



STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
869 PUNCHBOWL STREET  
HONOLULU, HAWAII 96813-5097

February 17, 2009

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

HOUSE BILL NO. 1163, RELATING TO HARBORS.

COMMITTEE ON JUDICIARY

The Department of Transportation (DOT) **strongly supports** this Administration Measure. This bill will expressly authorize the DOT to impose upon private parties who use our commercial harbors, the duty to defend, indemnify and hold harmless the State against claims that arise from such use.

Section 19-41-7, Hawaii Administrative Rules (HAR), imposed a duty upon users of harbor facilities to defend and indemnify the State against all claims arising from such activities, except where the State was proven to be solely and legally negligent. However, the Hawaii Supreme Court's decision in William Haole v. State of Hawaii, 111 Haw. 144 (2006), rendered Section 19-41-7, unenforceable. The Court ruled, in pertinent part, that:

"DOT's governing statutes do not explicitly or implicitly authorize the DOT to issue administrative rules exonerating the State from the negligence of its employees (i.e., they do not allow the DOT to impose upon private parties a duty to defend or indemnify the State)."

As a result of the Haole decision, the State, as the landowner, has and will continue to bear considerable financial exposure in costly lawsuits filed against the State for injury caused to plaintiffs by the negligent acts of the users of our harbor facilities.

This bill will provide the DOT with the express authority to impose, via the Hawaii Administrative Rules, a duty to defend, hold harmless and indemnify the State. Users of commercial harbor piers and properties should be held responsible for the safe operation of maritime and maritime related activities on harbor lands. While the duty to defend, hold harmless and indemnify is already imposed upon tenants under written lease agreements; other commercial activities take place within our harbors, such as on our general purpose piers, for which written agreements are impracticable and/or do not exist. Because tariffs presently control the fees charged to most users of commercial harbor facilities and services, written agreements are not executed by all users as a matter of custom and practice. This Administration Measure will provide protection to the State in situations where such historical uses are not covered by a written agreement.

At a hearing on a similar measure (Senate Bill No. 1613) before the Senate Committee on Transportation, International and Intergovernmental Affairs, the Hawaii Harbors User Group (HHUG) expressed their reservations on the proposal. The DOT agreed to provide the Senate Transportation Committee Chair with draft language that would be acceptable to both the DOT and HHUG. We will also provide a copy of the proposed amendment to this Committee for its consideration as soon as we reach agreement with HHUG on this matter.

In light of the above, we respectfully request your favorable consideration of this bill.