**EXPLANATORY STATEMENT**

Issued by authority of the Secretary of the Department of Home Affairs

*Maritime Transport and Offshore Facilities Security Act 2003*

***Maritime Transport Security (Screening Officer Requirements) Determination 2021***

The *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act) establishes a regulatory framework to safeguard against unlawful interference with maritime transport and offshore facilities. To achieve this purpose, the Maritime Act establishes minimum security requirements for maritime industry participants by imposing obligations on persons engaged in civil aviation related activities.

Consistent with this purpose, the *Maritime Transport Security (Screening Officer Requirements) Determination 2021* (the Determination) determines training, qualification, use of identity card and uniform requirements for specified screening officers.

**Legislative authority**

The Determination is made under section 165A of the Maritime Act. Paragraph 165A(a) of the Maritime Act provides that the Secretary of the Department of Home Affairs (the Secretary) may determine, by a legislative instrument, the training and qualification, and any other requirements for specified screening officers. Paragraph 165A(b) of the Maritime Act provides that the Secretary may, by legislative instrument, determine for specified screening officers the requirements in relation to use of identity cards or requirements in relation to uniforms.

**Purpose**

The *Transport Security Amendment (Testing and Training) Act 2020* (the Testing and Training Act), at Schedule 2:

* repealed the regulation making provision that provided for screening officer requirements to be prescribed in the *Maritime Transport and Offshore Facilities Security Regulations 2003* (the Maritime Regulations); and
* amended the Maritime Act to provide that the Secretary may by legislative instrument determine certain requirements for specified screening officers.

The Determination was made as a result of the amendments made by the Testing and Training Act.

The purpose of the Determination is to determine certain requirements for specified screening officers, thereby standardising the competency levels of specified screening officers. The effect of the Determination is that specified screening officers are required to have completed relevant training and to hold relevant qualifications, and meet other requirements, prior to exercising powers or performing screening functions.

The training, qualification and other requirements of screening officers in the Determination establishes a national standard of competency for specified screening officers, which will strengthen the performance of security screening activities undertaken at Australian security regulated ports and help ensure all screeners in Australia are equipped to respond to current and emerging threats.

The Determination determines requirements for two classes of screening officers; new screening officers and existing screening officers. The purpose of this is to enable the current screening workforce (existing screening officers) to continue in their role as a screening officer by meeting requirements which more closely align with the requirements for screening officers prior to the commencement of this Determination than the requirements determined for new screening officers.

Broadly, the following has been determined in relation to requirements for specified screening officers:

* a new screening officer is required to hold a Certificate II in Transport Security Protection or a qualification the Secretary is satisfied will enable the holder to carry out the duties of a screening officer; cannot make independent screening decisions until a supervisor has assessed them as competent as a screening officer; must display a valid Maritime Security Identification Card (MSIC) while on duty; and wear a distinctive and recognisable uniform.
* an existing screening officer is required to hold a Certificate II in Transport Security Protection or Certificate II in Security Operations or a qualification the Secretary is satisfied is equivalent to a Certificate II in Transport Security Operations; or have sufficient training and experience acquired while working as a security guard; cannot make independent screening decisions unless a supervisor has assessed them as competent as a screening officer; must display a valid MSIC while on duty; and wear a distinctive and recognisable uniform.

The Department of Home Affairs (the Department) consulted with transport industry stakeholders on the development and implementation of the Testing and Training Act and the Determination. An exposure draft of the Determination was provided to targeted industry stakeholders for their review and comment. Following the exposure draft minor amendments were made to the determination in response to industry feedback. Transport industry stakeholders were supportive of the Determination being made with the amendments made following the consultation period.

The Office of Best Practice Regulation (OBPR) was consulted prior to making the Regulations. OBPR noted that the Determination was unlikely to have more than a minor regulatory impact and that a Regulation Impact Statement for this Determination was not required (OBPR: 22344).

A Statement of Compatibility with Human Rights in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* is included at Attachment A. The overall assessment is that the Determination is compatible with human rights.

Details of the Determination are set out in Attachment B.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

The whole of the Determination commences immediately after the commencement of Schedule 2 to the Testing and Training Act.

**ATTACHMENT A**

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**Maritime Transport Security (Screening Officer Requirements) Determination 2021**

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Disallowable Legislative Instrument**

The *Maritime Transport and Offshore Facilities Security Act 2003* (the Act) establishes a regulatory framework to safeguard against unlawful interference with maritime transport and offshore oil and gas facilities. To achieve this purpose, the Act establishes minimum security requirements for maritime transport or offshore facilities in Australia by imposing obligations on persons engaged in related activities.

Consistent with this purpose, the *Maritime Transport Security (Screening Officer Requirements) Determination 2021* (the Determination) determines training, qualification, use of identity card and uniform requirements for specified screening officers.

The Determination relates to Schedule 2 to the *Transport Security Amendment (Testing and Training) Act 2020* (the Testing and Training Act). The Testing and Training Act at Schedule 2:

* repealed the regulation making provision that provided for screening officer requirements to be prescribed in the *Maritime Transport and Offshore Facilities Security* *Regulations 2003* (the Regulations); and
* amended the Act to provide that the Secretary may, by legislative instrument, determine certain requirements for specified screening officers.

Broadly the following is determined in relation to requirements for specified screening officers:

* a new screening officer is required to hold a Certificate II in Transport Security Protection or a qualification the Secretary is satisfied will enable the holder to carry out the duties of a screening officer; cannot make independent screening decisions until a supervisor has assessed them as competent as a screening officer; must display a valid Maritime Security Identification Card (MSIC) while on duty; and wear a distinctive and recognisable uniform.
* an existing screening officer is required to hold a Certificate II Transport Security Protection or Certificate II in Security Operations or a qualification the Secretary is satisfied is equivalent to a Certificate II in Transport Security Operations or have sufficient training and experience acquired while working as a security guard; cannot make independent screening decisions until a supervisor has assessed them as competent as a screening officer; must display a valid MSIC while on duty; and wear a distinctive and recognisable uniform.

**Human rights implications**

This Disallowable Legislative Instrument will engage the following human rights:

* the right to freedom from discrimination under Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR)
* the right to work under Article 6 of ICESCR

*The right to work and non-discrimination*

Article 6(1) of the ICESCR provides that:

*The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

Article 6 of the ICESCR is a right to the opportunity for a person to gain work of their choosing. The right to work does not equate to a guarantee to particular employment. The United Nations Committee on Economic Social and Cultural Rights has stated that this protection includes the right to not be unfairly deprived of work. Any limitations need to be reasonable, necessary and proportionate to the legitimate objective sought to be achieved.

Article 2(2) of the ICESCR provides:

*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 26 of the ICCPR provides:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee, to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

In its General Comment 18, the UN Human Rights Committee stated that:

*The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.*

Similarly, in its General Comment on Article 2 of the ICESCR (E/C.12/GC/20), UNCESCR has stated (at 13) that:

*Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.*

The Disallowable Legislative Instrument may limit the right to work in Article 6 of the ICESCR and the right to non-discrimination in Article 2 of the ICESCR and Article 26 of the ICCPR by imposing requirements on persons seeking employment as maritime screening officers. However this limitation is reasonable, necessary and proportionate in achieving the legitimate aim of safeguarding against interference with maritime transport and ensuring that screening officers are properly qualified to carry out their duties.

The Australian maritime security environment is a highly sensitive environment, the consequences of unlawful interference with maritime transport are significant, and it is reasonable to impose necessary qualifications on persons wishing to work in this environment. The new requirements also implement recommendations of the Inspector of Transport Security’s *Inquiry into Aviation and Maritime Transport Security Education and Training in Australia*.

To the extent that the measure limits the opportunity for an individual to gain employment of their choosing, the measure is proportionate and least rights restrictive, as the level of qualification required for employment as a screening officer is appropriately directed to the role and is an objective, nationally accredited qualification. The right to work in Article 6 of ICESCR may be engaged where a person seeking employment as a maritime screening officer is unable to obtain the relevant qualification and is therefore unable to obtain employment as a screening officer, however Article 6 does not guarantee an individual employment in a particular position and it is reasonable and necessary to impose qualification requirements to safeguard against interference with the maritime industry and ensuring that screening officers are properly qualified to carry out their duties.

To the extent that the Disallowable Legislative Instrument limits the right to non-discrimination and the right to work, the limitations are reasonable, necessary and proportionate in achieving a legitimate objective.

**Conclusion**

The Disallowable Legislative Instrument is compatible with human rights because it will assist to maintain the integrity of Australia’s maritime security. To the extent that the Disallowable Legislative Instrument may limit human rights, those limitations are reasonable, necessary and proportionate.

**ATTACHMENT B**

***Details of the Maritime Transport Security (Screening Officer Requirements) Determination 2021***

Section 1 – Name

This section provides that the title of this instrument is *Maritime Transport Security (Screening Officer Requirements) Determination 2021* (the Determination).

Section 2 – Commencement

This section provides for the commencement of the Determination. The Determination commences immediately after the commencement of Schedule 2 to the *Transport Security Amendment (Testing and Training) Act 2020*.

Section 3 – Definitions

Section 3 provides various definitions for the purpose of the Determination.

***Note***

The note to section 3 notes that certain terms used in the Determination, have already been defined in the *Maritime Transport and Offshore Facilities Security Regulations 2003* (the Maritime Regulations). Those terms include “***MSIC***”, which means a Blue or White Maritime Security Identification Card (see regulation 6.07B of the Maritime Regulations);

***Act***

For the purposes of the Determination this means the *Maritime Transport and Offshore Facilities Security Act 2003.*

***existing screening officer***

Different requirements have been determined for those screening officers that are employed prior to the Determination commencing, and those that are employed following commencement. As such it is necessary to include definitions differentiating between those two groups of screening officers. ‘Existing screening officer’ means a person who:

* has been employed or engaged by a port facility operator as a screening officer at any time in the 12 months before the Determination commences; and (paragraph (a))
* since this instrument has commenced, has not ceased engagement or employment as a screening officer for any period of at least 24 months. (paragraph (b)).

Existing screening officers are defined to allow for requirements to be determined for people who meet this definition, with the purpose of to ensuring that the people working as screening officers prior to the Determination commencing could continue in their roles.

***independent screening decision***

This means a decision whether to allow a person, personal effects, carry-on baggage, goods or a vehicle to pass through a screening point, without prompting or guidance from a supervising officer. This definition is relevant to the training requirements determined in section 6 of the Determination.

***new screening officer***

This means a person who is not an existing screening officer, as defined above, and is engaged or employed by a port facility operator as a screening officer after the Determination commences.

***Regulations***

This definition is clarifying that references to Regulations are references to the *Maritime Transport and Offshore Facilities Security Regulations 2003*.

Section 4 – Application

Section 4 provides that the Determination determines requirements, under section 165A of the Maritime Act, for screening officers. Section 165A of the Maritime Act provides that the Secretary may, by legislative instrument, determine training and qualification requirements, and any other requirements, for specified screening officers. It also provides that the Secretary may determine for specified screening officers requirements in relation to the use of identity cards and requirements in relation to uniforms.

Section 5 – Qualifications

Section 5 of the Determination details the qualification requirements for screening officers. Subsection 5(1) provides that a new screening officer must have either a Certification II in Transport Security Protection or a qualification that the Secretary is satisfied will enable them to carry out the duties of a screening officer under the Aviation Act.

Subsection 5(2) provides that an existing screening officer must hold any of the following:

* a Certificate II in Security Operations;
* a qualification that the Secretary is satisfied is equivalent to a Certificate II in Security Operations;
* training and experience acquired while working as a security guard that is sufficient to satisfy the requirements for obtaining a security guard license in the state or territory where the person intends to work as s screening officer; or
* a Certification II in Transport Security protection.

Subsection 5(3) provides that the qualifications mentioned in section 5, for a screening officer who is an existing screening officer or a new screening officer, are required for the screening officer to carry out each power and function mentioned in Division 6 of Part 8 of the Aviation Act.

As mentioned above in the definition for existing screening officer, to ensure screening officers, employed prior to this Determination commencing, can continue to operate as screening officers, it is necessary to have different requirements for new screening officers and existing screening officers.

Prior to this Determination commencing the standard qualification obtained by screening officers was a Certificate II in Security Operations. The intention is that existing screening officers will be able to continue to rely on that qualification. They will not be required to obtain a new qualification to continue to perform their role. Screening officers were also able to rely on training and experience obtained while working as a security guard, if the experience and training was sufficient to satisfy the requirements for obtaining a security guard licence. While existing screening officers will continue to be able to rely on that experience, a similar provision is not included for new screening officers in this Determination.

The purpose of these requirements is to provide a consistent standard of qualification for screening officers to meet. The effect is that if the screening officer does not meet the requirements, they are unable to perform the role of a screening officer.

The note to section 5 provides that the Secretary can, under section 165B of the Maritime Act, exempt a class of screening officers from any of the requirements. Section 165B provides that the Secretary may, in writing, exempt a class of screening officers from one or more of the requirements determined under paragraph 165A(1)(a), if the Secretary is satisfied that there are exceptional circumstances.

Section 6 – Training

Section 6 specifies the training requirements for both new and existing screening officers. Specifically it provides that until a supervisor is satisfied that they are competent as a screening officer, a person who is a new screening officer or a person who is an existing screening officer must:

* be supervised by someone who is capable of making an independent screening decision; and
* must not themselves make an independent screening decision.

The purpose of this requirement is to ensure that screening officers are appropriately supervised until they are capable of making an independent screening decision. The effect is that until a supervisor is satisfied that they are capable of doing so, a screening officer will not be able to make an independent screening decision.

The note to section 6 is the same as that note to section 5. It provides that the Secretary may, under section 165B of the Maritime Act, exempt a class of screening officers from this requirement.

Section 7 – Maritime Security Identification Cards

Section 7 provides that a screening officer must at all times properly display a valid Maritime Security Identification Card (MSIC) while on duty.

Obtaining an MSIC involves the applicant for the MSIC undergoing identity confirmation, a criminal history check and a security assessment, and if applicable a check to ensure they have the right to work in Australia.

Screening officers perform a vital role in relation to aviation security. The purpose of this requirement is to ensure that all screening officers display that they have an MSIC at all times, while on duty or as otherwise required by the Maritime Regulations, to provide assurance that they have met the requirements to obtain an MSIC and are allowed access to certain areas of Australian security regulated ports.

The note to section 7 outlines that a screening officer must also properly display an MSIC when otherwise required by the Maritime Regulations.

Section 8 – Uniforms

Section 8 provides that a screening officer must wear a distinctive and recognisable uniform. The phrase ‘distinctive and recognisable’ is not defined in the Determination the Maritime Act or the Maritime Regulations and should be given its ordinary meaning.

The purpose of this requirement is to ensure that persons performing screening functions are in a distinct and recognisable uniform making them easily identifiable to the public. The effect of the requirement is that in order to perform the role of a screening officer, a person must wear a uniform.