1130 cited below) Australia's is effectively 48 hours [Department of Transport and Regional Security, *Strengthening Australia's Offshore Maritime Security* <<http://www.dotars.gov.au/transsec/docs.html>> at 11 March 2005]. *Maritime Transport and Offshore Facilities Security Act* s.92 and *Regulations* 4.80 and 5.10 require the information to be given to a Customs Officer when making the crew report for the purpose of the *Customs Act* 1901.

Where? Not specified

What? Valid certificate and issuing authority, security level, previous security levels and special measures for the last 10 calls, other information in accordance with Part B para 4.39 – rescuees, location, time of arrival, crew list, cargo, passenger list, certain company information. *Maritime Transport Security Regulations* 4.80 and 5.10 and Customs Form 3A require much of this information but also notably require information about the next 4 ports of call.

See IMO *Maritime Safety Committee Circular* 1130 of 14 December 2004 for further detail of practical requirements and a pro forma standard data set of information a ship should provide.

Foreign ship regulated as an offshore security facility:

Must provide information as for a foreign ship entering port, s.100Z1

Transiting vessels:

Not covered. However note that the Automatic Identification of Ships (AIS) transponder system will provide a certain amount of information, such as course, speed, vessel type, and so on, to other ships and shore stations much like the aircraft Identify Friend or Foe (IFF) system. Cargo ships, but not passenger ships or tankers, of 300 gross tonnage and upwards must have it effectively from 31 December 2004. The law does not specify the range at which AIS must be detectable. [Regulation 19 Chapter V SOLAS Convention and <http://www.imo.org/Safety/mainframe.asp?topic_id=754.html> at 28 April 2005]

There is also now a requirement for prominent display of the ship identification number, which would assist in visual identification. [Regulation 3 Chapter XI-1, SOLAS Convention]

Note also the requirement for a ship security alert system under Regulation XI-2/5 to alert flag State authorities of threats to, or compromises of, ship security without raising any alarm on-board.

Note Conference Resolution 10 on *Early Implementation of Long-Range Ships' Identification and Tracking* – not yet in place but subject to discussion

AMIS and the ISPS Code

Consequences for non compliance:

1. Duly authorised officers of port must have clear grounds for believing vessel is non-compliant
2. Must attempt communication
3. If still non-compliant, proportionate measures:
 1. Require rectification
 2. Proceed to a location in territorial sea or internal waters
 3. Inspection
 4. Denial of entry into port



Consequences for non-compliance

ISPS Code

1. [Regulation 9.2.2]
2. With both ship and Administration [Regulation 9.2.2]
3. Ship must be informed of port State's intentions, and the master may withdraw intention to enter port [Regulation 9.2.5]

Note Additional Requirements of Regulation 9.3

Maritime Transport and Offshore Facilities Security Act

Obligations upon Ships Section 93 *Maritime Transport and Offshore Facilities Security Act* states that a regulated foreign ship (ie a ship to which the ISPS Code could apply, even if it does not) must allow a maritime security inspector to board and inspect it. Section 96 states that such a ship must then comply with control directions, which, under s.99 include removing it from Australian waters. Section 99(3) states that a control direction must be both necessary and able to be made under SOLAS Chapter XI-2 or the ISPS Code. Foreign ships regulated as offshore facilities must allow inspections (s.100ZJ) and must comply with control directions (s.100ZK), which can include removing the ship from Australian waters, security regulated ports and offshore security zones (s.100ZM).

Powers of Officers Sections 139 and 148 *Maritime Transport and Offshore Facilities Security Act* provide that specified officers may board and inspect ships (Australian or foreign) for the purpose of determining compliance after giving reasonable notice. An officer must not subject a person to greater indignity than is necessary. There is no requirement to give notice when boarding in a port. Sections 140A, 140B and 148A provide similarly for security regulated offshore facilities.

Distress situations must prevail.

Note the powers available under the *Maritime Transport and Offshore Facilities Security Act*, except with regard to offshore facilities, do not apply outside of the territorial sea of Australia and the external territories, s.5, therefore boardings must occur within the territorial sea. Further, foreign ships, except with regard to offshore facilities, are only regulated when in Australian waters and in or heading to a port, s.17, thus foreign ships transiting under the right of innocent passage may not be boarded. Foreign ships may be dealt with where they are involved with a security regulated offshore facility, ss.17D and 17E.

(The offence provisions of the Act can however apply beyond the territorial sea by virtue of s.6 but an arrest in regard to them could not occur unless the vessel involved subsequently entered the territorial sea and Australia could exercise jurisdiction consistently with LOSC Article 27, which essentially requires that there must be a consequence of the offence for the coastal State or a request to co-operate from the flag State.)

Comparable International Practice

- United States – 96 hours
- United Kingdom – 24 hours
- New Zealand – 48 hours



United States

Has National Vessel Movement Centre to implement requirement for vessels, that essentially meet ISPS criteria, to provide information **96** hours before entering port.

[*United States Federal Register* Vol.68 No.40, 28 February 2003, Rules and Regulations p.9537, and see <<http://www.nvmc.uscg.gov/index.html>> at 1 May 2005]

United Kingdom

No Maritime Identification Zone as such, but requirement for ISPS vessels to provide information **24** hours before entering port. EU Regulations are stricter, in requiring all vessels to provide information 24 hours before entering port.

[<http://www.dft.gov.uk/stellent/groups/dft_transsec/documents/pdf/dft_transsec_pdf_030409.pdf> at 1 May 05]

New Zealand

Again, no Maritime Identification Zone as such, but information must be provided **48** hours prior to entering port.

[<http://www.msa.gov.nz/Security/security_docs?Advice_to_Arriving_Vessels.pdf> at 1 May 05]

AMIS outside the ISPS Code

Non ISPS vessels and Flag States

- Cargo ships under 500 gross tonnage
- Fishing Vessels
- Non SOLAS and therefore non ISPS flag States include North Korea, Nauru, Kiribati, Micronesia, Palau, Somalia



What falls outside the ISPS Code?

Cargo ships under 500 gross tonnage [ISPS Code Part A 3.1]

Fishing Vessels

Non SOLAS and therefore non ISPS flag States include North Korea, Nauru, Kiribati, Micronesia, Palau, Somalia [see Status of Conventions at http://www.imo.org/Conventions/mainframe.asp?topic_id=247 at 26 April 2005]

Note requirements of Part B para 4.45 that non SOLAS ships must be treated in essentially the same way. Regulation 9 and the ISPS Code Part B regarding control and compliance should be applied to them. This does not create any new jurisdiction outside of the territorial sea however.

AMIS outside the ISPS Code

- Obligations to provide information in international waters? – inbound and transiting vessels
- Obligations in the territorial sea
- Consequences for non-compliance



If there are no grounds to interfere with navigation under the exceptions applying for the high seas, EEZ and contiguous zone, then in international waters:

- Inbound vessels may still be asked for information on the basis of consent and, if they do not provide it, denied entry to port or access to an offshore facility;
- Transiting vessels may also be asked for information but there is nothing that can be done to compel its production of information.

In the territorial sea, the coastal State may seek information from vessels but must still not interfere with innocent passage except for under quite specific grounds to protect the peace, good order and security of the coastal State.

Protecting Offshore Platforms Beyond the Territorial Sea

- *Petroleum Submerged Lands Act 1967*
- *Customs Act 1901*
- *Crimes (Ships and Fixed Platforms) Act 1992*
- *Maritime Transport and Offshore Facilities Security Act 2003*
- Executive power and national self defence

PSLA - The PSLA provides for safety zones of 500m around resources installations and an Area to be Avoided around the Bass Strait field. The Designated Authority may close any safety zone to all vessels by notice published in the gazette, s.119. A certain degree of control may be exercised over vessels in either type of zone to protect the safety of installations. This would include ordering out, boarding and towing out. The powers in the Area to be Avoided are applicable to Australian vessels, vessels in the adjacent area involved in petroleum or mineral exploration or exploitation, or in serious circumstances to prevent damage to equipment. The Bass Strait Area to be Avoided is an extension of the safety zone concept under Articles 60 and 80, or a special routeing system under Article 211. It is likely the latter, given that the IMO website considers areas to be avoided in the context of routeing systems.

See also the *Sea Installations Act 1987* - This act makes similar provisions for safety zones under s.57. It has more limited effect in that it only applies to sea installations, as opposed to resource installations, s.4. It also does not directly empower the ADF or Customs, granting power instead to inspectors appointed by the Minister for the Environment, s.60.

Customs Act - This act treats the 500m safety zone as effectively a contiguous zone, see s.184A(4). This is questionable under the LOSC. From a domestic point of view though, it would allow stopping and searching of vessels to establish their identity or where they are likely to be involved in an offence under, or prescribed by the, Act. The *Customs Act* deems sea and resources installations to be part of Australia, s.5C. The limitation is that there is only power to apprehend a vessel leaving an installation or push one back that is trying to get to an installation. It would not be possible to apprehend a vessel in a safety zone, and detain it, where it has not yet reached the installation. As already mentioned, in the counter terrorist context, this is perhaps most relevant to infiltration/ exfiltration of weapons or people.

CSFP Act - This act creates a form of universal jurisdiction but grants no specific enforcement powers other than for the ship's master to arrest and handover alleged offenders. There is no equivalent power for a person in charge of a platform. Such provisions are optimistic in expecting a ship's master to be in a position to exercise them anyway. The *Crimes Act 1914* would grant a power of arrest to ADF/ Customs personnel but not a power to board. Note - s.3 of the Act states that "*fixed platform* means an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration for, or exploitation of, resources or for other economic purposes." It is not immediately clear whether this would include a sea installation. The CSFP Act implements the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* 1988 and its protocol on fixed platforms. The IMO is close to concluding a process to amend both the Convention and its protocol. This could see significantly greater powers over terrorist type acts in international waters.

MTOFS Act - Division 5 of Part 6 of the MTOFSA provides for offshore security zones around facilities, which must be consistent with international law. It has extensive provisions for controlling movement and access within an offshore security zone. A law enforcement officer, which does not include a member of the ADF (s.151), will be able to remove a vessel from an offshore security zone where the officer reasonably suspects that vessel presents a risk to an offshore facility (s.159). There is a potential issue of a need for the ADF to board offshore platforms without consent, either for preventative or responsive purposes. The preventative purpose might be addressed through the MTOFSA. Boarding for responsive purposes at this stage would probably rely upon the executive power. (See also ISPS Part B para 4.19 and 2002 SOLAS Conference Resolution 7.)

Protecting Shipping Beyond the Territorial Sea

- *Crimes (Ships and Fixed Platforms) Act 1992*
- *Crimes Act 1914* for piracy
- *Customs Act 1901*
- *Maritime Transport and Offshore Facilities Security Act 2003*
- Executive power and national self defence

CSFP Act – Same as for previous slide. This act creates a form of universal jurisdiction but grants no enforcement powers other than for the ship's master. Amendment at the international level through the IMO could expand the possible enforcement powers available to the coastal state. The *Crimes Act 1914* would grant a power of arrest but not a power to board.

Crimes Act for piracy – The obvious limitations are that the domestic legislation is essentially a reproduction of the LOSC provisions. An offence must be committed for private purposes and it must be on the high seas (or in Australia's TS). Piracy specifically does not involve offshore platforms, s.51. The Act is relevant in that it empowers the ADF, s.54.

Customs Act – This is relevant in that it provides powers to stop and board ships without nationality on the high seas, s.184A(9), as well as Australian ships, s.184A(3). It also allows for the exercise of powers on foreign flagged ships with the consent of the flag state, s.184A(8). The powers would be subject to whatever agreement was struck with the flag state, s.185A.

MTOFS Act – As for previous slide, this act concerns the security of ports, ships and offshore facilities, and requires them to develop security plans and have graded levels of security readiness. This is preventative work. The MTOFSA does not deal specifically with responses to security incidents. It also makes no provision for security zones around ships at sea, security zones may only operate when they are in port (s.106).

Protecting Ships and Platforms Within the Territorial Sea and Contiguous Zone

- *Customs Act 1901*
- *Maritime Transport and Offshore Facilities Security Act 2003*
- *Crimes (Ships and Fixed Platforms) Act 1992*
and *Crimes Act 1914*
- Executive power to protect interests of the Commonwealth

The *Customs Act* – This act allows for the stopping and searching, detention, etc. (s.185) of any vessel in the TS for the purpose of the Act, s.184A(2)&(3). Regarding terrorism, this would probably relate to unlawful entry/ exit of weapons or people. It could not be used as a general security power. Similar powers would apply in the CZ, s.184A(4), except that stopping a vessel is allowed for identification, or to prevent or punish a FISC offence; again probably relating to movement of weapons or people. There would be no power to detain and bring into the TS vessels found in the CZ that have not yet entered the TS, s.185.

The CZ is really intended to protect the coastal state rather than the shipping within it though. This may be said of all the relevant maritime zones perhaps.

MTOFS Act - There are some limited powers to enforce compliance onboard security regulated ships, including boarding under s.148. These mostly relate to ships in ports but there is limited provision for boarding ships outside ports, with reasonable notice. This implements Regulation 9 of the Amendments to SOLAS Chapter XI together with sections 4.29 to 4.46 of Part B of the ISPS Code. It is important to note that the SOLAS and ISPS provisions are much more detailed than the MTOFS Act provision, and limit boarding to within the TS. With regard to platforms, the provisions for offshore security zones noted in slide 13 will apply in any event. As noted in slide 14, security zones may only operate around ships when they are in port.

No change in the regime for *Crimes Act* for piracy and terrorism, CSFP Act or PSLA

Note possibility of Part IIIAAA *Defence Act* applying

Conclusions

- ISPS based AMIS is actually uncontroversial in most respects
- There are powers available to counter terrorism offshore but they are not uniformly satisfactory