Transport Security Amendment (Serious Crime) Bill 2019

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Law and Bills Digest Section

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Date introduced: 23 October 2019
House: House of Representatives
Portfolio: Home Affairs
Commencement: The day after the Act receives Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at December 2019.
History of the Bill

There have been two earlier iterations of this Bill. The first 2016 Bill, the Transport Security Amendment (Serious or Organised Crime) Bill 2016, was introduced into the 44th Parliament on 11 February 2016.¹ That Bill passed in the House of Representatives on 16 March 2016 and then lapsed on prorogation of Parliament.

The second 2016 Bill, the Transport Security Amendment (Serious or Organised Crime) Bill 2016, was introduced into the 45th Parliament on 31 August 2016 and was, on introduction, identical to the first 2016 Bill; however, its commencement provision, second reading speech and the Explanatory Memorandum were different.² That Bill passed in the House of Representatives on 13 February 2017 and passed with amendments in the Senate on 27 March 2017. Those amendments were disagreed in the House of Representatives and substituted Government amendments were passed on 30 March 2017. The Government amendments replaced all references to ‘serious or organised crime’ with ‘serious crime’, the intention being that ‘serious crime’ will still encompass ‘organised crime’ that is of a serious nature. The Supplementary Explanatory Memorandum stated that the amendments were a response to concerns raised during debate in both Houses that ‘serious or organised crime’, referenced by the Bill as introduced, may allow the Government to prevent persons with convictions for non-serious crimes from gaining an aviation or maritime security identification card (Aviation Security Identification Card (ASIC) or Maritime Security Identification Card (MSIC)).³ The second 2016 Bill lapsed on 1 July 2019 on prorogation of Parliament.

The current Bill, the Transport Security Amendment (Serious Crime) Bill 2019, is substantially the same as the second 2016 Bill and incorporates the Government amendments to that Bill that replaced ‘serious or organised crime’ with ‘serious crime’. Note also that while the two 2016 Bills were introduced by the Minister for Infrastructure and Regional Development, the current Bill was introduced by the Minister for Home Affairs. This reflects the administrative changes that occurred in 2017, whereby responsibility for transport security moved to the new Department of Home Affairs.⁴

This Bills Digest replicates much of the relevant material from the Bills Digest for the second 2016 Bill.⁵

Purpose and structure of the Bill

The purpose of the Transport Security Amendment (Serious Crime) Bill 2019 (the Bill) is to amend the Aviation Transport Security Act 2004 (ATS Act) and the Maritime Transport and Offshore Facilities Security Act 2003 (MTOFS Act) to:

- create an additional purpose in the ATS Act and the MTOFS Act, in relation to access to aviation and maritime areas and zones, to prevent the use of aviation and maritime transport or offshore facilities in connection with serious crime

³ Supplementary Explanatory Memorandum, Transport Security Amendment (Serious or Organised Crime) Bill 2016, p. 2.
⁴ See Department of Prime Minister and Cabinet, Home Affairs Portfolio established, media release, 20 December 2017.
⁵ M Biddington, Transport Security Amendment (Serious or Organised Crime) Bill 2016, Bills digest, 28, 2016–17, Parliamentary Library, Canberra, 19 October 2016.
• strengthen the regulatory framework, with harmonised eligibility criteria for the ASIC and MSIC Schemes

• clarify the legislative basis for undertaking security checking (including background checking) of ASIC and MSIC applicants and holders

• allow for Regulations to prescribe penalties for offences against new serious crime requirements that are consistent with existing penalty provisions across both schemes

• insert an additional severability provision to provide guidance to a court as to Parliament’s intention and

• make other technical amendments.

The Bill contains one Schedule, making amendments to the ATS Act and the MTOFS Act. Note, though, that the amendments substantially prescribe that the details be set by Regulation and these Regulations will be made at a later time. Regulations will be made by amending the Aviation Transport Security Regulations 2005 and the Maritime Offshore Facilities Security Regulations 2005. This use of Regulations was subject to some criticism in relation to the two 2016 Bills, however, as has also been noted, this practice is consistent with other operational matters relating to the issue of an ASIC or a MSIC.6

Background

The ASIC and MSIC schemes

A security card, known as an Aviation Security Identification Card (ASIC) or a Maritime Security Identification Card (MSIC), is required by individuals in Australia if they require regular access to secure areas of Australia’s airports, seaports, Australian flagged ships, and offshore oil and gas facilities.7

An ASIC is required to obtain unescorted access to the secure areas of security controlled airports that have regular public transport (RPT) services. An ASIC is valid for up to two years.8 Eligible workers include persons involved in the operation of an airport or aircraft, couriers or suppliers, baggage handlers, passenger screening officers, and security guards.9

A MSIC is required if a person needs to work unescorted or unmonitored in a maritime security zone. The MSIC scheme covers waterfront workers, seafarers on Australian regulated ships, customs brokers and shipping agents, contractors, service providers and maintenance workers, truck drivers, train operators and anyone who works onboard an offshore oil or gas facility. An MSIC is valid for up to four years.10

6. Ibid., p. 2.
7. This paragraph and subsequent paragraphs are taken from the Bills Digest for the second 2016 Bill, Biddington, op. cit., p. 2. That Bills Digest quoted pages from the Department of Infrastructure and Regional Development (DIRD) website: ‘Aviation security identification’ and ‘Applying for a Maritime Security Identification Card (MSIC)’. These pages are no longer accessible, however the Department of Home Affairs website now provides similar information at: Identity security and Identity security: ASIC and MSIC identification cards.
Cards are issued by a relevant issuing authority who, in the case of employees of Commonwealth and state and territory agencies is the ASIC MSIC Issuing Unit within the Department of Home Affairs. For a card to be issued, the person also needs to demonstrate an operational need for an ASIC or MSIC.  

Under the *AusCheck Act 2007*, AusCheck is responsible for coordinating a background check on the person applying for the card. A background check will then include a security assessment by the Australian Security Intelligence Organisation, a criminal history check by the Australian Criminal Intelligence Commission and an immigration check (if needed) by the Department of Home Affairs.

Presently, by way of example, applicants are required to fulfil the eligibility criteria set out in Division 6 of the Aviation Transport Security Regulations, which prescribe that they have not been convicted of any of the following:

<table>
<thead>
<tr>
<th>Item</th>
<th>Kind of offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>An offence involving dishonesty</td>
</tr>
<tr>
<td>2</td>
<td>An offence involving violence or a threat of violence</td>
</tr>
<tr>
<td>3</td>
<td>An offence involving intentional damage to property or a threat of damage to property</td>
</tr>
</tbody>
</table>
| 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 |
| 6    | An offence against Part 2 of the *Crimes (Aviation) Act 1991* |
| 7    | An offence against Part 5.3 of the *Criminal Code* |
| 8    | An offence constituted by the production, possession, supply, import or export of explosives or explosive devices |


The Government proposes in this Bill to allow Regulations made under the *ATS Act* and the *MTOFS Act* to also prescribe additional criteria intended to prevent the use of aviation or maritime...
ports in connection with serious crime. Proposed section 38AB of the ATS Act (at item 4 of Schedule 1 to the Bill) prescribes that Regulations may, for the purposes of preventing the use of aviation in connection with serious crime, prescribe requirements in relation to specified areas and zones. Item 17 of Schedule 1 inserts proposed section 113F into the MTOFS Act to allow equivalent Regulations to be made in relation to maritime transport or offshore facilities. The Explanatory Memorandum states that the new eligibility criteria will introduce new offence categories such as offences arising from anti-gang or criminal organisation legislation; illegal importation of goods; interfering with goods under Australian Border Force control; and foreign incursion and recruitment.  

Organised crime is a serious threat to Australia’s security and prosperity, with estimated costs to the Australian economy of more than $47 billion per annum. In his second reading speech to the Bill, the Minister for Home Affairs, Peter Dutton, stated:

Airports and seaports are transit points for organised criminals to import weapons, illicit drugs and other harmful goods into Australia. Trafficking of these illicit goods puts Australia’s security and prosperity, and the welfare of our communities, at great risk.

...  
The ASIC and MSIC schemes are essential in ensuring security within Australia’s transport network. Persons who hold an ASIC or MSIC card are able to access the most secure areas of Australia’s airports and seaports...

ASIC and MSIC card holders can abuse their privileged position for criminal purposes, and card holders are able to assist crime syndicates by facilitating the transit of illicit goods through our transport networks and border controls...

The bill will address such criminality at our airports and seaports by broadening the Aviation Transport Security Act 2004 and the Maritime Transport and Offshore Facilities Security Act 2003 beyond their present focus on security to include provisions aimed at addressing crime.

The bill establishes a regulatory framework for introducing new eligibility criteria to address the existing vulnerability across both schemes and to ensure that persons convicted of serious offences will be ineligible to hold an ASIC or MSIC card. In addition, the bill will strengthen the regulatory framework by harmonising the eligibility criteria under each scheme. These changes will reduce the ability of criminals to exploit Australia’s aviation and maritime networks for illicit gain.

The reforms in this Bill will not change the framework under which the eligibility criteria is considered or the process by which AusCheck conducts a background check. The same application, reporting, and appeal mechanisms will apply.

The first 2016 Bill was referred to the Senate Rural and Regional Affairs and Transport Legislation Committee (the Committee) on 25 February 2016. The Committee reported earlier than originally scheduled, tabling the report out of session on 22 April 2016. The Senate noted its receipt on 2 May 2016. The Committee’s report is discussed below.

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17. Ibid.
**Election commitment**

The first 2016 Bill gave effect to the Government’s 2013 election commitment to ‘reduce potential risks associated with criminal influences at our air and sea ports.’\(^{18}\) In June 2016, the Government included the measures in the second 2016 Bill in its policy to ‘keep illegal guns off our streets and our communities safe’, committing to:

... strengthen background checking regimes to ensure that individuals with links to serious and organised crime cannot gain access [to] our airports, ports, and other Commonwealth sites where security is a concern.\(^{19}\)

**Previous Parliamentary and independent reviews**

There have been a number of reports focused on the security of the aviation and maritime industries. Of particular note are three Joint Committee of Public Accounts and Audit Reports on aviation security in Australia and the 2005 *Wheeler Airport Security and Policing Review*, which led to the establishment of AusCheck.\(^{20}\)

The Australian National Audit Office Report, *The Management of the Aviation Security Identification Card and Maritime Security Identification Card Scheme* was completed in 2011.\(^{21}\) The object of this audit was to assess the effectiveness of the Department of Infrastructure and Transport and the Attorney-General’s Department’s management of the ASIC and MSIC schemes.\(^{22}\) The audit results focused on governance, reporting and process issues and did not identify the eligibility criteria for ASIC and MSIC as an area for review at the time.

The Parliamentary Joint Committee on Law Enforcement’s (PJCLE) *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime* was a lengthy inquiry beginning in 2009.\(^{23}\) In its report tabled two years later, the Committee recommended that the Attorney-General’s Department, in consultation with the Australian Crime Commission (now the Australian Criminal Intelligence Commission), review the list of relevant security offences under the ASIC and MSIC scheme to assess whether any further offences are required in order to effectively extend those schemes to protect the aviation and maritime sectors against the threat of infiltration by serious and organised criminal networks.\(^{24}\) The Government agreed with this recommendation. The PJCLE also recommended that the scope of both Acts be widened to include

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24. Ibid., p. 93.
combating serious and organised crime in addition to terrorist activity and unlawful interference. The Government noted, and this Bill implements, that recommendation.  

**National Ice Taskforce**

The National Ice Taskforce was established on 8 April 2015 to advise the Government on the impacts of the drug ‘ice’ (crystal methamphetamine) in Australia and drive the development of a National Ice Action Strategy. One of the Taskforce’s priorities was to consider ways to disrupt supply of ice, in a more coordinated and targeted method. The National Ice Taskforce recommended in December 2015 that there be stronger law enforcement measures to tackle the trafficking of ice, including toughening background checks made on people seeking ASICs and MSICs. Recommendation 24 states:

The Commonwealth Government should continue to protect the aviation and maritime environments against organised crime by strengthening the eligibility criteria for holders of Aviation Security Identification Cards and Maritime Security Identification Cards; and establishing a legal mechanism to enable compelling criminal intelligence to be used in determining suitability of workers to hold such a card.

**Committee consideration**

**Senate Legal and Constitutional Affairs Legislation Committee**

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 21 February 2020. Details of the inquiry are at the [inquiry homepage](#).

**Senate Rural and Regional Affairs and Transport Legislation Committee**

The first 2016 Bill was referred to the Senate Rural and Regional Affairs and Transport Legislation Committee on 25 February 2016. The Committee reported on 22 April 2016. Note that in this section ‘the Bill’ refers to the first 2016 Bill.

The Senate Committee examined the provisions of the first 2016 Bill and identified the following issues of concern that had been raised by stakeholders:

- consultation on the development of the Bill
- the Bill could make Australian transport infrastructure less secure
- the Bill could adversely impact employment in the aviation and maritime sectors
- penalties for offences outlined by the Bill exceed the recommended penalties in the *Guide to Framing Commonwealth Offences* and
- the Bill treats crews on Flag of Convenience shipping and Australian crews differently, thereby disadvantaging local workers.

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27. Department of Prime Minister and Cabinet (PM&C), *The National Ice Taskforce*, PM&C website, n.d.
29. Ibid., p. 140.
31. Ibid., p. 5.
The majority report recommended that the first 2016 Bill be passed. There was no recommendation for amendment or further consideration. However, the Australian Greens provided a Dissenting Report, not supporting the Bill in that form and Senators from the Australian Labor Party (ALP) provided additional comments, noting that they were considering amendments to the Bill.

On 4 December 2014, the same Committee was referred matters relating to airport and aviation security for inquiry. That inquiry lapsed with the dissolution of the Parliament on 9 May 2016. On 15 September 2016 the Senate re-referred the inquiry to the Committee, with a reporting date of 1 December 2016. Details of the inquiry can be found at the Committee’s website. The Committee’s report included consideration of the second 2016 Bill; the numerous reviews and reforms undertaken of the ASIC scheme; the potential shortcomings of the card; and how these shortcomings may impact on airport security. The report concluded that the amendments in the second 2016 Bill ‘reflect the position reached by a number of previous reviews into the ASIC scheme’ and that a number of administrative concerns with the ASIC scheme were not within the scope of the transport security bill.

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills expressed some concerns in relation to the Bill. Specifically, the Committee expressed concern that significant matters in relation to eligibility criteria for access to aviation and maritime transport zones are provided for in delegated legislation, and noted that some guidance on this criteria could have been included in the Bill:

> The committee has consistently raised concerns about framework bills, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. As the detail of the delegated legislation is generally not publicly available when Parliament is considering the bill, this considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee’s view is that significant matters, such as the requirements relating to access to relevant aviation and maritime transport zones, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this case the explanatory materials do not provide an explanation as to why the relevant matters cannot be included in primary legislation. The committee notes that delegated legislation, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

> It is unclear to the committee why at least high level guidance about the eligibility criteria for access to relevant zones cannot be included on the face of the bill. For example, the committee notes that the explanatory memorandum lists the offence categories that will make up the new eligibility criteria, including offences relating to anti-gang or criminal organisation legislation and the illegal importation of

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32. Ibid., p. 13.
33. Ibid., pp. 15–18.
34. N Xenophon, ‘Committees: Rural and Regional Affairs and Transport References Committee’, Senate, Debates, 4 December 2014, p. 10205.
35. Senate Rural and Regional Affairs and Transport References Committee, ‘Airport and aviation security’, Inquiry homepage.
goods. It is unclear to the committee why these criteria cannot be provided for on the face of the primary legislation. (Emphasis added)\textsuperscript{39}

The Committee also expressed concerns in relation to penalties being provided for in delegated legislation, noting that its ‘longstanding view is that serious offences and penalties should be contained in the primary legislation to allow for appropriate levels of Parliamentary scrutiny.’\textsuperscript{40}

The Committee has requested the Minister’s advice as to the following:

- why it is considered necessary and appropriate to leave the new eligibility criteria for access to relevant aviation and maritime transport zones to delegated legislation, and the appropriateness of amending the bill to provide at least high level guidance in this regard; and

- the appropriateness of amending the bill to either include all relevant penalties and offences in the primary legislation or for the maximum penalties to be reduced to be consistent with the Guide to Framing Commonwealth Offences.\textsuperscript{41}

Policy position of non-government parties

At the time of writing, the views of the ALP on the Bill are not known. In the Senate Committee report on the first 2016 Bill, ALP Senators Glenn Sterle and Alex Gallacher made additional comments that were broadly supportive of targeted measures that address serious and organised crime. However, the Senators were concerned that adding an additional, secondary purpose to the Acts (preventing the use of aviation and maritime transport in connection with serious or organised crime) would ‘confuse the two missions of transport security and targeting serious or organised crime in the transport system’.\textsuperscript{42} The Senators concluded that ‘clarity of purpose is a really important issue from a mission perspective, and the main report does not address this issue adequately.’\textsuperscript{43} The Senators indicated that the ALP was considering amendments to this Bill.\textsuperscript{44} ALP Senators did introduce amendments to the second 2016 Bill. These were passed in the Senate but subsequently disagreed in the House of Representatives.\textsuperscript{45}

In a Dissenting Report on the first 2016 Bill, the Australian Greens stated that the eligibility criteria changes ‘make very little sense’, noting that it is excessively punitive that someone convicted of drug possession will no longer have access to the identification pass required for most roles within the maritime sector.\textsuperscript{46}

\textsuperscript{40} Ibid., p. 30.
\textsuperscript{41} Ibid., p. 31.
\textsuperscript{42} Australian Labor Party (ALP), \textit{Additional comments}, Senate Standing Committee on Rural and Regional Affairs and Transport Legislation, \textit{Inquiry into Transport Security Amendment (Serious or Organised Crime) Bill 2016 [Provisions]}, The Senate, Canberra, April 2016, p. 15.
\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid.
\textsuperscript{45} Parliament of Australia, ‘\textit{Transport Security Amendment (Serious or Organised Crime) Bill 2016 homepage’}, Australian Parliament website.
In broad terms however, the majority of the Senate Committee considered that the first 2016 Bill would have a positive security outcome, addressing the threat which serious and organised crime poses to Australian transport infrastructure.\textsuperscript{47}

**Position of major interest groups**

While the Senate Committee inquiring into the first 2016 Bill concluded that consultation on the Bill was appropriate, some witnesses argued that the Bill was developed with insufficient consultation with relevant stakeholders. The Australian Maritime Officers Union and the Australian Services Union expressed concern about potential delays in the ASIC and MSIC application process and that the Bill does not go far enough to reach to the security threat posed by those who are responsible for the management of the ports.\textsuperscript{48}

The Government at that time argued that the shift in focus from low level or minor offences to higher risk offences related to serious or organised crime would mean that more applicants would be expected to be found initially eligible for an ASIC or MSIC. The Department of Infrastructure and Regional Development asserted that this would result in a quicker issue of an ASIC or MSIC, reducing the impact on the person’s employment and increasing the staff available to employers:

> The proposed eligibility criteria is expected to provide positive employment outcomes overall across the ASIC and MSIC schemes.\textsuperscript{49}

At the date of writing, there has been no reported comment from these interest groups on the current Bill (noting that the ASIC and MSIC schemes are now administered by the Department of Home Affairs, not the Department of Infrastructure, Transport, Cities and Regional Development).

**Financial implications**

The Explanatory Memorandum states that the financial impact of the Bill is low and that any costs associated with the Bill will be met from within existing resources.\textsuperscript{50}

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.\textsuperscript{51}


\textsuperscript{48} Ibid., pp. 7–10.

\textsuperscript{49} Department of Infrastructure and Regional Development, Submission to the Senate Standing Committee on Rural and Regional Affairs and Transport Legislation, *Inquiry into the Transport Security Amendment (Serious or Organised Crime) Bill 2016*, [Submission no. 4], March 2016, p. 4.

\textsuperscript{50} Explanatory Memorandum, Transport Security Amendment (Serious Crime) Bill 2019, p. 2.

\textsuperscript{51} The Statement of Compatibility with Human Rights can be found in the Attachment to the Explanatory Memorandum to the Bill.
**Parliamentary Joint Committee on Human Rights**

At the time of writing, the Parliamentary Joint Committee on Human Rights has not reported on the Bill. However the Committee did report on the first and second 2016 Bills and considered that these Bills did not raise human rights concerns.  

**Key issues and provisions**

Schedule 1 of the Bill contains 18 items. The key items of interest for debate are item 4 and item 17.

Item 4 of the Bill will insert a new Division 4A—Serious crime (consisting of proposed sections 38AA and 38AB) into Part 3 of the ATS Act and item 17 will insert a new Division 6—Serious crime (consisting of proposed sections 113E and 113F) into Part 6 of the MTOFS Act. Proposed section 38AB of the ATS Act and proposed section 113F of the MTOFS Act provide the authority for amendments to the corresponding Regulations for the purpose of preventing the use of aviation, maritime transport and offshore facilities in connection with serious crime.

Items 4 and 17 further provide for the prescription of penalties against the new serious crime amendments. The Explanatory Memorandum notes that, by setting out the maximum penalties that may be prescribed in the Regulations, proposed subsection 38AB(3) of the ATS Act and proposed subsection 113F(3) of the MTOFS Act provide for discretion to be applied in making Regulations imposing penalties.

Section 44C of the ATS Act—‘Requirements for examining and clearing cargo’, provides that Regulations may be made under that section for the general purposes of safeguarding against unlawful interference with aviation. Item 5 amends subsection 44C(1) so that Regulations can also be made under that section to prevent the use of aviation in connection with serious crime. The Explanatory Memorandum notes that this amendment is to ensure that ASIC holders who do not have access to secure areas or zones in security controlled airports can still be captured under the new eligibility criteria (see discussion below).

All Commonwealth legislation must be supported by a Constitutional head of power. Like most legislation, the ATS Act and the MTOFS Act rely on more than one head of Constitutional power (including the corporations and external affairs powers). Section 132 of the ATS Act and section 208 of the MTOFS Act are ‘severability’ provisions that set out the alternative constitutional bases for the Acts’ provisions. These provisions operate so that if the High Court determined that the Acts were not properly founded on a particular power, then the Acts would still stand to the extent that another head or heads of power provides a valid Constitutional basis. Items 6 and 18 amend section 132 of the ATS Act and section 208 of the MTOFS Act respectively. They insert two new severability provisions to clarify the Commonwealth’s legislative power in relation to serious crime and the use of the ASIC and MSIC schemes as a measure to combat it within the sectors. The new provisions reference the incidental power (paragraph 51(xxxix)) and the executive power (section 61) of the Constitution.

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53. The meaning of ‘serious crime’ is discussed below at p. 12.
55. Ibid., p. 6.
Proposed ASIC and MSIC Eligibility Criteria

The meaning of ‘serious crime’

Serious crime is not defined in the Bill, the ATS Act or the MTOFS Act. Nor was it defined when the Government introduced amendments to the second 2016 Bill that replaced all references to ‘serious or organised crime’ with ‘serious crime’. 56

Definitions of ‘serious crime’ or ‘serious offence’ can be found in some criminal legislation. For example a ‘serious Commonwealth offence’ is defined in section 15GE in the Crimes Act 1914 as involving a matter mentioned in subsection 15GE(2) 57 and which is punishable on conviction by imprisonment for a period of three years or more. A ‘serious Commonwealth offence’ also includes an offence in relevant parts of the Criminal Code to do with terrorism or with child abuse (subsection 15GE(3)). ‘Serious crime’ is defined in the Intelligence Services Act 2001 to mean ‘conduct that, if engaged in within, or in connection with, Australia, would constitute an offence against the law of the Commonwealth, a State or a Territory punishable by imprisonment for a period exceeding 12 months’.

The proposed amendments in the Bill are quite novel, in that they will allow the respective Regulations under the ATS Act and the MTOFS Act to ‘tier’ offences. For example, less serious offences will require a higher imprisonment threshold to become an aviation or maritime-security-relevant offence, while more serious offences will only require conviction.

For the 2016 Bills, the Department of Infrastructure and Regional Development prepared a visual diagram of the proposed ASIC and MSIC Eligibility Criteria subject to Parliamentary approval. 58

That diagram is now located on the website for the Department of Home Affairs and would appear to also be relevant in explaining the 2019 Bill. 59 The following summary of the offence tiers is based on this diagram.

Tier 1 contains a list of disqualifying offences. Persons captured under Tier 1 of the eligibility criteria will be disqualified from being issued an ASIC/MSIC and would not have access to the discretionary assessment/ discretionary review. 60

**Tier 1 offences** include those involving or relating to:

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56 As noted above, the Supplementary Explanatory Memorandum stated the intention of the amendments was that that ‘serious crime’ will still encompass ‘organised crime’ that is of a serious nature. It provided the example of an offence of violence or extortion that involves two or more members of a criminal organisation which involves substantial planning and organisation could still be captured under the purpose of ‘serious crime’. Supplementary Explanatory Memorandum, Transport Security Amendment (Serious or Organised Crime) Bill 2016, p. 2.

57 The matters include, amongst others: theft; fraud; tax evasion; controlled substances; extortion; money laundering; perverting the course of justice; people smuggling; slavery; piracy; the organisation, financing or perpetration of sexual servitude or a sexual offence against a person who is under 18 outside Australia; dealings in child abuse material; importation of prohibited imports; exportation of prohibited exports; violence; and firearms.

58 Department of Infrastructure and Regional Development, ‘Proposed new eligibility criteria for the ASIC and MSIC schemes’, DIRD website. These tables are now located on the following Department of Home Affairs website under the heading: ‘Background checks’.

59 Department of Home Affairs, ‘Identity security: applicants and cardholders’, Department of Home Affairs website, last updated 26 February 2019. The relevant diagrams are hyperlinked at the following text under the subheading ‘Background checks’: ‘The criminal records check determines if you have any convictions against the aviation or maritime security-relevant offences’.

60 Department of Infrastructure and Regional Development, Submission to the Senate Standing Committee on Rural and Regional Affairs and Transport Legislation, op. cit., p. 4. A discretionary review involves a consideration of an individual’s circumstances/details of their criminal record following an unsuccessful application for an ASIC or MSIC due to an adverse criminal record. Information about discretionary reviews is available on the Department of Home Affairs website at: ‘Identity security: applicants and cardholders’.
Terrorism; treason, sedition, espionage or selling national secrets; engagement in hostile activities in a foreign country or involvement with foreign armed forces; an offence relating to weapons of mass destruction; hijacking or destroying an aircraft, vessel or offshore facility that is used in commerce or owned by the government; endangerment of an aircraft, airport, vessel, port or offshore facility that is used in commerce or owned by the government; acts of piracy at sea; an offence relating to involvement with a criminal organisation or gang; and smuggling or trafficking of people.

Tiers 2–5 are adverse offences and contain offences that would result in a person being found to have an adverse criminal record and unable to be issued an ASIC/MSIC following the initial application. These persons would be eligible to apply for an ASIC/MSIC through the discretionary assessment process.

Tier 2 offences for which conviction is adverse include those involving or relating to:

Assaulting or threatening a person on an aircraft, vessel or offshore facility, or in an airport or port; theft of an aircraft or vessel that is used in commerce or owned by the government; questioning conducted by a person or body investigating serious and organised crime or corruption; and an offence under the ATS Act or MTOFS Act that is punishable by imprisonment.

Tier 3 offences for which a sentence of imprisonment is adverse include those involving or relating to:

Murder or manslaughter, or an offence of a kind equivalent to murder or manslaughter; firearms, ammunition, weapons or the use of an item as a weapon; explosives or explosive devices; production, possession, supply, import or export of an illegal drug or controlled substance; illegal import or export of goods, fauna or flora; bribery or corruption; perjury or other involving perversion of the course of justice; an offence involving the use of a false identity or false identity documents; interference with goods under customs control; and use or access of data or electronic communications.

Tier 4 offences for which a sentence of 12 months imprisonment is adverse include those involving or relating to:

False imprisonment, deprivation of liberty or taking a hostage; racial hatred or racial vilification; assaulting or resisting a law enforcement officer or other public officer; impersonating a law enforcement officer or other public officer; extortion or blackmail; dealing with proceeds of crime; money laundering or currency violations; and arson or an offence of a kind equivalent to arson.

Tier 5 offences for which a sentence of 30 months imprisonment is adverse includes those involving or relating to:

Theft (other than offences referred to in other tiers); forgery or fraud; sexual abuse or sexual exploitation of a child; assault (other than offences referred to in other tiers) including indecent or sexual assault; intimidation (other than offences referred to in other tiers); endangerment of others (other than offences referred to in other tiers); affray or riot; and tax evasion.

The Department of Infrastructure and Development in its submission on the 2016 Bill explained the effect of this tiered approach:

61. Senate Rural and Regional Affairs and Transport References Committee, Report: airport and aviation security, op. cit., p. 62, paragraph 5.32.
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.62

**Concluding comments**

The Bill is the third attempt by the Government to introduce legislative amendments to the aviation and maritime security identification card schemes, the purpose being to improve protection of Australia’s airports and seaports. The two previous Bills were substantially the same as this Bill and were introduced in the 44th and 45th Parliaments. The Minister now argues that the need for this legislation is clear, noting that the reforms in this Bill were previously considered by the Senate Standing Rural and Regional Affairs and Transport Committee who recommended it be passed without amendment.63

While the Bill implements recommendations from the National Ice Taskforce and the Parliamentary Joint Committee on Law Enforcement, further scrutiny on the precise form of the eligibility criteria should be undertaken once the Regulations are presented. As the Bills Digest for the second 2016 Bill noted, there may be some parliamentary debate around the practicalities of the proposed changes and whether widening the ‘purpose of transport security legislation will confuse the two missions of transport security and targeting serious or organised crime in the transport system’.64 Other issues for debate may be around the balance between potential employment restrictions and the risk of serious crime at Australia’s air and maritime ports. The very nature of serious crime is such that drug convictions may be indicative of a vulnerability that may result in conduct that threatens the security of Australia’s ports.65

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62. Department of Infrastructure and Regional Development, *Submission* to the Senate Standing Committee on Rural and Regional Affairs and Transport Legislation, op. cit., p. 4.
64. ALP, Additional comments, op. cit.