



Transport Security Amendment (Serious Crime) Act 2021

No. 44, 2021

An Act to amend the law in relation to transport security, and for related purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (<https://www.legislation.gov.au/>)

Contents

1	Short title.....	1
2	Commencement.....	2
3	Schedules.....	2
4	Review of this Act.....	3
Schedule 1—Serious crime		4
	<i>Aviation Transport Security Act 2004</i>	4
	<i>Maritime Transport and Offshore Facilities Security Act 2003</i>	5
Schedule 2—Criminal intelligence assessments		9
	<i>Administrative Appeals Tribunal Act 1975</i>	9
	<i>Administrative Decisions (Judicial Review) Act 1977</i>	9
	<i>AusCheck Act 2007</i>	9
	<i>Australian Crime Commission Act 2002</i>	10



Transport Security Amendment (Serious Crime) Act 2021

No. 44, 2021

An Act to amend the law in relation to transport security, and for related purposes

[Assented to 22 June 2021]

The Parliament of Australia enacts:

1 Short title

This Act is the *Transport Security Amendment (Serious Crime) Act 2021*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	22 June 2021
2. Schedule 1	The day after this Act receives the Royal Assent.	23 June 2021
3. Schedule 2	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 12 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	22 June 2022

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

4 Review of this Act

- (1) The Minister must cause an independent review to be conducted of the operation of the amendments made by this Act as soon as practicable after the end of two years after this Act commences.
- (2) Further independent reviews of the operation of the amendments made by this Act must be made as soon as practicable after the fifth anniversary of the commencement of this Act and at five yearly intervals thereafter.
- (3) The persons who conduct the review must give the Minister a written report of each review mentioned in subsections (1) and (2).
- (4) The Minister must cause a copy of the report of each review mentioned in subsections (1) and (2) to be tabled in each House of Parliament within 15 sitting days of that House after the report is given to the Minister.

Schedule 1—Serious crime

Aviation Transport Security Act 2004

1 Subsection 3(1) (note)

Repeal the note, substitute:

Note: Division 4A of Part 3 and Divisions 2A and 10 of Part 4 have additional purposes (see sections 38AA, 44C and 74J).

2 Section 4 (at the end of the paragraph relating to Part 3)

Add “and preventing the use of aviation in connection with serious crime”.

3 Section 27 (after the paragraph relating to Division 4)

Insert:

Regulations under Division 4A will prescribe requirements for the purposes of preventing the use of aviation in connection with serious crime.
--

4 After Division 4 of Part 3

Insert:

Division 4A—Serious crime

38AA Purpose of this Division

The purpose of this Division is to prevent the use of aviation in connection with serious crime.

38AB Requirements relating to access to areas and zones

- (1) The regulations may, for the purposes of preventing the use of aviation in connection with serious crime, prescribe requirements in relation to areas and zones established under this Part.

-
- (2) Without limiting the matters that may be dealt with by regulations made under subsection (1), the regulations may deal with the following:
- (a) access to areas and zones (including conditions of entry, the issue and use of security passes and other identification systems);
 - (b) the security checking (including background checking) of persons who have access to areas and zones.
- (3) Regulations made under this section may prescribe penalties for offences against those regulations. The penalties must not exceed:
- (a) for an offence committed by an airport operator or an aircraft operator—200 penalty units; or
 - (b) for an offence committed by an aviation industry participant, other than a participant covered by paragraph (a) or (c)—100 penalty units; or
 - (c) for an offence committed by an accredited air cargo agent or any other person—50 penalty units.

5 Subsection 44C(1)

Omit “aviation,” substitute “aviation or preventing the use of aviation in connection with serious crime (or both),”.

6 At the end of section 132

Add:

- (8) This Act also has the effect that it would have if its operation were expressly confined to matters incidental to the execution of any of the legislative powers of the Parliament or the executive power of the Commonwealth.

***Maritime Transport and Offshore Facilities Security Act
2003***

7 At the end of subsection 3(1)

Add:

Note: Division 6 of Part 6 has an additional purpose (see section 113E).

8 Section 101 (after the paragraph relating to Division 5)

Insert:

Division 6 allows regulations to prescribe requirements for the purposes of preventing the use of maritime transport or offshore facilities in connection with serious crime.

9 Subsection 105(2)

Omit all the words before paragraph (a), substitute:

- (2) Without limiting the matters that may be dealt with by regulations made under subsection (1), the regulations may deal with the following:

10 After paragraph 105(2)(b)

Insert:

- (ba) the security checking (including background checking) of persons who have access to port security zones;

11 Subsection 109(2)

Omit all the words before paragraph (a), substitute:

- (2) Without limiting the matters that may be dealt with by regulations made under subsection (1), the regulations may deal with the following:

12 After paragraph 109(2)(b)

Insert:

- (ba) the security checking (including background checking) of persons who have access to ship security zones;

13 Subsection 113(2)

Omit all the words before paragraph (a), substitute:

- (2) Without limiting the matters that may be dealt with by regulations made under subsection (1), the regulations may deal with the following:

14 After paragraph 113(2)(b)

Insert:

- (ba) the security checking (including background checking) of persons who have access to on-board security zones;

15 Subsection 113D(2)

Omit all the words before paragraph (a), substitute:

- (2) Without limiting the matters that may be dealt with by regulations made under subsection (1), the regulations may deal with the following:

16 After paragraph 113D(2)(b)

Insert:

- (ba) the security checking (including background checking) of persons who have access to offshore security zones;

17 At the end of Part 6

Add:

Division 6—Serious crime

113E Purpose of this Division

The purpose of this Division is to prevent the use of maritime transport or offshore facilities in connection with serious crime.

113F Requirements relating to access to zones

- (1) The regulations may, for the purposes of preventing the use of maritime transport or offshore facilities in connection with serious crime, prescribe requirements in relation to zones established under this Part.
- (2) Without limiting the matters that may be dealt with by regulations made under subsection (1), the regulations may deal with the following:
 - (a) access to zones established under this Part (including conditions of entry, the issue and use of security passes and other identification systems);

- (b) the security checking (including background checking) of persons who have access to zones established under this Part.
- (3) Regulations made under this section may prescribe penalties for offences against those regulations. The penalties must not exceed:
 - (a) for an offence committed by a port operator, ship operator, port facility operator or offshore facility operator—200 penalty units; or
 - (b) for an offence committed by a maritime industry participant, other than a participant covered by paragraph (a)—100 penalty units; or
 - (c) for an offence committed by any other person—50 penalty units.

18 At the end of section 208

Add:

- (9) This Act also has the effect that it would have if its operation were expressly confined to matters incidental to the execution of any of the legislative powers of the Parliament or the executive power of the Commonwealth.

Schedule 2—Criminal intelligence assessments

Administrative Appeals Tribunal Act 1975

1 Paragraph 46(1)(a)

Before “cause”, insert “and subsection 36L(4) of the *Australian Crime Commission Act 2002*,”.

2 Subsection 46(2)

Before “certifying”, insert “or subsection 36L(2) of the *Australian Crime Commission Act 2002*,”.

3 Paragraph 46(3)(a)

Before “as the case”, insert “or paragraph 36L(2)(a) or (b) of the *Australian Crime Commission Act 2002*,”.

Administrative Decisions (Judicial Review) Act 1977

4 Paragraph (wa) of Schedule 1

After “34D”, insert “, or Division 2A of Part II,”.

5 After paragraph (y) of Schedule 1

Insert:

- (yaa) decisions of the Administrative Appeals Tribunal made on a review that is required by the *Australian Crime Commission Act 2002* to be conducted by the Security Division of that Tribunal;

AusCheck Act 2007

6 After paragraph 5(b)

Insert:

- (ba) if the background check is conducted for the purposes of paragraph 8(1)(a)—matters relevant to a criminal intelligence assessment (as defined in section 36A of the *Australian Crime Commission Act 2002*) of the individual;

Australian Crime Commission Act 2002

7 After Division 2 of Part II

Insert:

Division 2A—Criminal intelligence assessments

Subdivision A—Preliminary

36A Definitions

In this Division:

AAT Act means the *Administrative Appeals Tribunal Act 1975*.

adverse criminal intelligence assessment means a criminal intelligence assessment in respect of a person that contains:

- (a) any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person; and
- (b) a recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person.

applicant means a person who has applied to the Tribunal for a review of an adverse criminal intelligence assessment.

authorised member has the same meaning as in the AAT Act.

background check has the same meaning as in section 5 of the *AusCheck Act 2007*.

Commonwealth agency means an agency within the meaning of the *Freedom of Information Act 1982* and includes an exempt agency.

criminal intelligence assessment or *assessment* means a written statement prepared by the ACC expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it is necessary or desirable for prescribed administrative

action to be taken in respect of a person, having regard to whether there is intelligence or information that suggests that the person:

- (a) may commit a serious and organised crime; or
- (b) may assist another person to commit a serious and organised crime;

and includes any qualification or comment expressed in connection with any such recommendation, opinion or advice, being a qualification or comment that relates, or that could relate, to the question.

exempt agency means a body specified, or the person holding an office specified, in Part I of Schedule 2 to the *Freedom of Information Act 1982*.

law enforcement interests includes interests in the following:

- (a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;
- (b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;
- (c) the protection and safety of informants and of persons associated with informants;
- (d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies;
- (e) avoiding disclosure of lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.

member has the same meaning as in the AAT Act.

officer of the Tribunal has the same meaning as in the AAT Act.

prescribed administrative action means action that relates to or affects:

- (a) access by a person to any information or place, access to which is controlled or limited under:

- (i) the *Aviation Transport Security Act 2004* or regulations under that Act; or
- (ii) the *Maritime Transport and Offshore Facilities Security Act 2003* or regulations under that Act; or
- (b) a person's ability to perform an activity in relation to, or involving, a thing (other than information or a place), if that ability is controlled or limited under:
 - (i) the *Aviation Transport Security Act 2004* or regulations under that Act; or
 - (ii) the *Maritime Transport and Offshore Facilities Security Act 2003* or regulations under that Act.

President has the same meaning as in the AAT Act.

presidential member has the same meaning as in the AAT Act.

Registrar has the same meaning as in the AAT Act.

security has the same meaning as in the *Australian Security Intelligence Organisation Act 1979*.

Tribunal means the Administrative Appeals Tribunal.

Subdivision B—Criminal intelligence assessments

36B Conduct of criminal intelligence assessments

- (1) The ACC has the function of conducting criminal intelligence assessments for purposes related to background checks required or permitted by any of the following:
 - (a) the *Aviation Transport Security Act 2004* or regulations under that Act;
 - (b) the *Maritime Transport and Offshore Facilities Security Act 2003* or regulations under that Act.

Note 1: The CEO is responsible for conducting criminal intelligence assessments (see subsection 46A(8)).

Note 2: The function of conducting criminal intelligence assessments is separate to, and does not affect, the ACC's function of providing strategic criminal intelligence assessments to the Board (as referred to in paragraph 7A(f)) and the Board's function of disseminating those strategic criminal intelligence assessments (as referred to in paragraph 7C(1)(g)).

-
- (2) The CEO may, by legislative instrument, determine the following in relation to the making of criminal intelligence assessments:
 - (a) the matters that must be taken into account;
 - (b) the manner in which those matters are to be taken into account;
 - (c) the matters that are not to be taken into account.
 - (3) The CEO must not make a determination under subsection (2) unless the CEO has consulted the Minister.
 - (4) If the ACC, in conducting a criminal intelligence assessment, considers that making an adverse criminal intelligence assessment in respect of a person would prejudice law enforcement interests, the ACC may decide not to make the assessment.

36C Giving of adverse criminal intelligence assessments to certain Commonwealth agencies

- (1) The ACC may give an adverse criminal intelligence assessment in respect of a person to a Commonwealth agency for purposes related to a background check of the person that is required or permitted by any of the following:
 - (a) the *Aviation Transport Security Act 2004* or regulations under that Act;
 - (b) the *Maritime Transport and Offshore Facilities Security Act 2003* or regulations under that Act.
- (2) If the ACC considers that giving a Commonwealth agency an adverse criminal intelligence assessment in respect of a person would prejudice law enforcement interests, the ACC may decide not to give the assessment to the agency.
- (3) An adverse criminal intelligence assessment given to a Commonwealth agency under subsection (1) must be accompanied by:
 - (a) a statement of the grounds for the assessment (which is taken to be part of the assessment); and
 - (b) if, under subsection (5), the CEO makes a certificate in relation to information contained in the assessment—a copy of the certificate.

- (4) The statement of the grounds for the assessment must contain all information that the ACC relied on in making the assessment, other than:
 - (a) subject to subsection (6), information in relation to which the CEO has made a certificate under subsection (5); and
 - (b) information the disclosure of which would be contrary to a law of the Commonwealth, a State or a Territory.
- (5) The CEO may certify, in writing, that the CEO is satisfied that disclosing particular information contained in an adverse criminal intelligence assessment, including particular information contained in the statement of the grounds for the assessment, to the person in respect of whom the assessment was made would prejudice law enforcement interests or security.
- (6) If the CEO makes a certificate under subsection (5) in relation to information, the ACC may decide not to give the information to a Commonwealth agency under subsection (1). However, the Minister may, after consulting the CEO, direct the ACC to give the information to the Commonwealth agency.
- (7) A certificate made under subsection (5) is not a legislative instrument.
- (8) If the direction under subsection (6) is made in writing, the direction is not a legislative instrument.

36D Person to be notified of adverse criminal intelligence assessment

- (1) If an adverse criminal intelligence assessment in respect of a person is given to a Commonwealth agency under subsection 36C(1), the Commonwealth agency must give written notice of the assessment to the person, unless a certificate made under subsection (4) is in force in relation to the assessment.
- (2) The written notice must:
 - (a) be given to the person within the period of 14 days beginning on the day after:
 - (i) unless subparagraph (ii) applies—the day the assessment is given to the Commonwealth agency; or

-
- (ii) if a certificate under subsection (4) that was in force in relation to the assessment is subsequently revoked—the day the certificate is revoked; and
 - (b) inform the person of the making of the assessment; and
 - (c) include the statement of the grounds for the assessment that was given to the Commonwealth agency (other than information in relation to which the CEO has made a certificate under subsection 36C(5)); and
 - (d) contain information concerning the person’s right to apply to the Tribunal for a review of the assessment.
 - (3) A written notice may be given to the person by delivering it to the person personally, or by sending it to the person by registered post at the person’s address last known to the Commonwealth agency.
 - (4) The Minister may certify, in writing, that the Minister is satisfied that the withholding of notice to a person of the making of an adverse criminal intelligence assessment in respect of the person is essential to either or both of the following:
 - (a) the protection of law enforcement interests;
 - (b) the security of the nation.
 - (5) If the Minister makes a certificate under subsection (4) in relation to an adverse criminal intelligence assessment, the Minister must:
 - (a) give a copy of the certificate to the Commonwealth agency to which the assessment was given under subsection 36C(1); and
 - (b) before the end of the following periods, consider whether to revoke the certificate:
 - (i) the period of 12 months beginning on the day on which the certificate was made;
 - (ii) each subsequent 12 month period.
 - (6) A certificate made under subsection (4) is not a legislative instrument.

36E Effect of preliminary advice by the ACC

A Commonwealth agency must not take, refuse to take or refrain from taking prescribed administrative action on the basis of any

communication in relation to a person made by the ACC not amounting to a criminal intelligence assessment.

Subdivision C—Review of adverse criminal intelligence assessments

36F Applications to Tribunal

- (1) Applications may be made to the Tribunal for review of a decision of the ACC under section 36B to make an adverse criminal intelligence assessment.

Note: Paragraph 29(1)(d) of the AAT Act generally requires an application for review of a decision to be made within 28 days after the applicant has been given a copy of the decision.

- (2) An application under subsection (1) may be made by the person in respect of whom the assessment was made and who has been given notice of the assessment under section 36D.
- (3) At any time after the completion of a review by the Tribunal of an adverse criminal intelligence assessment, applications may be made to the Tribunal for review of the findings of the Tribunal on the ground that the applicant has fresh evidence of material significance that was not available at the time of the previous review.
- (4) An application under subsection (3) for review of the findings of the Tribunal on a review of an adverse criminal intelligence assessment may be made by the person who applied for the review in which the findings were made.
- (5) If the Tribunal is satisfied that an application under subsection (3) is justified, the Tribunal may review its previous findings and:
- (a) this Act; and
 - (b) the AAT Act;
- apply in relation to such a review, and the findings of such a review, as if it were a review of an adverse criminal intelligence assessment.

Interaction with the AAT Act

- (6) Subsections (2) and (4) have effect despite subsection 27(1) of the AAT Act.

36G Requirements for applications

- (1) An application made to the Tribunal for review of an adverse criminal intelligence assessment must be accompanied by:
- (a) a copy of the assessment as given to the applicant; and
 - (b) a statement indicating any part or parts of the assessment with which the applicant does not agree and setting out the grounds on which the application is made.

Note: See also subsection 29(1) of the AAT Act, which contains other requirements for making an application to the Tribunal.

- (2) An application made under subsection 36F(3) must be accompanied by a statement setting out the grounds on which the application is made.

Interaction with the AAT Act

- (3) This section has effect despite paragraph 29(1)(c) of the AAT Act.

36H Notice of application

- (1) If an application is made to the Tribunal for review of an adverse criminal intelligence assessment:
- (a) the Registrar must give the applicant written notice of receipt of the application; and
 - (b) the Tribunal must cause the following to be given to the CEO, and to the Commonwealth agency to which the assessment was given under subsection 36C(1):
 - (i) a copy of the application;
 - (ii) a copy of the statement lodged with the application in accordance with section 36G.
- (2) If the application relates to an adverse criminal intelligence assessment that contains information in relation to which the CEO has made a certificate under subsection 36C(5), the CEO must lodge with the Tribunal:
- (a) a copy of the certificate; and

- (b) a copy of the whole assessment.
- (3) The CEO must lodge the copies with the Tribunal within the period of 30 days beginning on the day the copy of the application was given to the CEO under subsection (1).
- (4) The Tribunal must not, at any time, tell the applicant of the existence of, or permit the applicant to have access to any copy, or particulars of, a certificate of the CEO referred to in subsection (2), or any matter to which the certificate relates.

Interaction with the AAT Act

- (5) This section has effect despite section 29AC of the AAT Act.

36J Reviews to be conducted by Security Division of Tribunal

- (1) Despite subsection 17B(1) of the AAT Act, the powers of review in respect of applications referred to in section 36F may be exercised by the Tribunal only in the Security Division of the Tribunal.
- (2) Despite subsection 19E(2) of the AAT Act, for the purposes of a proceeding in the Security Division of the Tribunal in which the Tribunal is exercising the powers mentioned in subsection (1) of this section, the Security Division is to be constituted by one or more members, at least one of which must be a presidential member.

36K Procedure for review

- (1) If an application for a review of an adverse criminal intelligence assessment is made to the Tribunal, the Tribunal is to review the assessment in accordance with this section.

Parties

- (2) Despite section 30 of the AAT Act, the parties to the proceeding are the CEO and the applicant, but the Commonwealth agency to which the assessment was given under subsection 36C(1) is entitled to adduce evidence and make submissions.

CEO must present all relevant information used to make assessment

- (3) In adducing evidence or making submissions, it is the duty of the CEO to present to the Tribunal all relevant information (whether favourable or unfavourable to the applicant) that:
- (a) was used to make the assessment; and
 - (b) is available to the CEO.

Member may require parties to attend etc.

- (4) A member who is to participate, or who is participating, in the hearing may, at any time, require either or both of the parties to attend or be represented before the member at a directions hearing for the purpose of conferring with the member concerning the conduct of the review with a view to identifying the matters in issue or otherwise facilitating the conduct of the proceedings.

Proceedings to be in private

- (5) Despite section 35 of the AAT Act, the proceedings are to be in private and, subject to this section, the Tribunal is to determine the people who may be present at any time.

Right of parties etc. to be present

- (6) Subject to subsection (9), the applicant and a person representing the applicant may be present when the Tribunal is hearing submissions made or evidence adduced by the CEO or the Commonwealth agency to which the assessment was given under subsection 36C(1).
- (7) The CEO or a person representing the CEO, and a person representing the Commonwealth agency to which the assessment was given under subsection 36C(1), may be present when the Tribunal is hearing submissions made or evidence adduced by the applicant.

Certificate regarding prejudice to law enforcement interests or security

- (8) The Minister may, in writing, certify that evidence proposed to be adduced or a submission proposed to be made by or on behalf of

the CEO or the Commonwealth agency to which the assessment was given under subsection 36C(1) is of such a nature that the disclosure of the evidence or submission would be contrary to the public interest because it would prejudice law enforcement interests or security.

- (9) If such a certificate is made:
- (a) the applicant must not be present when the evidence is adduced or the submission is made; and
 - (b) a person representing the applicant must not be present when the evidence is adduced or the submission is made, unless the Minister consents.
- (10) A person representing the applicant commits an offence if:
- (a) a certificate is made under subsection (8) in relation to evidence or a submission; and
 - (b) the person is present when the evidence is adduced or the submission is made; and
 - (c) the person discloses the evidence or submission, or information contained in the evidence or submission, to the applicant or to any other person.

Penalty: Imprisonment for 2 years.

- (11) A certificate made under subsection (8) is not a legislative instrument.

Protection of identity of person giving evidence

- (12) If the CEO requests the Tribunal to do so, the Tribunal must do all things necessary to ensure that the identity of a person giving evidence on behalf of the CEO is not revealed.

Evidence and submissions

- (13) The Tribunal must first hear evidence adduced, and submissions made, by or on behalf of the CEO and any evidence or submissions that the Commonwealth agency to which the assessment was given under subsection 36C(1) may wish to adduce or make.
- (14) The Tribunal must next permit the applicant, if the applicant so desires, to adduce evidence before, and make submissions to, the Tribunal.

-
- (15) The Tribunal may, on its own initiative and at any stage of the proceedings, invite a person to give evidence, or cause a person to be summoned to give evidence.
- (16) If a person invited or summoned to give evidence under subsection (15) is:
- (a) a member of the staff of the ACC; or
 - (b) a member of the Board; or
 - (c) an examiner; or
 - (d) an officer or employee of the Commonwealth agency to which the assessment was given under subsection 36C(1);
- subsection (8) applies as if any evidence to be given by the person were evidence proposed to be adduced by or on behalf of the CEO or that Commonwealth agency.
- (17) If:
- (a) a party presents that party's case to the Tribunal; and
 - (b) after that case has been presented, the other party adduces evidence; and
 - (c) the Tribunal thinks that, because of evidence adduced by the other party, the first-mentioned party should be further heard;
- the Tribunal must give the first-mentioned party an opportunity of adducing further evidence, but must not give to the applicant any particulars of any evidence to which a certificate made under subsection (8) relates.
- (18) A member of the Tribunal may ask questions of a witness before the Tribunal, and the presiding member may require a witness to answer any such questions.

Dismissal of application

- (19) If the applicant fails within a reasonable time:
- (a) to proceed with the application; or
 - (b) to comply with a direction of the Tribunal in relation to the application;
- the President or an authorised member may dismiss the application without proceeding to review the assessment.

36L Certain documents and information not to be disclosed in review

Scope

- (1) This section applies to a proceeding to which section 36K applies.

Minister may make public interest certificate

- (2) If the Minister certifies, in writing, that the disclosure of information with respect to a matter stated in the certificate, or the disclosure of the contents of a document, would be contrary to the public interest:
- (a) because it would prejudice security or the defence or international relations of Australia; or
 - (b) because it would prejudice law enforcement interests; or
 - (c) because it would involve the disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet or of the Executive Council; or
 - (d) for any other reason stated in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the contents of the document should not be disclosed;
- the following provisions of this section have effect.
- (3) A certificate made under subsection (2) is not a legislative instrument.

Protection of information etc.

- (4) A person who is required by or under this Act to disclose the information or to produce the document to the Tribunal for the purposes of a proceeding is not excused from the requirement, but the Tribunal must, subject to subsections (5), (6) and (8) of this section and section 46 of the AAT Act, do all things necessary to ensure:
- (a) that the information or the contents of the document are not disclosed to anyone other than a member of the Tribunal as constituted for the purposes of the proceeding; and
 - (b) in respect of a document produced to the Tribunal—that the document is returned to the person who produced it.

- (5) Subsection (4) does not apply in relation to disclosure to the CEO or the CEO's representative if the reason stated in the certificate is the reason referred to in paragraph (2)(a) or (b).

Disclosure of information etc.

- (6) If:
- (a) the Minister has certified in accordance with subsection (2) that the disclosure of information, or of the contents of a document, would be contrary to the public interest, but the certificate does not state a reason referred to in any of paragraphs (2)(a) to (c); and
 - (b) the presiding member is satisfied that the interests of justice outweigh the reason stated by the Minister;
- the presiding member may authorise the disclosure of the information, or of the contents of the document, to the applicant.

What presiding member must consider

- (7) In considering whether information or the contents of a document should be disclosed as mentioned in subsection (6):
- (a) the presiding member must take as the basis of the presiding member's consideration the principle that it is desirable, in the interest of ensuring that the Tribunal performs its functions effectively, that the parties should be made aware of all relevant matters; but
 - (b) the presiding member must pay due regard to any reason stated by the Minister in the certificate as a reason why the disclosure of the information or of the contents of the document, as the case may be, would be contrary to the public interest.

Disclosure of information etc. to staff of Tribunal

- (8) This section does not prevent the disclosure of information or of the contents of a document to a member of the Tribunal's staff in the course of the performance of that person's duties as a member of the Tribunal's staff.

Public interest

- (9) This section excludes the operation, apart from this section, of any rules of law relating to the public interest that would otherwise apply in relation to the disclosure of information or of the contents of documents in a proceeding.

Copy of document

- (10) If the Minister has made a certificate under subsection (2) in respect of a document, this section applies in relation to a document that is a copy of the first-mentioned document as if the copy were the original document.

Certificate lodged under subsection 36H(2)

- (11) For the purposes of this section, if the CEO, in accordance with subsection 36H(2), has lodged with the Tribunal a certificate of the CEO made under subsection 36C(5) in relation to information, the Minister is taken to have certified, in accordance with subsection (2) of this section, that the disclosure of the information would be contrary to the public interest because of a reason referred to in paragraph (2)(a) or (b) of this section.

Duty of Tribunal

- (12) It is the duty of the Tribunal, even though there may be no relevant certificate under this section, to ensure, so far as it is able to do so, that, in or in connection with a proceeding, information is not communicated or made available to a person contrary to law enforcement interests or the requirements of security.

36M Orders for non-publication and non-disclosure

- (1) This section applies to a proceeding to which section 36K applies.
- (2) The Tribunal may, by order, give directions prohibiting or restricting the publication or other disclosure of:
- (a) information tending to reveal the identity of:
 - (i) a party to or witness in the proceeding; or
 - (ii) any person related to or otherwise associated with any party to or witness in the proceeding; or

-
- (b) information otherwise concerning a person referred to in paragraph (a); or
 - (c) information that relates to the proceeding and is any of the following:
 - (i) information that comprises evidence or information about evidence;
 - (ii) information lodged with or otherwise given to the Tribunal; or
 - (d) the whole or any part of its findings on the review.
- (3) A person commits an offence if:
- (a) the person engages in conduct; and
 - (b) the conduct contravenes an order under subsection (2).

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

36N Findings of Tribunal

- (1) Upon the conclusion of a review of an adverse criminal intelligence assessment, the Tribunal must make and record its findings in relation to the assessment, and those findings may state the opinion of the Tribunal as to the correctness of, or justification for, any opinion, advice or information contained in the assessment.
- (2) The Tribunal must not make findings in relation to an adverse criminal intelligence assessment that would, under subsection (8) of this section, have the effect of superseding any information that is, under subsection 36C(3), taken to be part of the assessment unless those findings state that, in the Tribunal's opinion, the information:
 - (a) is incorrect; or
 - (b) is incorrectly represented; or
 - (c) could not reasonably be relevant for the purposes of having regard to whether there is intelligence or information that suggests that the person:
 - (i) may commit a serious and organised crime; or
 - (ii) may assist another person to commit a serious and organised crime.

Copies of findings to be given to parties etc.

- (3) Subject to subsection (4), the Tribunal must cause copies of its findings to be given to:
 - (a) the applicant; and
 - (b) the CEO; and
 - (c) the Commonwealth agency to which the assessment was given under subsection 36C(1); and
 - (d) the Minister.
- (4) The Tribunal may direct that the whole or a particular part of its findings, so far as they relate to a matter that has not already been disclosed to the applicant, is not to be given to the applicant or is not to be given to the Commonwealth agency to which the assessment was given under subsection 36C(1).

Applicant may publish findings

- (5) Subject to any direction of the Tribunal, the applicant is entitled to publish, in any manner that the applicant thinks fit, the findings of the Tribunal so far as they have been given to the applicant.

Tribunal may attach comments to findings

- (6) The Tribunal may attach to a copy of findings to be given to the CEO under this section any comments the Tribunal wishes to make on matters relating to procedures or practices of the ACC that have come to the Tribunal's attention as a result of a review.
- (7) The Tribunal must give the Minister a copy of any comments attached as mentioned in subsection (6).

Treatment of findings

- (8) If an adverse criminal intelligence assessment has been reviewed by the Tribunal, the following are to treat the findings of the Tribunal, to the extent that they do not confirm the assessment, as superseding the assessment:
 - (a) any Commonwealth agency concerned with prescribed administrative action to which the assessment is relevant;
 - (b) any tribunal, person or authority having power to hear appeals from, or to review, a decision with respect to any

prescribed administrative action to which the assessment is relevant.

Interaction with AAT Act

- (9) Section 43 of the AAT Act applies subject to this section, and this section has effect despite section 43AAA of that Act.

36P Restriction on further assessments after review

If the Tribunal has made findings upon a review of an adverse criminal intelligence assessment, the ACC must not make a further criminal intelligence assessment in respect of the person concerned that is not in accordance with those findings except on the basis of matters occurring after the review or of which evidence was not available at the time of the review.

36Q Secrecy—criminal intelligence assessment information

- (1) A person commits an offence if:
- (a) the person is, or has been:
 - (i) a member or an officer of the Tribunal; or
 - (ii) an officer or employee of a Commonwealth agency to which an adverse criminal intelligence assessment has been given under subsection 36C(1); and
 - (b) the person makes a record of, discloses or otherwise uses information; and
 - (c) the information was obtained by the person by reason of, or in the course of, the performance or exercise of the person's functions, duties or powers as a member or an officer of the Tribunal, or as an officer or employee of the agency; and
 - (d) the information is, is contained in, or relates to, a criminal intelligence assessment.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

- (2) Subsection (1) does not apply if the making of the record, disclosure or use:
- (a) is for the purposes of this Division; or
 - (b) is for the purposes of, or in connection with, the performance or exercise of the person's functions, duties or powers as a

member or an officer of the Tribunal, or as an officer or employee of the agency.

- Note 1: A defendant bears an evidential burden in relation to a matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).
- Note 2: Section 66 of the AAT Act also deals with the disclosure of certain information and documents by members and officers of the Tribunal.
- Note 3: Section 51 of this Act deals with secrecy requirements for the CEO, members of the Board, members of the staff of the ACC and examiners.

36R Costs

- (1) If:
- (a) a person makes an application under section 36F for review of an adverse criminal intelligence assessment in respect of the person; and
 - (b) the applicant was, in the opinion of the Tribunal, successful, or substantially successful, in the application for review; and
 - (c) the Tribunal is satisfied that it is appropriate to do so in all the circumstances of the case;

the Tribunal may order that the costs reasonably incurred by the applicant in connection with the application, or any part of those costs that is determined by the Tribunal, be paid by the Commonwealth.

Interaction with AAT Act

- (2) For the purposes of section 69A of the AAT Act, the Commonwealth is taken to be a party to the proceeding referred to in subsection (1) of this section.

36S Interaction with AAT Act

The following do not apply in relation to a proceeding to which section 36K of this Act applies:

- (a) sections 30A and 31 of the AAT Act;
- (b) Division 3 of Part IV of the AAT Act;
- (c) sections 36, 36A, 36B, 36C, 36D, 37, 38 and 39 of the AAT Act.

Note: Certain other provisions of the AAT Act do not apply to a proceeding to which section 36K of this Act applies because of the operation of

other provisions in this Division (see, for example, subsection 36K(2)).

8 At the end of section 46A

Add:

Criminal intelligence assessments

- (8) The CEO is responsible for conducting criminal intelligence assessments under Division 2A of Part II.

9 Section 59A

Omit “or functions under this Act (other than a power or function under section 47A)”, substitute “, functions or duties under this Act (other than a power, function or duty under subsection 36B(2) or section 47A)”.

10 Application provision

The amendments made by items 6 to 9 of this Schedule apply in relation to a background check conducted on or after the commencement of this item if:

- (a) the application for the background check is made on or after that commencement; or
- (b) immediately before that commencement, the application for the background check is pending.

[Minister’s second reading speech made in—
House of Representatives on 23 October 2019
Senate on 9 November 2020]

(210/19)
