



Australian Government
Department of Home Affairs



Submission to the Inquiry into the Transport Security Amendment (Serious Crime) Bill 2020

Senate Rural and Regional Affairs and Transport
Legislation Committee

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Department of Home Affairs' Submission

1. Introduction

The Department of Home Affairs (the Department) welcomes the opportunity to provide a submission to the Senate Rural and Regional Affairs and Transport Legislation Committee (the Committee) inquiry into the Transport Security Amendment (Serious Crime) Bill 2020 (the Bill) following its referral from the Senate on 22 February 2021. The Department has developed this submission in consultation with the Australian Criminal Intelligence Commission (ACIC).

Serious and organised crime is a major threat to the Australian way of life and causes enormous human suffering with highly visible flow-on effects to our community. In 2016-17, the Australian Institute of Criminology estimated the cost of serious and organised crime to be between \$23.8 billion to \$47.4 billion per annum. It is imperative that the Australian Government (the Government) puts measures in place to prevent serious and organised crime for the safety and security of all Australians.

Airports and seaports are transit points for organised crime groups to import weapons, illicit drugs and other harmful goods into Australia. Securing Australia's airports, seaports and offshore facilities is vital to protect the Australian community and legitimate industries from terrorists and serious criminals.

The aviation and maritime security identification card (ASIC and MSIC) schemes are an important part of securing the aviation, maritime and offshore facilities sectors. Several parliamentary and independent reviews have identified vulnerabilities in the ASIC and MSIC schemes. In particular, they have identified the schemes' vulnerability to exploitation by serious criminals and organised crime syndicates.

The Parliamentary Joint Committee on Law Enforcement (PJCLE) Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime (2011), recommended that the list of offences under the ASIC and MSIC schemes be reviewed to assess whether any additional offences are required to effectively protect the aviation and maritime sectors against serious and organised criminal networks. The Final Report of the National Ice Taskforce 2015 also recommended that the Government should continue to protect the aviation and maritime environments against organised crime by strengthening the eligibility criteria for holders of ASICs and MSICs.

Following its introduction into the House of Representatives on 23 October 2019, the Bill was referred to the Senate Legal and Constitutional Affairs Committee on 28 November 2019. The introduction of criminal intelligence assessments was a recommendation of the Senate Legal and Constitutional Affairs Legislation Committee Report on the Bill (25 March 2020). Pending that amendment, it was recommended that the Senate pass the Bill. The Government accepted this recommendation and the Bill has been amended to incorporate a criminal intelligence assessment in the background check process for the ASIC and MSIC schemes.

The Government is committed to reducing criminal influence at airports, seaports and offshore facilities and strengthening the ASIC and MSIC schemes to address serious crime. The passage of the legislation currently before the Senate will implement recommendations made by the PJCLE, the National Ice Taskforce and the Senate Legal and Constitutional Affairs Legislation Committee. The legislation would also meet the Government's commitment to strengthen background checking regimes, ensuring that individuals with links to serious and organised crime cannot gain access to airports, seaports and offshore facilities.

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2. ASIC and MSIC schemes

2.1. Background

The *Aviation Transport Security Act 2004* (ATSA) and the *Maritime Transport and Offshore Facilities Security Act 2003* (MTOFSA) establish the regulatory framework to safeguard against unlawful interference with aviation and maritime transport, and offshore facilities. The ASIC and MSIC schemes are established under the *Aviation Transport Security Regulations 2005* (Aviation Regulations) and *Maritime Transport and Offshore Facilities Security Regulations 2003* (Maritime Regulations), prescribed under the ATSA and MTOFSA respectively, and are administered by the Department.

2.2. ASICs and MSICs

ASICs and MSICs are nationally consistent identification cards that show the holder has met the minimum security requirements to remain unescorted or unmonitored within a secure area or security zone at airports, seaports and offshore facilities respectively. As at 24 February 2021, there were approximately 123,073 validly issued ASICs and 99,798 validly issued MSICs.

To be eligible for an ASIC or MSIC, a person must have an operational need to access secure areas and zones or work in a security sensitive position (for example screening officers, check-in staff, baggage handlers, stevedores, port and dock workers and truck drivers), and successfully pass a background check every two years. Seafarers, including those on Australian regulated ships, are not required to hold an MSIC as a matter of course. Any seafarer, whether Australian or foreign, is only required to hold an MSIC if they require unsupervised access to a maritime security zone. Some maritime employers may require all their employees to hold MSICs, however, this is not a Government requirement.

If a person does not hold a valid ASIC or MSIC they must be escorted or supervised by an ASIC holder (in secure areas of an airport) or escorted or continuously monitored by an MSIC holder (in security zones of a seaport, Australian flagged ship or offshore oil and gas facility).

2.3. Background checking

AusCheck undertakes a background check for each individual who applies for an ASIC or MSIC. AusCheck sits within the Department and its functions are authorised under the *AusCheck Act 2007* (AusCheck Act).

The primary purpose of the background check for an ASIC or MSIC applicant is to establish whether an applicant may pose a threat to aviation and maritime security, or offshore facilities.

A background check includes an identity check, a national security assessment by the Australian Security Intelligence Organisation (ASIO), a criminal history check by the ACIC to determine if an applicant has an unfavourable criminal history (such as an adverse criminal record) and, if required, an immigration check by the Department to assess the applicant's right to work. An applicant will have an adverse criminal record where they have been convicted and sentenced to imprisonment for an aviation-security-relevant or maritime-security-relevant offence (ASRO or MSRO) as defined by the Aviation Regulations and Maritime Regulations.

Under the ASIC and MSIC schemes, when an applicant has one or more ASROs or MSROs on their criminal record, there is a need to make an assessment to determine whether the applicant is eligible for a card. Currently, the schemes have separate eligibility criteria which rely on inconsistent types of offences. Further, the criteria can only prescribe offences that are relevant for preventing unlawful interference (that is, terrorist threats to aviation and maritime security) and cannot consider whether the individual poses a serious criminal risk.

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3. Transport Security Amendment (Serious Crime) Bill 2020

3.1. Purpose of the Bill

The Bill seeks to amend the ATSA and MTOFSA to reduce criminal influence at Australia's security controlled airports, security regulated seaports, and security regulated offshore facilities.

Schedule 1 to the Bill will:

- create an additional purpose in the ATSA and MTOFSA to prevent the use of aviation and maritime transport or offshore facilities in connection with serious crime;
- provide for the making of regulations for this additional purpose, which will provide for the strengthening of the eligibility criteria under the ASIC and MSIC schemes to target serious criminal offences;
- allow for regulations to be made for the additional purpose to prescribe penalties for offences against the regulations of up to 200 penalty units, consistent with penalty provisions across the ASIC and MSIC schemes;
- clarify and align the legislative basis for undertaking background checks of individuals under the ATSA and MTOFSA; and
- make technical amendments to improve the operation of the ATSA and MTOFSA.

Schedule 2 to the Bill will:

- amend the *Australian Crime Commission Act 2002* (the ACC Act) and the AusCheck Act to introduce criminal intelligence assessments as part of the background checking process for the ASIC and MSIC schemes;
- establish that the ACIC has the function to make and disseminate criminal intelligence assessments for use in decisions about an individual's suitability to hold an ASIC or MSIC;
- amend the ACC Act to provide for merits review of criminal intelligence assessments in the Security Division of the Administrative Appeals Tribunal (AAT). Minor amendments to the *Administrative Appeals Tribunal Act 1975* (the AAT Act) are also included to facilitate the functions of the AAT under the ACC Act; and
- exclude ACIC and AAT decisions concerning criminal intelligence assessments from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) consistent with other decisions made under the ACC Act and in the Security Division of the AAT. Impacted individuals can seek merits review of adverse criminal intelligence assessments in the Security Division of the AAT. Other forms of judicial review, apart from review under the ADJR Act, remain available.

3.2. Overview of the Bill

Schedule 1

The Bill amends the ATSA and MTOFSA to establish the statutory framework required to introduce the expanded eligibility criteria. The current eligibility criteria can only apply to offences related to unlawful interference with aviation and maritime security, and offshore facilities when assessing suitability to access security-sensitive areas. This has resulted in individuals with serious criminal histories, including convictions

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for involvement with a criminal organisation or gang, and illegal importation of goods, being cleared to work at airports, seaports and offshore facilities. The amendments made by the Bill will allow for new, expanded, eligibility criteria to be prescribed in the Aviation Regulations and Maritime Regulations for the ASIC and MSIC schemes.

The expanded eligibility criteria will introduce new offence categories such as anti-gang or criminal organisation legislation, illegal importation of goods, interfering with goods under customs control, and foreign incursion and recruitment, to address the existing vulnerabilities across both schemes. The expanded eligibility criteria will be harmonised between the ASIC and MSIC schemes to ensure a consistent approach to assessing risks in the aviation and maritime environment. Harmonising the criteria creates potential efficiencies for both individuals and government as only a single criminal history checking process would be required for either an ASIC or MSIC.

Schedule 2

The introduction of criminal intelligence assessments will play an important role in preventing the use of aviation and maritime transport or offshore facilities in connection with serious and organised crime by expanding the scrutiny that a person is afforded during the background check process. The ACIC will assess, by reference to intelligence and information available to the ACIC, whether there is a risk that a person may commit or may assist another person to commit, a 'serious and organised crime' as defined by subsection 4(1) of the ACC Act. It is known that serious and organised crime groups deliberately use individuals with no criminal history records and who can avoid existing background checking requirements, and criminal intelligence assessments are critical to addressing this known threat.

The ACIC gave evidence at the Senate Legal and Constitutional Affairs Committee hearing on 26 February 2020, on the risks around ASIC and MSIC holders and serious and organised crime, indicating that approximately 227 ASIC and MSIC holders are recorded on the ACIC's national criminal intelligence target lists. This figure includes 167 outlaw motorcycle gang members and associates and 60 individuals identified on the ACIC's National Criminal Target List.

Examples of the current threat, include a well-known criminal group exploiting corrupted ASIC/MSIC holders to import a range of illicit drugs, including cocaine and MDMA, and an airline ground services manager (a current ASIC holder, who is linked to a senior outlaw motorcycle gang member) likely using his managerial position to employ associates that facilitate illicit drug imports into Australia.

While these individuals pose a significant threat to the security of Australia's borders, under the current ASIC and MSIC criteria, they are deemed eligible to hold an ASIC or MSIC as they may not have convictions that fall within the current (or expanded) eligibility criteria. Without any other means to prevent these individuals from holding an ASIC or MSIC they are able to maintain unescorted access to secure areas and zones of airports, seaports and offshore facilities.

Schedule 2 will ensure that these individuals, with known links to serious and organised crime, will no longer be eligible for an ASIC or MSIC.

3.3. Key issues

The following section addresses key issues raised during the Bill's second reading in the Senate. In summary, the Department is satisfied that the Bill achieves its intended purpose to reduce criminal influence in Australia's transport sector. The Department will continue to engage partner agencies to regularly review the threat environment and the ASIC and MSIC schemes to ensure they remain fit for purpose.

3.3.1. Flags of convenience

The Government has security arrangements in place to monitor all vessels and personnel entering Australia and a clear protective security regime for ports and ships, underpinned by legislation. The security requirements apply to all vessels that enter Australian waters and ports irrespective of flag state.

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Under the MTOFSA, all regulated foreign ships, regardless of flag, must verify compliance with international security standards. Regulated foreign ships must also provide the Australian Border Force (ABF) with pre-arrival information including the ship's maritime security level and last 10 ports of call. The ship's master must allow a Departmental or ABF maritime security inspector to board and inspect the ship when requested. Australian ships are subject to similar security requirements when they operate in other jurisdictions. Pre-arrival information is used by the Department and the ABF to critically assess the risk posed by all vessels entering Australia.

Foreign-flagged ships must comply with a port's security requirements. Foreign seafarers must also comply with the security measures of Australian ports and port facilities, including the requirement to hold an MSIC if they require unsupervised access to a maritime security zone.

3.3.2. Maritime Crew Visas

The maritime crew visa (MCV) and the MSIC are two distinct regimes with two distinct purposes.

The MCV allows a non-citizen to enter and temporarily remain in Australia as a crew member to undertake work that meets the normal operational requirements of their ship. MCVs are multiple entry visas which are valid for three years. The MSIC is a national identity card that indicates the holder has undergone a background check and is cleared to work unescorted or unmonitored in a maritime security zone.

Due to the different purpose and function of the MCV and MSIC, the vetting processes are tailored appropriately for each scheme. Whereas the MSIC vetting process assesses Australian criminal history and carries out a security check, the MCV assesses applicants against a number of public interest criteria including the character test (incorporating criminality) as well as requiring an Australian and international security check.

While the MCV and MSIC schemes undertake similar assessments they are for two different purposes, one for the purpose of access to security zones as in the case of the MSIC and the other for the purpose of immigration entry and stay rights in the case of MCVs. Where a foreign seafarer requires unsupervised access to a maritime security zone they would require both an MCV and an MSIC.

3.3.3. Migration Amendment (New Maritime Crew Visas) Bill 2020

The Migration Amendment (New Maritime Crew Visas) Bill 2020 (the New MCVs Bill) seeks to link aspects of the MSIC background check process with MCVs and consequently replace the current MCV with two new categories of MCVs. Proposed amendments to the Serious Crime Bill would only commence on passage of the New MCVs Bill, thereby delaying the changes to the eligibility criteria for the ASIC and MSIC schemes until the New MCVs Bill is passed.

As part of managing the Australian border, the Department implements Australia's universal visa system, under which all non-citizens require a valid visa to come to Australia. The MCV is an important mechanism to manage the movement of foreign nationals into and out of Australia.

The vast majority of MCV holders do not require unescorted access in maritime security zones. Any seafarer, whether Australian or foreign, is only required to hold an MSIC if they require unsupervised access to a maritime security zone. Obliging visa holders to comply with elements of the MSIC scheme, where they do not require unsupervised access to a maritime security zone, would pose a significant financial burden on the administration of the MCV scheme for no discernible benefit.

3.3.4. Time to process applications and automatic renewals

During the 2020 calendar year, AusCheck processed 85 per cent of ASIC and MSIC applications received within 15 business days. This includes the time applications spent with external checking partners. AusCheck has an ongoing program that includes system enhancements and process optimisation. This has resulted in an over 10 per cent improvement for processing times between 2019 and 2020.

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The minority of applications that require additional time with external checking partners, have complex criminal history information, and applicants are afforded a period of at least 28 days by AusCheck to respond to potentially adverse criminal history information. AusCheck or the Department may also request further information from an applicant or cardholder so that their background check can be finalised or their card can be issued.

Should a complex criminal history be returned as part of the ACIC criminal history check, AusCheck may be required to contact local jurisdictional courts to seek additional information to ensure accuracy within the assessment process. These complexities may require additional processing time and are beyond AusCheck's control. Delays in the card renewal process may also be due to national security concerns, including active ASIO surveillance operations, or a requirement to seek additional information from local jurisdictions to ensure accuracy within the assessment process. Mandating specific timeframes for card renewals would be inappropriate given the risk and complexities of individual cases.

In cases where there is a delay, it would be a perverse outcome for the ASIC or MSIC to be automatically renewed. Further, any automatic renewal mechanism would create a loophole, which could be subject to exploitation by serious criminal entities, where an applicant does not respond to a request for further information within the 60 day period leading to the automatic renewal of the ASIC or MSIC.

An applicant that fails the criminal history background checking process has a right to apply to the AAT for a review of the decision, unless they have been convicted of a disqualifying offence related to terrorism or have received an adverse security assessment from ASIO. Alternatively, the applicant may apply to the discretionary card area for review. The merits review process in relation to an adverse or qualified security assessment from ASIO in the Security Division of the AAT is also available to an applicant or cardholder before their background check can be finalised.

3.3.5. Definition of serious crime

The amendment, introduced under sheet 1022, seeks to insert a specific definition of 'serious crime' into the ATSA and MTOFSA, which is limited to offences with a penalty of at least three years' imprisonment. This amendment will result in an inconsistent application of the reforms across different State and Territory jurisdictions given differences in penalties across the jurisdictions. For example, it would be inconsistent for drug possession and supply offences to only be considered in relation to an applicant who had offended in Western Australia where the penalty is greater than three years' imprisonment and not a person who had offended in the Northern Territory where the penalty is less than three years' imprisonment.

The new regulation-making provisions in the Bill only permit regulations to be made to target relevant serious criminal offences that have a connection with the aviation and maritime environments. Adopting a specific definition of 'serious crime', as proposed, could mean that offences that are not relevant to securing the aviation and maritime environments could be prescribed, which could adversely affect individuals currently employed in these sectors.

3.3.6. The threshold for an adverse criminal intelligence assessments

The ACIC is Australia's national criminal intelligence agency, with a specific mandate to address serious and organised crime. An adverse criminal intelligence assessment can only be issued where the ACIC has intelligence or information which suggests a person may commit, or may assist another person to commit, a serious and organised crime.

In conducting criminal intelligence assessments which could affect an individual's employment opportunities, the ACIC will use an appropriately high threshold based on subsection 4(1) of the ACC Act, including offences that:

- involves two or more offenders, substantial planning and organisation;
- involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques;

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- is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind;
- is specifically listed in paragraph (d) of the definition including money laundering, drugs and firearms offences; and
- is punishable by imprisonment for a period of three years or more.

This is a clear and specific definition that the ACIC consistently uses and applies throughout its work. The proposed model for criminal intelligence assessments has been adapted from the long-standing ASIO assessment model, which has proven effective in reducing the national security risks at Australia's border.

Simply being the subject of a rumour will not be sufficient to meet this high threshold for the ACIC to issue an adverse assessment. Nor will simply being a relative of, or unknowingly linked to, a person who is involved in serious and organised crime be sufficient. There must be intelligence that suggests the person in question may commit or may assist another to commit a serious and organised crime.

3.3.7. Review mechanisms

The ASIC and MSIC schemes currently contain an effective review and reconsideration mechanism under the ATSA and MTOFSA. ASIC and MSIC applicants can currently apply to the AAT to challenge their ineligibility and may apply to the Secretary of the Department for a 'discretionary card'.

The Bill additionally provides that individuals who receive adverse criminal intelligence assessments will be able to make applications for merits review to the Security Division of the AAT. Utilising the existing Security Division of the AAT will enable a thorough and independent review of decisions made by the ACIC to issue adverse criminal intelligence assessments, while also protecting the inherently sensitive intelligence used to make such decisions. Enabling the Security Division to review decisions will allow tribunal members to fully consider sensitive intelligence which might otherwise be subject to a public interest immunity claim.

If an applicant is not satisfied with the outcomes from the review of the decision by the AAT, they can also appeal the decision to the Federal Court and the High Court.

The ACIC is currently subject to extensive oversight to ensure compliance with laws and frameworks. This includes oversight by the Commonwealth Ombudsman, Australian Commission for Law Enforcement Integrity, Australian National Audit Office, the Australian Human Rights Commission, and Office of the Australian Information Commissioner. The ACIC is also subject to scrutiny through the Senate Estimates process and the PJCLE and the ACC Act is subject to an independent review every five years.

4. Conclusion

Securing our airports, seaports and offshore facilities from serious and organised crime is a vital and ongoing requirement to protect legitimate industries and the Australian community. This is not a static issue and will not disappear or diminish over time.

The amendments made by the Bill will establish the statutory framework required to introduce the expanded eligibility criteria and criminal intelligence assessments into the background check process for ASICs and MSICs. The Bill is consistent with several parliamentary inquiries and will address the existing vulnerabilities in the ASIC and MSIC schemes to improve outcomes for Australia's transport sector.