



Australian Government

Department of Infrastructure and Regional Development

SUBMISSION FROM

THE DEPARTMENT OF INFRASTRUCTURE AND REGIONAL DEVELOPMENT

TO THE

**SENATE RURAL AND REGIONAL AFFAIRS TRANSPORT LEGISLATION
COMMITTEE**

**TRANSPORT SECURITY AMENDMENT
(SERIOUS OR ORGANISED CRIME)
BILL 2016**

MARCH 2016

Background

- 1) The *Aviation Transport Security Act 2004* (the Aviation Act) and the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act) establish the framework to create the aviation and maritime security identification card (ASIC and MSIC) schemes through the Aviation Transport Security Regulations 2005 (the Aviation Regulations) and the Maritime Transport and Offshore Facilities Security Regulations 2003 (the Maritime Regulations).
- 2) The ASIC and MSIC schemes are an important part of securing the aviation, maritime and offshore oil and gas sectors.
- 3) The schemes require any person with an operational need for unescorted access to security-sensitive areas at airports, seaports, Australian flagged ships and offshore facilities to hold and display (respectively) an ASIC or MSIC that confirms they have passed a background check.
- 4) Either an individual has been background checked and holds a valid ASIC or MSIC or they must be escorted by an ASIC holder (in the security-sensitive areas of an airport) or escorted or continuously monitored by an MSIC holder (in the security-sensitive areas of a seaport, Australian flagged ship or offshore oil and gas facility).
- 5) Security-sensitive areas do not encompass entire airports or seaports. For example, the arrivals hall of an airport and the commodity storage area of a bulk loading terminal at a seaport are not defined as security-sensitive areas.
- 6) Security-sensitive areas are discrete zones established to protect critical or vulnerable aspects of our aviation and maritime infrastructure. These areas are subject to stringent security measures, including significant access restrictions. They include the secure areas at:
 - security controlled airports, such as the area immediately surrounding the regular public transport (RPT) aircraft apron; the runway and area around the runway; non-RPT aprons and hangars; aviation safety infrastructure; fuel storage areas; and areas encompassing air traffic control facilities and navigational aids; and
 - security regulated seaports¹, regulated Australian flagged ships and offshore oil and gas facilities. These areas include parts of the dock/wharf and the water approaches to the port; areas for screening passengers; waters surrounding the security regulated ship; the ship's engine room or bridge²; waters surrounding the offshore oil and gas facility; and the offshore oil and gas facility's control room and production manifold.
- 7) AusCheck, within the Attorney-General's Department, coordinates the ASIC and MSIC background checks. A background check comprises:
 - a security assessment by the Australian Security Intelligence Organisation (ASIO);
 - a criminal history check by CrimTrac; and
 - where required, an immigration check by the Department of Immigration and Border Protection – to confirm an applicant's right to work in Australia.

¹ Maritime security zones at seaports, unlike aviation security zones, are not always established on a full-time basis. For example, the Port of Melbourne has permanent security zones established given the nature and number of vessels that the port services. MSICs are required at all times in the security zone. Conversely, the Port of Useless Loop in Western Australia has defined security zones that are switched on a set period prior to a vessel berthing and switched off after a vessel departs. MSICs are only required in the security zone when the security zone is active.

² The Secretary of the Department of Infrastructure and Regional Development (the Department) may establish, by notice, security zones at specific or all maritime security (marsec) levels. This includes zones on board ships. As such, some security regulated Australian flagged ships may not have on-board security zones in force at marsec 1 – the current maritime security level.

- 8) The primary purpose of the background check is to establish whether an applicant may pose a security threat to aviation and maritime infrastructure and does not currently extend to consider whether the individual poses a serious criminal risk within the security-sensitive areas of our transport infrastructure.
- 9) A number of inquiries and reports³ over recent years have identified vulnerabilities in the ASIC and MSIC schemes. These have focused on the limited purpose of the schemes, in particular their inability to address serious criminality at airports and seaports.
- 10) Notably, the 2011 Parliamentary Joint Committee on Law Enforcement, *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime*, highlighted that because the ASIC and MSIC schemes were never originally designed to harden the transport environment against serious or organised crime, organised crime groups have exploited gaps, weaknesses and inconsistencies in the application of the regimes.
- 11) In addition, the final report of the National Ice Taskforce recommended that the Commonwealth Government should continue to protect the aviation and maritime environments organised crime by strengthening the eligibility criteria for holders of ASICs and MSICs.

The Transport Security Amendment (Serious or Organised Crime) Bill 2016

- 12) The Transport Security Amendment (Serious or Organised Crime) Bill 2016 (the Bill) will amend the purpose of the Aviation and Maritime Acts to enable the ASIC and MSIC schemes to target serious or organised crime in addition to their current purpose of safeguarding against unlawful interference.
- 13) The Bill will also allow amendment of the Aviation and Maritime Regulations to introduce new—and for the first time—harmonised eligibility criteria for the ASIC and MSIC schemes. The new proposed criteria are at **Attachment A**. The current ASIC and MSIC criteria are at **Attachment B** and **Attachment C** respectively.
- 14) To ensure legislative consistency and transparency, the Bill will also:
 - clarify and align the legislative basis for undertaking security checking of ASIC and MSIC applicants and holders;
 - allow for regulations to be made prescribing penalties for offences against the new serious or organised crime requirements that are consistent with existing penalty provisions across the ASIC and MSIC schemes; and
 - insert an additional severability provision to provide guidance to a court as to Parliament's intention. This clarifies the Commonwealth's legislative power in relation to serious or organised crime.
- 15) New eligibility criteria for the ASIC and MSIC schemes will be set out in the Aviation and Maritime Regulations respectively to give effect to the proposed change in purpose for the schemes. Consequential amendments will also be made to the AusCheck Regulations 2007 – which provide for the background checks to be conducted by the Attorney-General's Department.

³ Australian National Audit Office Report, 2011, *the Management of the Aviation Security Identification Card and Maritime Security Identification Card Scheme*;
Parliamentary Joint Committee on Law Enforcement, 2011, *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime*; and
Commonwealth of Australia, Department of the Prime Minister and Cabinet, 2015, *Final Report of the National Ice Taskforce*.

- 16) Currently, the existing eligibility criteria do not recognise a number of offences arising from serious criminal activity. The new proposed criteria will capture offences arising from:
- anti-criminal organisation legislation;
 - the illegal sale and possession of firearms and other weapons;
 - foreign incursion and recruitment offences;
 - the illegal importation of goods; and
 - interfering with goods under control of the Australian Border Force.
- 17) The proposed eligibility criteria will also introduce a tiered approach to offence categories. Under current eligibility criteria, an ASIC or MSIC applicant's status is based *solely* on the presence of a relevant offence in the applicant's criminal history. Under the new proposed criteria, less serious criminal offences will only become an aviation or maritime-security-relevant offence when a significant term of imprisonment has been imposed, while more serious offences will only require conviction. This tiered approach places emphasis on the judgement of a court in determining the seriousness of the offence and hence its significance to the ASIC or MSIC scheme.
- 18) The tiers of the new eligibility criteria comprise:
- **Tier 1** contains disqualifying offences. Persons convicted of Tier 1 offences will be disqualified from being issued an ASIC or MSIC and will not have access to a discretionary assessment.⁴ These persons will continue to have access to appeal the decision by application to the Australian Government's Administrative Appeals Tribunal (AAT).
 - **Tiers 2-5** contain offences that would result in an adverse criminal record and the person being unable to be issued an ASIC or MSIC following the initial application. These persons will be eligible to apply for an ASIC or MSIC discretionary assessment.
- 19) Each year, approximately 500 applicants are found initially ineligible for an ASIC or MSIC. Analysis conducted by the Attorney-General's Department indicates that under the new proposed criteria, approximately 320 of these applicants would be found eligible for an ASIC or MSIC on initial application. Conversely, the analysis showed that due to the serious nature of their offences, approximately 30 existing cardholders would be found ineligible to be issued with an ASIC or MSIC.
- 20) The shift in focus from low level or minor offences to higher risk offences related to serious or organised crime means that more applicants are expected to be found initially eligible for an ASIC or MSIC. This will mean these people may be issued their ASIC or MSIC quicker, reducing the impact to their employment and increasing the staff available to employers.
- 21) The proposed eligibility criteria is expected to provide positive employment outcomes overall across the ASIC and MSIC schemes.
- 22) Indicative scenarios comparing the current and proposed criteria are at **Attachment D**.

⁴ The Aviation and Maritime Regulations enable the Secretary of the Department to undertake a discretionary assessment to approve the issue of an ASIC or MSIC, to applicants who have an adverse criminal history outcome. The discretionary assessment includes a comprehensive review of the applicant's individual circumstances.

- 23) All existing appeals processes remain available for applicants. Applicants denied an ASIC or MSIC will continue to have the option to seek a discretionary assessment, or appeal the decision to the AAT.

Penalties

- 24) The inclusion of the ability to prescribe penalties for offences against the new serious or organised crime requirements will ensure uniform implementation and enforcement of offences. These follow the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) and take into account the body corporate multiplier rule identified in the Guide. This rule provides that penalties can be set five times higher for body corporates than for natural persons, which also applies to offences in subordinate legislation.
- 25) The maximum penalty imposed in the Bill for natural persons (identified as “any other persons” in the Bill) is 50 penalty units, which is consistent with the requirements under the Guide. However, in accordance with the Guide, higher maximum penalties are prescribed for industry roles undertaken by corporate entities. ‘Aviation industry participants’ and ‘maritime industry participants’ are corporate entities such as port operators or airlines.
- 26) By prescribing maximum penalties, the Bill provides for discretion to be applied in making regulations imposing any such penalties. The provisions of the Bill itself do not establish any offences or impose any penalties.

Attachments

Attachment A - New proposed ASIC and MSIC eligibility criteria

Attachment B - Current ASIC criteria

Attachment C - Current MSIC criteria

Attachment D - Comparative scenarios

ATTACHMENT A

New proposed ASIC and MSIC eligibility criteria

- 1. Tier 1: Disqualifying Offences**
 - 1.1. Terrorism
 - 1.2. Treason, treachery, sedition, espionage or selling national secrets
 - 1.3. Foreign incursion and recruitment offences
 - 1.4. An offence relating to weapons of mass destruction
 - 1.5. Hijacking or destruction of a government or commercial aircraft, vessel or offshore facility
 - 1.6. Endangering a government or commercial aircraft, airport, vessel, port or offshore facility
 - 1.7. Maritime piracy
 - 1.8. An offence under anti-criminal gang legislation
 - 1.9. People smuggling or people trafficking
- 2. Tier 2: Adverse with any form of conviction**
 - 2.1. Threatening or assaulting persons in or on an aircraft, airport, vessel or port
 - 2.2. Theft of a government or commercial aircraft or vessel
 - 2.3. An offence relating to questioning by a person or body investigating serious or organised crime or corruption
 - 2.4. Any conviction for an offence under the *Aviation Transport Security Act 2004* or the *Maritime Transport and Offshore Facilities Security Act 2003* that is punishable by imprisonment
- 3. Tier 3: Adverse with any form of imprisonment**
 - 3.1. Murder and manslaughter
 - 3.2. Unlawful activity relating to firearms and ammunition, weapons or items used as weapons
 - 3.3. Unlawful activity relating to explosives (other than small arms ammunition, or activity relating to fireworks⁵)
 - 3.4. Possess, import, export, supply, manufacture or cultivate an illegal drug or controlled substance
 - 3.5. Illegal importation or exportation of goods, fauna or flora
 - 3.6. Bribery or corruption
 - 3.7. Perjury, impeding a court proceeding or criminal investigation including escaping legal custody and harbouring a criminal
 - 3.8. Unlawful activity relating to a false identity or identity documents including but not limited to vehicle and other licences, birth and proof of age documentation, passports and visas
 - 3.9. Move, alter or otherwise interfere with goods under Australian Border Force control
 - 3.10. Unauthorised use, access, modification, impairment, possession, interception, transmission, duplication or supply of data or electronic communications.
- 4. Tier 4: Adverse with 12 months or more imprisonment**
 - 4.1. Hostage-taking, deprivation of liberty or false imprisonment
 - 4.2. Racial hatred or racial vilification
 - 4.3. Assaulting or resisting a law enforcement or other public officer
 - 4.4. Impersonation of a law enforcement or other public officer
 - 4.5. Extortion, blackmail or making demands accompanied with a threat
 - 4.6. Dealing with money or other property that is a proceed of crime
 - 4.7. Currency violations and money laundering
 - 4.8. Arson
- 5. Tier 5: Adverse with 30 months or more imprisonment**
 - 5.1. Theft
 - 5.2. Forgery and fraud
 - 5.3. Offences involving the sexual abuse or exploitation of a minor including but not limited to: child prostitution, indecent treatment and indecent dealing with children, child pornography and internet grooming offences
 - 5.4. Assaultive offences including assaults of an indecent or sexual nature and acts of intimidation or endangerment of others
 - 5.5. Affray or riot
 - 5.6. Tax evasion

⁵ This item includes any act or intention to convert explosive material from ammunition or fireworks into an improvised explosive device.

ATTACHMENT B

Current ASIC eligibility criteria

Regulation 6.01 – Aviation Transport Security Regulations 2005

Item	Kind of offence
1.	An offence involving dishonesty e.g. fraud, identity fraud, theft, bribery or corruption.
2.	An offence involving violence or a threat of violence e.g. aggravated assault, threat to murder.
3.	An offence involving intentional damage to property or a threat of damage to property e.g. arson, threat to cause fire.
4.	An offence constituted by the production, possession, supply, import or export of a substance that is: (a) a narcotic substance within the meaning of the Customs Act 1901; or (b) a drug, within the meaning of: (i) Regulation 10 of the Customs (Prohibited Exports) Regulations 1958; or (ii) Regulation 5 of the Customs (Prohibited Imports) Regulations 1956.
5.	An offence, of a kind dealt with in Part II of the Crimes Act 1914, against the Government of: (a) the Commonwealth or a State or Territory; or (b) a country or part of a country other than Australia (includes treachery, sabotage, destroying Commonwealth property).
6.	An offence against Part 2 of the Crimes (Aviation) Act 1991 (which includes hijack and destruction of aircraft).
7.	An offence against Part 5.3 of the Criminal Code (which deals with terrorism related offences).
8.	An offence constituted by the production, possession, supply, import or export of explosives or explosive devices.

ATTACHMENT C

Current MSIC eligibility criteria

Schedule 1 of the Maritime Transport and Offshore Facilities Security Regulations 2003

	Item	Kind of offence
Part 1. Disqualifying offences: A person convicted of an offence mentioned in Part 1 is disqualified from holding a MSIC and cannot apply for a discretionary card. The person may seek reconsideration through the AAT.	1.1	terrorism
	1.2	treason, sedition, espionage or selling national secret
	1.3	weapon of mass destruction
	1.4	hijacking or destruction of an aircraft, vessel or offshore facility
Part 2. A person is initially ineligible for a MSIC where they have been convicted of an offence mentioned in Part 2, and sentenced to imprisonment for that offence. However a person with an offence in this category may apply for a discretionary card.	2.1	armed attack relating to aircraft, airport, vessel, port or offshore facility
	2.2	unlawful interference with maritime transport, offshore facility or aviation
	2.3	threat to endanger aircraft, airport, vessel or port
	2.4	theft of aircraft or vessel
	2.5	piracy
	2.6	assassination, murder, attempted murder or manslaughter
	2.7	threat to murder
	2.8	Aggravated assault including the following, whether or not the assault results in injury: grievous bodily harm actual bodily harm torture wounding aggravated sexual assault assault with use of weapon assault in company
	2.9	kidnap
	2.10	hostage-taking, deprivation of liberty or false imprisonment
	2.11	people smuggling or people trafficking
	2.12	racial hatred or racial vilification
	2.13	affray or riot
	2.14	arson or sabotage
	2.15	threat to cause fire or explosion
	2.16	unlawful activity relating to weapons, firearms or explosives (not including weapons of mass destruction)
	2.17	armed robbery
	2.18	destruction of or damage to property belonging to the Commonwealth
	2.19	threat to destroy or damage property belonging to the Commonwealth
	2.20	hinder or resist government officer concerned with national security
	2.21	bribery or corruption
	2.22	extortion, blackmail or racketeering
	2.23	money laundering
	2.24	false testimony, perjury or subverting the course of justice
	2.25	forgery or fraud, including identity fraud
	2.26	supply false documentation to get a weapons, explosives or vehicle licence
	2.27	unlawful activity relating to passports or visas
	2.28	impersonate, misrepresent or falsely advertise a profession or professional status
	2.29	deceptive business practice
	2.30	import, export, supply, manufacture or cultivate illegal drug or controlled substance
	2.31	permit premises to be used for taking, selling or distributing illegal drugs or controlled substances
	2.32	conspiracy to commit an offence related to a matter mentioned in items 1.1 to 1.4 and 2.1 to 2.31.

ATTACHMENT D

ASIC / MSIC comparative criteria scenarios

Scenario 1

An applicant for an MSIC has a conviction for unlawfully importing tobacco and sentenced to three years imprisonment.

Current criteria

- The applicant is found eligible (**offence not captured under Maritime Security Relevant Offences (MSRO)**)

New criteria

- The applicant is found ineligible.
- Ineligible applicants will continue to have the option to seek a discretionary assessment, or appeal a decision.

Rationale

- This offence indicates the person was willing to circumvent Australia's border integrity and may pose a serious or organised crime risk.

The proposed new eligibility criteria lists a new offence criteria relating to illegal importation or exportation of goods, fauna or flora (**refer Tier 3.5**).

Scenario 2

An applicant for an ASIC has a conviction for assaulting a police officer and was sentenced to 30 days imprisonment.

Current criteria

- The applicant is found ineligible (**Reg 6.01 - Aviation Security Relevant Offences (ASRO) – item 2**)

New criteria

- The applicant is found eligible and issued an ASIC.

Rationale

- The offending conduct alone and resulting penalty does not indicate that the applicant poses a high risk to aviation security.

If the term of imprisonment of greater than 12 months (**Tier 4.3**), then the applicant would have been ineligible under the new proposed criteria.

Scenario 3

An MSIC applicant was sentenced to 9 months imprisonment for the misappropriation of funds from a former employer.

Current criteria

- The applicant is found ineligible (**schedule 1 – MSRO – item 2.25**)

New criteria

- The applicant is found eligible and issued an MSIC.

Rationale

- The offending conduct alone and resulting sentence does not indicate that the applicant poses a high risk to maritime security.

If the term of imprisonment had been of 30 months duration or more (**Tier 5.2**), the applicant would be ineligible.

Scenario 4

An ASIC applicant has multiple convictions: offence 1 - 'knowingly participating in a criminal group to assist crime' and sentenced to 18 months imprisonment; and offence 2 - 'deal with property suspected to be proceeds of crime' and sentenced to 8 months imprisonment.

Current criteria

- Applicant is found ineligible due to offence 2 – (**Regulation 6.01 - ASRO – item 1: an offence involving dishonesty**).

New criteria

- Applicant is disqualified due to offence 1 – (**Tier 1 – Disqualifying Offences - item 8: offence relating to involvement with a criminal organisation or gang**).

Rationale

- A criminal history of involvement with the operations or membership of criminal gangs, or having associations with criminal gangs, represents a high level of risk.