

EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

AusCheck Act 2007

Aviation Transport Security Act 2004

Maritime Transport and Offshore Facilities Security Act 2003

Transport Security Legislation Amendment (Serious Crime) Regulations 2021

The *Aviation Transport Security Act 2004* (the Aviation Act) and the *Aviation Transport Security Regulations 2005* (the Aviation Regulations) operate to give effect to Australia's obligations under Annex 17 to the Convention on International Civil Aviation and to prevent the use of aviation in connection with serious crime.

The *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (the Maritime Regulations) operate to safeguard against unlawful interference with maritime transport and offshore oil and gas facilities and prevent the use of maritime transport or offshore facilities in connection with serious crime.

To achieve the purposes of Australia's international obligations and to safeguard against unlawful interference, the Aviation Act and Maritime Act establish regulatory frameworks and set minimum security requirements for the Australian aviation and maritime industries by imposing obligations and requirements on persons engaged in certain aviation and maritime-related activities, respectively.

The *AusCheck Act 2007* (AusCheck Act) and the *AusCheck Regulations 2017* (AusCheck Regulations) establish the AusCheck scheme which operates to provide a regulatory framework for coordinating and conducting, within the Department of Home Affairs, centralised criminal, security and other background checks relating to aviation and maritime security.

Legislative authority

Subsection 18(1) of the AusCheck Act, subsection 133(1) of the Aviation Act, and subsection 209(1) of the Maritime Act each provide that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Purpose

The Aviation Act and the Maritime Act were recently amended by the *Transport Security Amendment (Serious Crime) Act 2021* (the Serious Crime Act, which received Royal Assent on 22 June 2021) so that the Aviation Regulations and the Maritime Regulations may prescribe requirements for the purposes of preventing the use of aviation, maritime transport or offshore facilities in connection with serious crime.

The purpose of the *Transport Security Legislation Amendment (Serious Crime) Regulations 2021* (the Amending Regulations) is to amend the AusCheck Regulations to make consequential amendments that support the amendments made to the Aviation

Regulations and the Maritime Regulations, and to amend the Aviation Regulations and the Maritime Regulations to give effect to amendments introduced by the Act for the purposes of preventing the use of aviation, maritime transport or offshore facilities in connection with serious crime. In particular the Amending Regulations amend the Aviation Regulations and the Maritime Regulations to:

- introduce new criteria for aviation and maritime security identification cards (ASIC and MSIC) schemes that would affect an applicant's eligibility to hold or be issued an ASIC or MSIC if they have an adverse criminal record;
- ensure consistency of the language used to describe the ASIC and MSIC schemes;
- provide 30 days for current ASIC or MSIC holders to report offences they were previously not required to report; and
- make other consequential and technical amendments to the Aviation and Maritime Regulations.

From early August 2011, following the Parliamentary Joint Committee on Law Enforcement's report, extensive stakeholder consultation across the aviation, maritime and offshore oil and gas sectors, and with relevant government agencies, was undertaken on the development and introduction of the Serious Crime Act and the offences included in the new ASIC and MSIC eligibility criteria.

Consultation included a range of discussion papers, presentations and agenda items at various industry forums including: the Aviation Security Advisory Forum; the Aviation Security Employee Consultative Forum; the Maritime Industry Security Consultative Forum; the Maritime Security Strategic Forum; the Offshore Oil and Gas Security Forum; Regional Industry Consultative Meetings; Issuing Body Forums; and various ASIC and MSIC Stakeholder Consultative Forums. Industry is generally supportive of the proposed changes to the ASIC and MSIC schemes to strengthen their ability to prevent serious criminal influence at airports, seaports and offshore facilities.

The AusCheck Act, Aviation Act, and Maritime Act specify no conditions that need to be satisfied before the power to make the Amending Regulations may be exercised.

The Office of Best Practice Regulation (OBPR) was consulted prior to making the Regulations, and the Regulation Impact Statement requirements for these Regulations have been met (OBPR: 19964 and 43554).

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 Amending Regulations are compatible with human rights.

Details of the Amending Regulations are set out in [Attachment B](#).

The Amending Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The whole of the Amending Regulations commences on 23 August 2021.

Statement of Compatibility with Human Rights

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

Transport Security Legislation Amendment (Serious Crime) Regulations 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 *Transport Security Legislation Amendment (Serious Crime) Regulations 2021* (the Regulations) supports the implementation of the additional purpose of the *Aviation Transport Security Act 2004* (the Aviation Act) and the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act), as introduced by the *Transport Security Amendment (Serious Crime) Act 2021* (the Act), to prevent the use of aviation, maritime transport or offshore facilities, in connection with serious crime.

The Act allows for making regulations under the Aviation Act and the Maritime Act that prescribe requirements for the additional purpose.

The Regulations will amend the *Aviation Transport Security Regulations 2005* and the *Maritime Transport and Offshore Facilities Security Regulations 2003* to strengthen the criteria affecting a persons' eligibility to hold or be issued an aviation or maritime security identification card (ASIC or MSIC) under the ASIC and MSIC schemes, by including a number of serious criminal offences. In particular, the Regulations will amend the *Aviation Transport Security Regulations 2005*, *Maritime Transport and Offshore Facilities Security Regulations 2003* and the *AusCheck Regulations 2017* (the AusCheck Regulations) to:

- allow the Secretary to make decisions in consideration of both safeguarding against unlawful interference and preventing the use of aviation, maritime transport or offshore facilities, in connection with serious crime;
- introduce new criteria for ASIC and MSIC schemes that would affect a person's eligibility to hold or be issued an ASIC or MSIC if they have an adverse criminal record;
- introduce a measure to prevent the automatic cancellation of a four year MSIC at the two year mark, if the second anniversary background check shows no change in circumstances, despite the person originally being assessed as having an adverse criminal record;
- ensure consistency of the language used to describe the ASIC and MSIC schemes and the background checks for the ASIC and MSIC schemes conducted under the AusCheck scheme; and
- make other consequential and technical amendments to the Aviation and Maritime Regulations and to the AusCheck Regulations.

A number of independent reviews have noted that serious and organised criminals are exploiting the ASIC and MSIC schemes for criminal purposes. The 2011 Parliamentary Joint Committee on Law Enforcement (PJCLE), *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime* (the PJCLE Inquiry), recognised that the ASIC and MSIC schemes were originally designed to prevent terrorism and they should be extended to protect against the threat of exploitation by serious and organised crime.

The PJCLE recommended the Government review the list of relevant security offences under the ASIC and MSIC schemes to assess where adding any further offences are necessary to protect the aviation and maritime sectors against the threat of infiltration by serious and organised criminal networks.

Similarly, the 2015 National Ice Taskforce recognised that airports and seaports are gateways for Ice importation and recommended that the Government continue to protect the aviation and maritime environments against organised crime by strengthening the eligibility criteria for ASICs and MSICs. These amendments are necessary to ensure that serious and organised crime groups are unable to exploit the vulnerabilities in the aviation and maritime environments.

Human rights implications

This Disallowable Legislative Instrument engages the following 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 in Article 6 of the ICESCR; and
- the right to justice and a fair trial in Article 14(2) of the ICCPR.

Right to work and non-discrimination

Article 6(1) of the ICESCR provides that the right to work includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept, allowing them to live in dignity. The right to work does not equate to a guarantee to particular employment. As the Parliamentary Joint Committee on Human Rights (PJCHR) notes in its Guide to Human Rights, the right to work:

... is not to be understood as providing an unconditional right to obtain employment or for the state to provide everyone with employment; rather it is a right to choose an occupation and engage in work. It applies to all types of work, both in the public and private sectors, and to the formal and informal labour market.

The United Nations Committee on Economic Social and Cultural Rights (the UN Committee) recognises that the right to work in Article 6 does not equate to a guarantee of full employment. The UN Committee recognises the existence of international factors beyond the control of countries, which may hinder the full employment of the right to work in many countries (for example, transnational, serious and organised crime). The Committee has stated that the right to work affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly.

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 on discrimination, 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.

Under Article 4 of the ICESCR, the rights in Article 6 may only be limited as determined by law for the purposes of promoting general welfare in a democratic society. Any limitations need to be reasonable, necessary and proportionate to the legitimate objective sought to be achieved. The UN Committee has stated that such limitations must be proportional, and must be the least restrictive alternative where several types of limitations are available, and that even where such limitations are permitted, they should be subject to review.

The Government is committed to act in accordance with 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. That said, these amendments are reasonable and necessary to limit the influence of serious criminal activity in the aviation and maritime or offshore facilities environments, consistent with recommendations made by the 2015 National Ice Taskforce and the PJCLE Inquiry.

The amendments engage the right to work and right to non-discrimination, as the consequence of an adverse criminal record is that an applicant is denied an ASIC or MSIC and therefore may be denied certain jobs that require a person to hold an ASIC or MSIC. Given the significant impact that serious crime (in particular the sale of illicit drugs) has on the economic and social prosperity of Australia, the amendments are reasonable, necessary and proportionate to prevent Australia's security controlled airports, security regulated seaports, and security regulated offshore oil and gas facilities from being used in connection with serious crime. They are also the least rights restrictive.

Under the new eligibility criteria, the list of offences will be harmonised over a three tier structure. Tier 1 offences represent significant national or international offences such as offences involving terrorism, hijacking or people trafficking. Tier 2 offences represents serious transport related or criminal offences that are directly relevant to aviation or maritime security such as threatening or assaulting persons in or on an aircraft, airport, vessel, port or offshore facilities. Tier 3 offences are serious criminal offences such as murder, supply of drugs, arson and offences relating to sexual exploitation of a child.

An adverse criminal record is established where a person has received a conviction for a tier 1 or tier 2 offence, or a conviction and sentence of imprisonment for a tier 3 offence. Individuals whose background check establishes an adverse criminal record in regard to tiers 2 and 3 offences will continue to have the opportunity to seek a discretionary review and/or appeal to the Administrative Appeals Tribunal (AAT) to determine their suitability for holding a card and remaining unsupervised in secure areas of airports, seaports and offshore facilities. Individuals whose background check establishes an adverse criminal record in regard to a tier 1 offence will have the opportunity to appeal their disqualification to the AAT.

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 it only limits their ability to gain employment in locations that require an ASIC or an MSIC. It would not prevent the individual from gaining employment of their choosing in a location that does not require an ASIC or MSIC. The measures are reasonable, necessary and proportionate in safeguarding security controlled airports and security regulated seaports against the impact of transnational and serious organised crime.

Right to justice and a fair trial

Article 14(1) of the ICCPR provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 14 of the ICCPR includes protections relating to justice and ensuring a fair hearing. The right to a fair trial and a fair hearing applies to both criminal and civil proceedings, and in cases before both courts and tribunals. The right is concerned with procedural fairness, rather than with the substantive decision of the court or

tribunal. The proposed amendments engage this right by providing for review of an adverse outcome by the AAT.

The amendments engage the right to a fair hearing in Article 14(1) of the ICCPR. As stated above, the eligibility criteria is structured over three tiers based on the type of offence. Individuals whose background check establishes an adverse criminal record in regard to tiers 2 and 3 offences will have the opportunity to seek a discretionary review and/or appeal to the AAT. Individuals whose background check establishes an adverse criminal record in regard to a tier 1 offence will have the opportunity to appeal their disqualification to the AAT. Under these arrangements, individuals are able to present their case to the AAT in a fair and public hearing by a competent, independent and impartial tribunal established by law. This engages the right to equality before courts and tribunals and the principle that all parties should have a reasonable opportunity to present their case. The measures promote the rights in Article 14 by ensuring that persons can seek review of a decision in relation to a decision on whether an MSIC or an ASIC is granted and is equal before the tribunal in relation to such a review.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because to the extent that it may limit the right to non-discrimination and the right to work, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective.

The Honourable Karen Andrews MP, Minister for Home Affairs

Details of the proposed *Transport Security Legislation Amendment (Serious Crime) Regulations 2021*

Section 1 – Name

This section provides that the title of the Regulations is the *Transport Security Amendment (Serious Crime) Regulations 2021* (the Amending Regulations).

Section 2 – Commencement

This section provides for the commencement of the Regulations, as set out in the table in subsection 2(1).

Table Item 1 of subsection 2(1) provides for the whole of the instrument to commence on 23 August 2021.

Subsection 2(2) clarifies that information in column 3 of the table in subsection (1) is not part of the instrument, and that information may be inserted there, or edited, in any published version of the instrument.

Section 3 – Authority

This section provides that the instrument is made under the *AusCheck Act 2007*, the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*.

Section 4 – Schedules

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

Schedule 1—Amendments

AusCheck Regulations 2017

The amendments to the *AusCheck Regulations 2017* (the AusCheck Regulations) made by this instrument make consequential amendments to align the defined terms and language used in the AusCheck Regulations with that used in both the *Aviation Transport Security Regulations 2005* and the *Maritime Transport and Offshore Facilities Security Regulations 2003* with respect to conducting background checks on applicants for, or holders of, an aviation security identification card (ASIC) or maritime security identification card (MSIC). The amendments to the AusCheck Regulations also make other technical and consequential amendments.

Item [1] – Section 4 (paragraph (b) of the definition of *adverse criminal record*)

This item amends paragraph (b) of the definition of *adverse criminal record* in section 4 of Part 1 of the AusCheck Regulations to omit “regulation 6.08A”, and substitute “subregulation 6.07B(3)”.

Previously, the definition of *adverse criminal record* operated to provide that an *adverse criminal record* for an individual who is an applicant for, or a holder of, an MSIC—has the meaning given by regulation 6.08A of the *Maritime Transport and Offshore Facilities Security Regulations 2003*.

This item is consequential to the repeal of regulation 6.08A of the *Maritime Transport and Offshore Facilities Security Regulations 2003* by item 45 below, and the amendment to subregulation 6.07B(3) of the *Maritime Transport and Offshore Facilities Security Regulations 2003* made by item 43, below.

The purpose and effect of this amendment is to repeal a reference made redundant by the repeal of a provision, and to substitute a reference to the relevant provision.

Item [2]– Section 4 (definition of *qualified criminal record*)

This item repeals the definition of *qualified criminal record* in section 4 of Part 1 of the AusCheck Regulations and substitutes a new definition of *qualified criminal record*.

The new definition provides that *qualified criminal record* has the meaning given by clause 1.3 of the *Security Sensitive Biological Agent (SSBA) Standards* determined under section 35 of the *National Health Security Act 2007*.

The purpose and effect of this amendment is to repeal a definition made redundant by other amendments made in this instrument and to make clear that for the purposes of the AusCheck Regulations, the term has the same meaning as that given by Part 1 of the *SSBA Standards*.

Item [3]– Paragraph 6(b)

This item amends paragraph 6(b) of the definition of *unfavourable criminal history* in Part 1 of the AusCheck Regulations to insert the words “for an individual for whom a background check is undertaken under section 11—” before the words “a qualified”.

The purpose and effect of this amendment is to distinguish between the various purposes for which a background check is undertaken, to make clear that paragraph 6(b) refers specifically to background checks undertaken under section 11 of the AusCheck Regulations in relation to national health security purposes.

Item [4] – Paragraph 6(c)

The amendment made by this item would repeal paragraph 6(c) of the definition of *unfavourable criminal history* in Part 1 of the AusCheck Regulations.

The amendment made by this item is consequential to the repeal of the definition of *disqualifying offence* in the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Maritime Regulations) proposed by item 39 below.

The purpose and effect of this amendment is to repeal a provision made redundant by other amendments made in this instrument.

Item [5] – Subsection 13(3)

This item repeals subsection 13(3) of Subdivision A of Division 5 of Part 2 of the AusCheck Regulations, and substitutes a new subsection 13(3).

This item deals with giving advice in relation to a background check of an individual, where an application for a background check has been made, or is taken to have been made, by an issuing body.

Subsection 13(3) operates to provide that, if the individual holds an ASIC or MSIC and the issuing body has been advised in relation to a previous background check of the individual and the advice was that the individual had an unfavourable criminal history, the Secretary must also advise the issuing body whether there has been a material change in the individual’s criminal history.

The purpose and effect of the proposed amendment is to avoid the situation where an issuing body is required to cancel an ASIC or MSIC based on an unfavourable background checking assessment, despite the person’s criminal history record remaining the same (i.e. where the original check showed an adverse criminal record or equivalent, but the card was approved to be issued). This change also has the effect of negating the need for an ASIC or MSIC holder to make an application for the reinstatement of an ASIC or MSIC under regulation 6.43A of the Aviation Regulations or regulation 6.08MA of the Maritime Regulations as a result of the issuing body cancelling their ASIC or MSIC.

Item [6] – Subsection 14(3)

This item repeals subsection 14(3) of Subdivision A of Division 5 of Part 2 of the

AusCheck Regulations.

This item is consequential to the amendment to the definition of *qualified criminal record* made by item 3, above and to the Administrative Arrangements that transferred responsibility from the Transport Secretary to the Secretary of the Department of Home Affairs.

The purpose and effect of this amendment is to repeal a provision made redundant by other amendments made in this instrument, and by the altered administrative arrangements that are in place.

Item [7] – Subsection 14(4)

This item omits all the words after “unfavourable criminal history,” in subsection 14(4) and substitutes the words “the Secretary must inform the issuing body for the ASIC or MSIC of that advice”.

The amendments are consequential to the amendment to the definition of *qualified criminal record* made by item 3, above.

The purpose and effect of this amendment is to repeal provisions that are made redundant by other amendments made in this instrument.

Item [8] – After subsection 14(4)

This item inserts a new subsection 14(4A) which operates to provide that, if the issuing body for the ASIC or MSIC has been advised in relation to a previous background check of the individual, and the advice was that the individual had an unfavourable criminal history, the Secretary must also advise the issuing body whether there has been a material change in the individual’s criminal history.

The purpose and effect of the amendment is to avoid the situation where an issuing body is required to cancel an ASIC or MSIC based on an unfavourable background checking assessment, despite the person’s criminal history record remaining the same (i.e. where the original check showed an adverse criminal record or equivalent, but the card was approved to be issued). This change also has the effect of negating the need for an ASIC or MSIC holder to make an application for the reinstatement of an ASIC or MSIC under regulation 6.43A of the Aviation Regulations or regulation 6.08MA of the Maritime Regulations as a result of the issuing body cancelling their ASIC or MSIC.

Item [9] – Subsection 15(4)

This item omits all the words after “unfavourable criminal history,” in subsection 15(4), and substitutes the words “the Secretary must inform the issuing body for the ASIC or MSIC of that advice”.

This amendment is consequential to the proposed amendment to the definition of *qualified criminal record* made by item 3, above.

The purpose and effect of this amendment is to repeal a provision made redundant by other amendments made in this instrument.

Item [10] – After subsection 15(4)

This item inserts a new subsection 15(5) which operates to provide that, if the issuing body for the ASIC or MSIC has been advised in relation to a previous background check of the individual, and the advice was that the individual had an unfavourable criminal history, the Secretary must also advise the issuing body whether there has been a material change in the individual’s criminal history.

The purpose and effect of the amendment is to avoid the situation where an issuing body is required to cancel an ASIC or MSIC based on an unfavourable background checking assessment, despite the person’s criminal history record remaining the same (i.e. where the original check showed an adverse criminal record or equivalent, but the card was approved to be issued). This change also has the effect of negating the need for an ASIC or MSIC holder to make an application for the reinstatement of an ASIC or MSIC under regulation 6.43A of the Aviation Regulations or regulation 6.08MA of the Maritime Regulations as a result of the issuing body cancelling their ASIC or MSIC.

Item [11] –After subsection 16A(1)

This item amends section 16A of Part 1 of the AusCheck Regulations to provide AusCheck with the discretion to take action which would initiate a new background check under section 16A if requested information is received after a background check has been cancelled by the Secretary of the Department of Home Affairs under subsection 11A(7) of the AusCheck Regulations.

This item operates to provide that section 16A also applies if Secretary cancels a background check (the original check) under subsection 11A(7) and gives advice about the cancellation under section 15A, and the thing that the Secretary requested be done under subsection 11A(2) is later done.

For example, this item would cater for circumstances where a background check was triggered by subsection 9(2) of the AusCheck Regulations and the Secretary subsequently requested further information from the applicant under paragraph 11A(2)(f), but the applicant failed to provide that information within the required timeframe. If the requested information arrives after the time stipulated, AusCheck can initiate a new background check.

The purpose and effect of this item is to provide an additional new basis on which AusCheck can initiate a new background check, in accordance with subsection 16A(2), if the Secretary receives the requested information after the deemed background check application was cancelled under subsection 11A(7).

Item [12] –After subsection 20B(1)

This item amends section 20B of Part 1 of the AusCheck Regulations to provide AusCheck with the discretion to take action which would initiate a new background

check under section 20B if requested information is received after a background check has been cancelled by the Secretary of the Department of Home Affairs under subsection 11A(7) of the AusCheck Regulations.

This item operates to provide that section 20B also applies if Secretary cancels a background check (the original check) under subsection 11A(7) and gives advice about the cancellation under section 20A, and the thing that the Secretary requested be done under subsection 11A(2) is later done.

The purpose and effect of this item is to provide an additional new basis on which AusCheck can initiate a new background check, in accordance with subsection 20B(2), if the Secretary receives the requested information after the deemed background check application was cancelled under subsection 11A(7).

Item [13] –After subsection 21C(1)

This item amends section 21C of Part 1 of the AusCheck Regulations to provide AusCheck with the discretion to take action which would initiate a new background check under section 21C if requested information is received after a background check has been cancelled by the Secretary of the Department of Home Affairs under subsection 11A(7) of the AusCheck Regulations.

This item operates to provide that section 21C also applies if Secretary cancels a background check (the original check) under subsection 11A(7) and gives advice about the cancellation under section 21B, and the thing that the Secretary requested be done under subsection 11A(2) is later done.

The purpose and effect of this item is to provide an additional new basis on which AusCheck can initiate a new background check, in accordance with subsection 21C(2), if the Secretary receives the requested information after the deemed background check application was cancelled under subsection 11A(7).

Item [14] – In the appropriate position in Part 5

This item creates new Division 5 in Part 5 of the AusCheck Regulations to contain proposed new section 39, which deals with the amendments made by the Amending Regulations, as they relate to the AusCheck Regulations.

New section 39

New section 39 provides that the amendments made by the proposed Amending Regulations apply in relation to applications for background checks made after the commencement of this instrument.

The purpose and effect of this amendment is to ensure that applications for background checks that were made prior to the commencement of the proposed Regulations would continue to be dealt with under the AusCheck Regulations that were in force at that time, and that the amendments made by the proposed Regulations apply to applications for background checks made after the instrument commences.

Aviation Transport Security Regulations 2005

The amendments to the *Aviation Transport Security Regulations 2005* (the Aviation Regulations) made by this instrument expand the concept of an *aviation security relevant offence* to align with the similar concept used in the *Maritime Transport and Offshore Facility Security Regulations 2003* (the Maritime Regulations). The amendments also introduce ‘tiered’ offences that would mean a person has an *adverse criminal record* which may affect the eligibility of a person to hold, or be issued, an aviation security identification card (ASIC).

Item [15] – Subregulation 6.01(1) (definition of *aviation-security-relevant offence*)

This item amends subregulation 6.01(1) of Division 6.1 of Part 6 of the Aviation Regulations to repeal the current definition of *aviation-security-relevant offence*, and substitute a new definition of that term.

The New definition provides that *aviation-security-relevant offence* means an offence, of a kind mentioned in an item of a table in Schedule 1 against a law of (a) the Commonwealth, a State or Territory or (b) a foreign country or part of a foreign country.

The purpose and effect of this amendment is to direct the reader to the *aviation-security-relevant offences* listed as items in tables located in Schedule 1 to the Aviation Regulations.

Item [16] – Subregulation 6.01(1) (definition of *qualified criminal record*)

This item amends subregulation 6.01(1) of Division 6.1 of Part 6 of the Aviation Regulations to repeal the definition of *qualified criminal record*.

The purpose and effect of this amendment is to reflect the move to the concept of *adverse criminal record* and categorisation of tier 1, 2 and 3 offences by reference to the newly-inserted tables in Schedule 1 to the Aviation Regulations. As a consequence of the conceptual change, a definition for *qualified criminal record* is no longer necessary.

Item [17] – Subregulation 6.01(1)

This item amends subregulation 6.01(1) of Division 6.1 of Part 6 of the Aviation Regulations to insert new definitions of *tier 1 offence*, *tier 2 offence*, and *tier 3 offence*.

The new definitions provide that:

- a *tier 1 offence* means an *aviation-security-relevant offence* mentioned in the table in clause 1 of Schedule 1 to the Aviation Regulations;
- a *tier 2 offence* means an *aviation-security-relevant offence* mentioned in the table in clause 2 of Schedule 1 to the Aviation Regulations; and
- a *tier 3 offence* means an *aviation-security-relevant offence* mentioned in the table in clause 3 of Schedule 1 to the Aviation Regulations.

The purpose and effect of this amendment is to define the terms tier 1, 2 and 3 for the purposes of the regulations by referencing the offences set out in Schedule 1 to the Aviation Regulations.

Item [18] – Subregulation 6.01(2)

This item amends regulation 6.01 of Division 6.1 of Part 6 of the Aviation Regulations to repeal subregulation 6.01(2) and substitute a new subregulation 6.01(2) which relates to the definition of *adverse criminal record*.

New subregulation 6.01(2) provides that a person has an *adverse criminal record* if the person (a) has been convicted of a *tier 1 offence* or a *tier 2 offence*; or (b) has been convicted of, and sentenced to imprisonment for, a *tier 3 offence*.

This item is consequential to the introduction of the definitions for *tier 1 offence*, *tier 2 offence*, and *tier 3 offence* in regulation 6.01 of the Aviation Regulations made by item 17 of this instrument, above.

Item [19] – Subregulation 6.01(3)

This item amends regulation 6.01 of Division 6.1 of Part 6 of the Aviation Regulations to repeal subregulation 6.01(3).

Previously, subregulation 6.01(3) provided the substantive meaning of the term *qualified criminal record* and operated in conjunction with the sign-post definition of the term in subregulation 6.01(1).

The purpose and effect of this amendment is to reflect the move to the concept of *adverse criminal record* and categorisation of tier 1, 2 and 3 offences by reference to the newly-inserted tables in Schedule 1 to the Aviation Regulations. As a consequence of the conceptual change, and as a direct consequence of the amendment proposed by item 16 above, the meaning for the term *qualified criminal record* is no longer required.

Item [20] – Subregulation 6.28(1)

This item amends subregulation 6.28(1) of Subdivision 6.5.2 of Division 6.5 of Part 6 of the Aviation Regulations to omit “(4D) and (4H)”, and substitute “(4D)”.

This item is consequential to the repeal of subregulation 6.28(4H) proposed by item 22 of this instrument, below.

Item [21] – Subparagraph 6.28(1)(d)(i)

This item amends subparagraph 6.28(1)(d)(i) of Subdivision 6.5.2 of Division 6.5 of Part 6 of the Aviation Regulations to omit the words “or a qualified criminal record”.

This item is consequential to the repeal of the definition of *qualified criminal record* made by item 16, above.

The purpose and effect of this amendment is to remove a reference to the concept of qualified criminal record that would no longer be necessary.

Item [22] – Subregulation 6.28(4H)

This item amends regulation 6.28 of Subdivision 6.5.2 of Division 6.5 of Part 6 of the Aviation Regulations, which deals with the circumstances in which an issuing body may issue ASICs, to repeal subregulation 6.28(4H).

Subregulation 6.28(4H) previously provided that the issuing body may issue an ASIC to a person who had his or her ASIC cancelled under paragraph 6.43(2)(da).

Paragraph 6.43(2)(da) previously dealt with immediate cancellation of an ASIC if notice is received that the holder has a *qualified criminal record*. Paragraph 6.43(2)(da) is amended by item 32 of this instrument, and the definition of *qualified criminal record* is repealed by item 3 of this instrument.

This item is consequential to the repeal of a defined term proposed by item 3 of this instrument, above, and the amendment to paragraph 6.43(2)(da) proposed by item 32 of this instrument, below.

Item [23] – Subregulation 6.29(1)

This item amends regulation 6.29 of Subdivision 6.5.2 of Division 6.5 of Part 6 of the Aviation Regulations, to repeal current subregulation 6.29(1) and substitute a new subregulation 6.29(1).

New subregulation 6.29(1)

New subregulation 6.29(1) operates to provide that an issuing body or an applicant may make a written application to the Secretary for permission for an ASIC to be issued to the person in circumstances where: the person is not eligible to be issued an ASIC because he or she: (i) has an *adverse criminal record*; or (ii) is disqualified under regulation 6.48 from holding an ASIC; and (b) the only other reason (if any) the person is not eligible is that the person does not have an *operational need* for an ASIC; and (c) the person has not been convicted of a *tier 1 offence*.

New subregulation 6.29(1) substantially replicates previous subregulation 6.29(1), with the addition of a reference to a person not being eligible by reason of not having an *operational need* and a reference to the person not having been convicted of a *tier 1 offence*.

The note following subregulation 6.29(1) makes clear that if the person does not have an *operational need* for an ASIC, an ASIC must not be issued until the person has an *operational need* (see subregulation 6.29(7)).

The purpose and effect of this amendment is make clear that an issuing body, or an applicant, may only apply to the Secretary for permission for an ASIC to be issued in certain circumstances, and may not make an application under regulation 6.29 if the applicant has been convicted of a *tier 1 offence*, which would disqualify an applicant from being issued an ASIC.

Item [24] – Subregulation 6.32(2)

This item amends subregulation 6.32(2) of Subdivision 6.5.2 of Division 6.5 of Part 6 of the Aviation Regulations, which deals with the periods an ASIC is issued for and

the circumstances of expiry of an ASIC, to omit “subregulations (3) and (4)” and to substitute “subregulation (3)”.

This item is a technical amendment, consequential to the amendment proposed by item 25, below, which proposes repealing subregulation 6.32(4).

The purpose and effect of this amendment is to remove a reference to a repealed provision.

Item [25] – Subregulation 6.32(4)

This item amends regulation 6.32 of Subdivision 6.5.2 of Division 6.5 of Part 6 of the Aviation Regulations, to repeal subregulation 6.32(4).

Previously, subregulation 6.32(4) dealt with when an ASIC issued to a person with a *qualified criminal record* expires. The concept of a *qualified criminal record* is removed from the Aviation Regulations by a combination of the amendments proposed by items 16 and 19.

This item is a technical amendment that is consequential to the combination of amendments mentioned above.

Item [26] – Before subregulation 6.41(1)

This item amends regulation 6.41 of Subdivision 6.5.3A of Division 6.5 of Part 6 of the Aviation Regulations, which deals with the obligations of applicants for, and holders of, ASICs in relation to notifying of a conviction of an *aviation-security-relevant offence*, to insert a new subregulation 6.41(1A) before subregulation 6.41(1).

New subregulation 6.41(1A)

New subregulation 6.41(1A) provides that subregulation 6.41(1) applies if a person who is an applicant for, or the holder of, an ASIC is (a) convicted and sentenced for a *tier 1 offence* or a *tier 2 offence*; or (b) convicted of, and sentenced to imprisonment for, a *tier 3 offence*.

Subregulation 6.41(1), as amended by the proposed Regulations, imposes a positive obligation on a person who is an applicant for, or the holder of, an ASIC if they are, or have been, convicted of and sentenced for a *tier 1* or *tier 2* offence that is an *aviation-security-relevant offence*, or if the person is, or has been, convicted of and sentenced to imprisonment for a *tier 3* offence that is an *aviation-security-relevant offence* to notify the issuing body or the Secretary in writing of certain matters within 7 days.

The purpose and effect of this amendment is to make clear which offences and circumstances would trigger the application of the 7 day period in which to give written notification to the issuing body or the Secretary.

Item [27] – Subregulation 6.41(1)

This item amends subregulation 6.41(1) of Subdivision 6.5.3A of Division 6.5 of Part 6 of the Aviation Regulations by repealing the chapeau and substituting a new chapeau.

The previous chapeau of subregulation 6.41(1) operated to provide that if a person who is an applicant for, or the holder of, an ASIC is convicted of and sentenced for an *aviation-security-relevant offence*, the person must notify the issuing body or the Secretary AGD in writing of the matters in paragraphs 6.41(1)(a) to (e) within 7 days.

The substituted chapeau of subregulation 6.41(1) operates to provide that within 7 days after being sentenced, the person must notify the issuing body or the Secretary in writing of the matters in paragraphs 6.41(1)(a) to (e). The ‘person’ in this instance is the person who holds, or is an applicant for, an ASIC. The amendment made by this item substantially replicates the previous chapeau of subregulation 6.41(1).

The purpose and effect of this amendment is to simplify and clarify the language that describes the timeframe for giving written notice to the issuing body or the Secretary of the matters in paragraphs 6.41(1)(a) to (e).

Please note that Item 28 immediately below replaces all references in the Aviation Regulations to “Secretary AGD” with a reference to “Secretary”.

Item [28] – Subregulations 6.41(2) to (4)

This item amends subregulations 6.41(2) to (4) of Subdivision 6.5.4 of Division 6.5 of Part 6 of the Aviation Regulations to omit all references to “AGD” wherever they occur.

The Administrative Arrangement Orders registered on 5 January 2018 (C2018Q00002) shifted administrative responsibility for the AusCheck Act (and the AusCheck Regulations) from the Attorney-General to the Minister for Home Affairs. Under the AusCheck Act and its regulations, the Secretary of the agency is empowered to make certain decisions and to give notice of, or advice in relation to, certain matters. This is recognised in subregulations 6.41(2) to (4) of the Aviation Regulations, which currently refer to “the Secretary AGD”.

As a consequence of administrative responsibility moving to the Department of Home Affairs, references to “the Secretary” should be to the Secretary of the Department of Home Affairs rather than to the Secretary AGD.

The amendments made by this item are consequential amendments that would remove references that are no longer necessary as a result of changed administrative arrangements.

Item [29] – Subregulation 6.42A(1)

This item amends regulation 6.42A of Subdivision 6.5.4 of Division 6.5 of Part 6 of the Aviation Regulations, which deals with suspension of an ASIC at the Secretary’s direction, by repealing subregulation 6.42A(1) and substituting a new subregulation 6.42A(1).

New subregulation 6.42A(1)

New subregulation 6.42A(1) provides the Secretary with the discretion to direct an issuing body, in writing, to suspend an ASIC if (a) the holder of the ASIC has been convicted of an *aviation-security-relevant offence*, but has not yet been sentenced for

the offence; and (b) the Secretary reasonably considers that either: (i) the holder of the ASIC constitutes a threat to aviation security; or (ii) there is a risk that the holder of the ASIC may use aviation in connection with serious crime.

The Secretary may “reasonably consider” that the holder constitutes a threat to aviation security, or that there is a risk that the holder may use aviation in connection with serious crime as result of a background check that establishes that a person has an *adverse criminal record* in relation to an *aviation-security-relevant offence*, taking the seriousness of the offence and the circumstances of the offending into account.

The purpose and effect of this amendment is to introduce an additional ground for the discretionary suspension of a person’s ASIC to cater for circumstances where the Secretary reasonably considers that there is a risk that the holder of the ASIC may use aviation in connection with serious crime.

Item [30] – Subregulation 6.42A(2)

This item amends the chapeau of subregulation 6.42A(2) of Subdivision 6.5.4 of Division 6.5 of Part 6 of the Aviation Regulations to omit the words “the holder constitutes a threat to aviation security”, and substitute the words “considering whether subparagraph (1)(b)(i) or (ii) applies”.

The amendment made by this item is consequential to the amendment made by item 29 above.

The purpose and effect of this amendment is to include both grounds set out in paragraph 6.42A(1)(b) in relation to the Secretary considering the exercise of the power to impose a discretionary suspension of a person’s ASIC.

Item [31] – Regulation 6.42C

The amendment made by this item repeals regulation 6.42C of Subdivision 6.5.4 of Division 6.5 of Part 6 of the Aviation Regulations, and substitutes a new regulation 6.42C to deal with the period of suspension of an ASIC.

New regulation 6.42C

New subregulation 6.42C(1) operates to provide that unless subregulation 6.42C(2) applies, the suspension of an ASIC continues until the ASIC is cancelled or expires.

New subregulation 6.42C(2) provides that if (a) the Secretary notifies the issuing body that issued the ASIC of the outcome of a background check of the ASIC holder; and (b) the issuing body is not required under regulation 6.43 to cancel the ASIC, the suspension of the ASIC ends on the day after the issuing body is notified.

The note following proposed subregulation 6.42C(2) provides that provisions relating to the conduct of a background check when the holder of an ASIC has been convicted of an *aviation-security-relevant offence* include regulations 6.27AA and 6.41 of the Aviation Regulations, and section 8 of the *AusCheck Regulations 2017* (AusCheck Regulations).

The purpose and effect of the amendment made by this item is to make clear that if an ASIC has been suspended, the ASIC continues to be suspended until the ASIC is cancelled or expired, unless the Secretary has notified the issuing body that the card does not need to be cancelled under regulation 6.43. This amendment does not alter the application or operation of the previous regulation 6.42C, except to the extent that it removes a reference to the formerly defined *qualified criminal records*.

Item [32] – Paragraph 6.43(2)(da)

This item amends subregulation 6.43(2) of Subdivision 6.5.5 of Division 6.5 of Part 6 of the Aviation Regulations by repealing current paragraph 6.43(2)(da) and substituting a new paragraph 6.43(2)(da).

New paragraph 6.43(2)(da)

New paragraph 6.43(2)(da) operates to provide that an issuing body must immediately cancel an ASIC if the Secretary advises the issuing body that a background check of the holder has been cancelled under section 11A of the AusCheck Regulations.

Previously, where an ASIC holder required an additional background check, they could continue to hold a card and have access to secure zones even where a background check could not be completed as a result of not having provided the required information.

Subsection 11A(7) of the AusCheck Regulations provides a power to seek additional information from an individual or issuing body for the purposes of a background check, and to cancel the background check where the individual or issuing body fails to provide the requested information within the period stipulated.

The purpose and effect of this amendment is to remove a redundant reference to *qualified criminal records* and to make clear that an issuing body must cancel an ASIC if the background check of the ASIC holder has been cancelled under section 11A of the AusCheck Regulations.

Item [33]– After subregulation 6.43(2A)

This item amends subregulation 6.43(2A) to omit all of the words after paragraph (b), and substitutes: if:(c) the notice that the holder has an adverse criminal record relates to an application for a new ASIC; or (d) the Secretary advises the issuing body that there has been no material change in the holder’s criminal history.

The purpose and effect of this amendment is to simplify, clarify and expand on the existing circumstances in which an issuing body must not cancel an ASIC if the issuing body receives notice that the ASIC holder has an *adverse criminal record*, if the circumstances are that the notice that the holder has an *adverse criminal record* relates to an application for a new ASIC, or the Secretary advises the issuing body that there has been no material change in the holder’s criminal history.

Item [34]– After subregulation 6.43A(2)

This item amends regulation 6.43A of Subdivision 6.5.5 of Division 6.5 of Part 6 of the Aviation Regulations to insert a new subregulation 6.43A(2A) after subregulation 6.43A(2).

Regulation 6.43A deals with applications for reinstatement of cancelled ASICs. Subregulation 6.43A(2) provides that the former holder of the ASIC or the issuing body may apply to the Secretary, in writing, for the cancellation to be set aside.

New subregulation 6.43A(2A)

New subregulation 6.43(2A) is an exception to subregulation 6.43A(2). Subregulation 6.43(2A) provides that an application must not be made if the former holder of the ASIC has been convicted of a *tier 1 offence*.

As noted above, being convicted of a *tier 1 offence* would disqualify a person from holding an ASIC.

The purpose and effect of this amendment is to make clear that, despite a provision permitting an application to be made for an ASIC to be reinstated after cancellation, an application must not be made if the former holder of the ASIC has been convicted of a *tier 1 offence*.

Item [35] – At the end of subregulation 6.44(2)

This item amends subregulation 6.44(2) of Subdivision 6.5.5 of Division 6.5 of Part 6 of the Aviation Regulations to insert the words “or the use of aviation in connection with serious crime” at the end of the subregulation.

Subregulation 6.44(2) previously provided the Secretary with the discretion to pass information on to other issuers (issuing bodies) in relation to the cancellation of ASICs, VICs and TACs if the Secretary thinks that doing so will help to prevent unlawful interference with aviation.

The purpose and effect of this amendment is to give the Secretary an additional discretion to notify other issuers that the holder’s ASIC has been cancelled if the Secretary considers that it could prevent the use of aviation in connection with serious crime. The amendment is a discretion to notify issuing bodies in addition to the existing arrangements if the Secretary thinks that doing so will help the prevention of unlawful interference with aviation.

Item [36] – In the appropriate position in Part 10

This Item inserts New Division 20 into Part 10 of the Aviation Regulations to deal with amendments made by the Amending Regulations, and inserts new regulations 10.44, 10.45 and 10.46.

New regulation 10.44

New regulation 10.44 deals with terms defined for the Division. New regulation 10.44 operates to provide that:

- ***amended Regulations*** means Aviation Regulations as amended by the amending Regulations.
- ***amending Regulations*** means the *Transport Security Legislation (Serious Crime) Regulations 2021*.
- ***convicted*** has the same meaning as in Part 6 of the amended Regulations.
- ***old Regulations*** means the Aviation Regulations as in force immediately before the commencement of the amending Regulations.

The purpose and effect of this amendment is to provide clarity for certain terms used within Division 20 of the Aviation Regulations.

New regulation 10.45

New regulation 10.45 deals with the continued application of the *old Regulations* (as defined by new regulation 10.44).

Regulation 10.45 is an application provision, which provides that, despite the amendments made to the Aviation Regulations by the *amending Regulations*, the *old Regulations* would continue to apply in relation to: (a) an application for a background check made before the commencement of the amending Regulations; (b) an application made to the Secretary under regulation 6.29 that (i) is made before the commencement of the *amending Regulations*; or (ii) relates to the outcome of a background check to which the *old Regulations* apply; and (c) an application made to the Secretary under regulation 6.43A before the commencement of the *amending Regulations*.

New regulation 10.46

New regulation 10.46 deals with a person's obligation to report a past conviction for an *aviation-security-relevant offence*.

Subregulation 10.46(1) is an application provision, which makes clear that regulation 10.46 applies to a person who is the holder of, or an applicant for, an ASIC when the *amending Regulations* commence in certain circumstances.

If, before the *amending Regulations* commence, the person was convicted of and sentenced for *tier 1 offence* or a *tier 2 offence*, or convicted of, and sentenced to imprisonment for, a *tier 3 offence*, and the offence was not previously an *aviation-security-relevant offence*, subregulation 10.46(1) applies.

The purpose and effect of new subregulation 10.46(1) is to make clear that an obligation to report a past conviction for a *tier 1 offence*, *tier 2 offence* or *tier 3 offence* that is an *aviation-security-relevant offence* under the *amending Regulations* applies to any person who is the holder of, or an applicant for, an ASIC when the *amending Regulations* commence.

Subregulation 10.46(2) provides that the person must notify the issuing body for the ASIC or the Secretary, in writing, of the matters in paragraphs 6.41(1)(a) to (e) in relation to the offence and sets the timeframe for giving notice. A person must notify the Secretary or an issuing body within 30 days after the day the *amending Regulations* commence.

Subregulation 10.46(3) makes it an offence if the person is required to notify an issuing body or the Secretary under subregulation 10.46(2) in relation to an offence, and the person fails to comply with the requirement. This offence carries a 20 penalty unit penalty.

In considering the application of the proposed new subregulation 10.46(3) offence to all holders of, or an applicants for, an ASIC the *Commonwealth Guide to Framing Offences, Infringement Notices and Enforcement Powers* (the Guide) was consulted.

The 20 penalty unit penalty is considered an appropriate penalty to impose in regard a failure to comply with the requirement to report a *tier 1, tier 2 or tier 3 aviation-security-relevant offence* because:

- paragraph 38AB(3)(c) of the Aviation Act sets out the maximum penalty for an offence permitted to be prescribed in the Regulations for a person as 50 penalty units, and this offence is punishable by a fine which does not exceed that threshold;
- the penalty for this offence is similar to others imposed within the Aviation Regulations, and is a lesser penalty than that imposed under existing regulation 6.41 which imposes an obligation on applicants for, and holders of, ASICs in relation to notifying of a conviction for an *aviation-security-relevant offence*;
- this offence and its penalty has a strong element of specific and general deterrence to the offence which operates to encourage compliance with the particular activity of reporting a conviction and sentence for a *tier 1 offence* or *tier 2 offence*, or a conviction of, and sentence of imprisonment for, a *tier 3 offence*;
- this offence and its penalty are imposed for the purposes of safeguarding against unlawful interference with aviation and to prevent the use of aviation in connection with serious crime;
- the penalty for this offence is commensurate with the risk to aviation security that a failure to comply with the obligation to report such offences may pose;
- a lesser penalty may not provide a deterrent to the commission of the offence due to the higher possible gains that could be made by the use of aviation in connection with serious crime; and
- this is a reasonable penalty to impose, as it has the necessary element of specific and general deterrence to the offence whilst not being a manifestly excessive penalty for an offence.

Subregulation 10.46(4) provides that paragraph 6.27AA(1)(c), subregulations 6.41(2) to (4), regulation 6.41A; and paragraph 6.43(2)(db) of the *amended Regulations* apply in relation to notification under subregulation 10.46(2) as if it were notification under subregulation 6.41(1).

The purpose and effect of proposed subregulation 10.46(4) is to make clear that the matters set out in subregulations 6.41(2) to (4) and paragraph 6.43(2)(db) apply in relation to notification given by the holder of, or an applicant for, an ASIC under subregulation 10.46(4).

Item [37] – At the end of the Regulations

This item inserts a new Schedule 1 at the end of the Aviation Regulations to deal with *aviation-security-relevant offences*, as noted in the definition of *aviation-security-relevant offence* in subregulation 6.01(1), introduced by item 25, introduced by the Amending Regulations (see item 25, above).

The note following the heading for Schedule 1 directs the reader to the definitions of *aviation-security-relevant offence*, *tier 1 offence*, *tier 2 offence* and *tier 3 offence* in subregulation 6.01(1).

New Schedule 1

The amendment made by this item inserts a new Schedule 1, with three clauses and a table for each of those clauses listing *aviation-security-relevant offences* that would or may affect a person's eligibility to continue to hold, or to be issued, an ASIC.

The offences are tiered, to represent the significance or seriousness of the offence and are commensurate with the threat to aviation security or risk that aviation may be used in connection with serious crime that a conviction for such an offence would signify.

Clause 1 of Schedule 1 – tier 1 offences

Clause 1 deals with *tier 1 aviation-security-relevant offences*. The table in Clause 1 lists ten offences.

Tier 1 aviation-security-relevant offences represent significant national or international offences such as offences involving terrorism, hijacking or destroying an aircraft, or people trafficking.

A person convicted of a *tier 1 aviation-security-relevant offence* mentioned in an item in the table in Clause 1 will have an *adverse criminal record* and would be disqualified from holding an ASIC, as such a person holding an ASIC with access to secure areas of an airport or an examination facility would constitute a threat to aviation security or would pose an unacceptable risk that aviation may be used in connection with serious crime.

A conviction for a *tier 1 aviation-security-relevant offence* may be disclosed by an applicant for an ASIC during the application process without prompt or request, or it may be discovered during a background check. Alternatively, a person – whether the holder of, or an applicant for, an ASIC – with a conviction for a *tier 1 aviation-security-relevant offence* must notify the issuing body or the Secretary under regulation 6.41 as amended by items 26 and 27 of the Amending Regulations.

Clause 2 of Schedule 1 – tier 2 offences

Clause 2 deals with *tier 2 aviation-security-relevant offences* for which a conviction is adverse. The table in Clause 2 lists five offences.

Tier 2 aviation-security-relevant offences represent serious transport related or criminal offences.

A person convicted of a *tier 2 aviation-security-relevant offence* mentioned in an item in the table in Clause 2 would have an *adverse criminal record* and may be ineligible to be issued an ASIC, or may have their ASIC suspended under regulation 6.42 if they are the holder of an ASIC and paragraph 6.42A(1)(b) applies (see item 30, above).

Clause 3 of Schedule 1 – tier 3 offences

Clause 3 deals with a *tier 3 aviation-security-relevant offence* for which a sentence of imprisonment is adverse. A person convicted of a *tier 3 aviation-security-relevant offence* mentioned in an item in the table in Clause 3 and sentenced to imprisonment for that offence would have an *adverse criminal record*.

The table in Clause 3 lists 26 offences.

Tier 3 aviation-security-relevant offences are serious criminal offences such as murder, supply of drugs, arson and offences relating to sexual exploitation of a child.

The purpose and effect of this amendment is to introduce new *aviation-security-relevant offence* categories to ensure that a person who is considered to be a threat to aviation or is considered to present a risk that aviation may be used in connection with serious crime, does not hold an ASIC.

Maritime Transport and Offshore Facilities Security Regulations 2003

The amendments to the *Maritime Transport and Offshore Facilities Security Regulations 2003* (the Maritime Regulations) made by this instrument expand the concept of a *maritime-security-relevant offence* to align with the similar concept used in the *Aviation Transport Security Regulations 2005* (the Aviation Regulations). The amendments also introduce tiered offences that mean a person has an *adverse criminal record* which may affect the eligibility of a person to hold, or be issued, a maritime security identification card (MSIC).

Item [38] – Subregulation 6.07B(1)

This item amends subregulation 6.07B(1) of Division 6.1A of Part 6 of the Maritime Regulations to insert a definition for *adverse criminal record* that directs the reader to subregulation 6.07B(3) for the meaning of the term *adverse criminal record*.

The term *adverse criminal record* was previously defined in regulation 6.08A and that definition is repealed by the Amending Regulations (see item 43 below). This item is consequential to the amendment proposed by item 43.

The purpose and effect of this amendment is to support the move to the categorisation of *tier 1, 2 and 3 offences* by reference to the newly inserted tables in Schedule 1 of the Maritime Regulations. This amendment will also ensure that this definition aligns with similar provisions in the Aviation Regulations.

Item [39] – Subregulation 6.07B(1) (definition of disqualifying offence)

This item amends subregulation 6.07B(1) of Division 6.1A of Part 6 to repeal the definition of *disqualifying offence*.

This term was previously defined as meaning a *maritime-security-relevant offence* mentioned in Part 1 of Schedule 1 of the Maritime Regulations.

The purpose and effect of this amendment is to reflect the move to the concept of *adverse criminal record* and categorisation of *tier 1, 2 and 3 offences* by reference to the newly-inserted tables in Schedule 1 to the Maritime Regulations. As a consequence of that change, a definition for *disqualifying offence* is no longer necessary.

Item [40] – Subregulation 6.07B(1)

This item amends subregulation 6.07B(1) of Division 6.1A of Part 6 to insert a definition of *imprisonment*. The definition of *imprisonment* includes periodic detention, home-based detention, and detention until the rising of a court, but does not include an obligation to perform community service.

This definition would align with the definition for the term *imprisonment* in the Aviation Regulations.

The purpose and effect of this amendment is to create consistency in the language used in the defined terms in the Aviation and Maritime Regulations, and to ensure that the Aviation and Maritime Regulations take the same approach when dealing with criminal offences.

Item [41] – Subregulation 6.07B(1) (definition of *maritime-security-relevant offence*)

This item amends subregulation 6.07B(1) of Division 6.1A of Part 6 to remove the words ‘relating to a matter mentioned in an item’ in the definition of *maritime-security-relevant offence* and replace them with the words ‘mentioned in an item of a table’.

The purpose and effect of this amendment is to reflect the move from a single table of *maritime-security-relevant offences*, to the categorisation of tier 1, 2 and 3 offences in the newly inserted tables in Schedule 1 to the Maritime Regulations.

Item [42] – Subregulation 6.07B(1)

This item amends subregulation 6.07B(1) of Division 6.1A of Part 6 of the Maritime Regulations to insert new definitions of a *tier 1 offence*, *tier 2 offence*, and *tier 3 offence*.

The definitions provides that:

- a *tier 1 offence* means a *maritime-security-relevant offence* mentioned in the table in clause 1 of Schedule 1 to the Maritime Regulations;
- a *tier 2 offence* means a *maritime-security-relevant offence* mentioned in the table in clause 2 of Schedule 1 to the Maritime Regulations; and

- a *tier 3 offence* means a *maritime-security-relevant offence* mentioned in the table in clause 3 of Schedule 1 to the Maritime Regulations.

The purpose and effect of this amendment is to direct the reader to the tier 1, 2 and 3 offences in the corresponding tables in clauses 1, 2, or 3 of Schedule 1 to the Maritime Regulations.

Item [43] – At the end of regulation 6.07B

This item amends regulation 6.07B of Division 6.1A of Part 6 of the Maritime Regulations to insert a new subregulation 6.07B(3), which provides that a person has an *adverse criminal record* if the person (a) has been convicted of a *tier 1 offence* or a *tier 2 offence*; or (b) has been convicted of, and sentenced to imprisonment for, a *tier 3 offence*.

The amendment made by this item is consequential to the introduction of the definitions for a *tier 1 offence*, *tier 2 offence*, and *tier 3 offence* in regulation 6.07B of the Maritime Regulations made by item 42 of this instrument, above.

The purpose and effect of this amendment is to direct the reader to the *maritime-security-relevant offences* which are *tier 1*, *tier 2*, and *tier 3 offences* listed as items in the tables in clauses 1, 2, or 3 of Schedule 1 to the Maritime Regulations.

Item [44] – Subregulation 6.07K(2)

This item amends regulation 6.07K of Subdivision 6.1A.2 of Division 6.1A of Part 6 of the Maritime Regulations to repeal subregulation 6.07K(2) and substitute a new subregulation 6.07K(2).

Previously subregulation 6.07K(2) provided that the offence created in subregulation (1) does not apply to a person who is a visitor to a maritime security zone for the purpose of boarding or leaving a vessel as part of a recreational activity.

New subregulation 6.07K (2)

New subregulation 6.07K(2) operates to provide that the offence created in subregulation 6.07K(1) does not apply to a person who is a visitor to a maritime security zone for the purpose of boarding or leaving a vessel (a) as part of a recreational activity or (b) as a passenger. The amendment made by this item would substantially replicate existing subregulation 6.07K(2), with the addition of the reference to a passenger.

The note following new subregulation 6.07K(2) provides that a defendant bears an evidential burden in relation to the matter in subsection (2), and directs the reader to see subsection 13.3(3) of the *Criminal Code*.

Drafting conventions now require a standard note about exceptions. The same rule with respect to evidential burden already applied to the former subregulation 6.07K(2), even though it was not explicitly stated.

The note following subregulation 6.07K(2) indicates a reversal of the evidential burden in relation to making out a defence of a matter contained in subregulation

6.07K(1) which is unusual, but not without precedent. In criminal matters the defendant would ordinarily be entitled to the presumption of innocence and it would be for the prosecution to adduce evidence of a matter. Similarly, generally in civil matters the evidential burden would lie on the plaintiff with respect to all essential elements of the matter. The note following the amendment indicates a reversal of the criminal evidential burden.

The reversal of the evidential burden is appropriate in this instance as the information to raise the possibility of one or more of the elements of the defence would be, if not peculiarly within the knowledge of the defendant, at least better known to the defendant than to the prosecution or to any individual third party. Consequently it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. For example, it is appropriate in this case for the defendant to provide evidence that their purpose for boarding or leaving a vessel in the maritime security zone was because it was part of a recreational activity or because they were a passenger, as that is something within their knowledge.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* notes that an evidential burden does not completely displace the prosecutor's burden, but only defers that burden. The defendant must point to evidence establishing a reasonable possibility that these defences are made out.

The purpose and effect of the amendment made by this item is to expand the exemption in subregulation 6.07K(2) to persons who are visitors to a maritime security zone for the purpose of boarding or leaving a vessel as a passenger.

Item [45] – Regulation 6.08A

This item repeals regulation 6.08A of Subdivision 6.1A.4 of Division 6.1A of Part 6 of the Maritime Regulations. Previously regulation 6.08A provided for the definition of *adverse criminal record*.

As a consequence of the conceptual change to the meaning for the term, *adverse criminal record* is now located more appropriately under regulation 6.07B, and the definition previously located in regulation 6.08A is no longer required.

The purpose and effect of this amendment is to reflect changes to the concept of *adverse criminal record* and categorisation of tier 1, 2 and 3 offences by reference to the newly-inserted tables in Schedule 1 to the Maritime Regulations.

Item [46] – Paragraph 6.08BA(c)

This item amends paragraph 6.08BA(c) of Subdivision 6.1A.4 of Division 6.1A of Part 6 of the Maritime Regulations to repeal existing paragraph 6.08BA (c) and substitute new paragraph 6.08BA(c), which provides that the holder of an MSIC who has notified the issuing body under regulation 6.08LB that the holder has been convicted of and sentenced for a maritime-security-relevant offence.

Previously, paragraph 6.08BA(c) operated to provide that an issuing body may apply to the Secretary for a background check on the holder of an MSIC who tells the issuing body, in writing, that the holder has been (i) convicted of a disqualifying

offence, or (ii) convicted of any other *maritime-security-relevant offence* and sentenced to imprisonment for the offence.

This item is consequential to the repeal of the definition of *disqualifying offence*.

The purpose and effect of this proposed amendment is to reflect the new categorisation of tier 1, 2 and 3 *maritime-security-relevant offences*.

Item [47] – Regulation 6.08D (heading)

This item amends the heading to regulation 6.08D of Division 6.1A of Part 6 of the Maritime Regulations, by omitting the word “offence”, so that the heading more accurately reflects the operation of the provision.

Item [48] – Paragraph 6.08D(1)(a)

This item amends paragraph 6.08D(1)(a) of Division 6.1A of Part 6 of the Maritime Regulations to remove the words ‘disqualifying offence’ and replace them with the words “tier 1 offence”.

The purpose and effect of this amendment is to reflect the move away from the concept of a *disqualifying offence* to the concept of *adverse criminal record* and the categorisation of tier 1, 2 and 3 offences.

Item [49] – Subregulation 6.08D(3)

This item amends the chapeau of subregulation 6.08D(3) of Division 6.1A of Part 6 of the Maritime Regulations to insert the words “or to prevent the use of maritime transport or offshore facilities in connection with serious crime” after the words “offshore facilities”.

Previously, subregulation 6.08D(3) empowered the Secretary, if the Secretary thought it was necessary to do so in order to prevent unlawful interference with maritime transport or offshore facilities, to direct an issuing body to provide certain information; and to give a notice to person’s employer stating that the person had been issued a disqualifying notice and providing the information obtained from the issuing body.

The purpose and effect of this amendment is to expand the purpose mentioned in the subregulation, to also include the new purpose of preventing the use of maritime transport or offshore facilities in connection with serious crime.

Item [50] – Paragraph 6.08F(1)(b)

This item amends paragraph 6.08F(1)(b) of Division 6.1A of Part 6 of the Maritime Regulations to remove the words “disqualifying offence” and replace them with the words “tier 1 offence”.

The purpose and effect of this amendment is to reflect the move away from the concept of a *disqualifying offence* to the concept of an *adverse criminal record* that includes the categorisation of *tier 1 offences*.

Item [51] – Subregulation 6.08F(8)

This item amends subregulation 6.08F(8) of Division 6.1A of Part 6 of the Maritime Regulations to insert the words “or to prevent the use of maritime transport or offshore facilities in connection with serious crime” after the words “offshore facilities”.

Previously subregulation 6.08F(8) empowered the Secretary, if the Secretary thought it was necessary to do so in order to prevent unlawful interference with maritime transport or offshore facilities, to direct an issuing body to provide certain information; and give a notice to person’s employer stating that the Secretary has refused to approve the issue of an MSIC to the person.

The purpose and effect of this amendment is to expand the purpose mentioned in the subregulation, to also include the new purpose of preventing the use of maritime transport and offshore facilities in connection with serious crime.

Item [52] – Subregulation 6.08H(1)

This item amends subregulation 6.08H(1) of Division 6.1A of Part 6 of the Maritime Regulations to insert the words “who applied to an issuing body for the issue of an MSIC” after the words “a person”.

Regulation 6.08H grants the Secretary certain powers in relation to dealing with persons that are the subject of a qualified security assessment.

The purpose and effect of this amendment is to make clear that the powers in regulation 6.08H will only be available in relation to applicants for MSICs and they will not apply to people who already hold an MSIC.

Item [53] – Paragraphs 6.08LB(1)(a) and (b)

This item amends paragraphs 6.08LB(1)(a) and (b) of Division 6.1A of Part 6 of the Maritime Regulations, which deals with the obligations of applicants for, and holders of, MSICs in relation to notifying of a conviction of an *maritime-security-relevant offence*.

This item would repeal the existing paragraphs and substitute new paragraphs.

New paragraphs 6.08LB(1)(a) and (b)

New paragraphs 6.08LB(1)(a) and (b) operate to provide that subregulation 6.08LB(2) applies if a person who is an applicant for, or the holder of, an MSIC is (a) convicted and sentenced for a *tier 1 offence* mentioned in the table in clause 1 of Schedule 1 or a *tier 2 offence* mentioned in the table in clause 2 of Schedule 1; or (b) has been convicted of an *tier 3 offence* mentioned in the table in clause 3 of Schedule 1 and sentenced to imprisonment.

Subregulation 6.08LB(2) imposes a positive obligation on a person who is an applicant for, or the holder of, an MSIC if they are convicted of and sentenced for a *maritime-security-relevant offence*, to notify the issuing body or the Secretary in writing of certain matters within 7 days.

The purpose and effect of this amendment is to make clear which offences and circumstances would trigger the application of the 7 day period in which to give written notification to the issuing body or the Secretary.

Item [54] – Subregulations 6.08LB(2) to (5)

This item amends subregulations 6.08LB(2) to (5) of Subdivision 6.1A.4 of Division 6.1A of Part 6 of the Maritime Regulations to omit all references to “AGD” wherever they occur.

The Administrative Arrangement Orders registered on 5 January 2018 (C2018Q00002) shifted administrative responsibility for the AusCheck Act (and the AusCheck Regulations) from the Attorney-General to the Minister for Home Affairs. Under the AusCheck Act and its regulations, the Secretary of the agency is empowered to make certain decisions and to give notice of, or advice in relation to, certain matters. This is recognised in subregulations 6.08LB(2) to (5) of the Maritime Regulations, which currently refer to “the Secretary AGD”.

As a consequence of administrative responsibility moving to the Department of Home Affairs, references to “the Secretary” should be to the Secretary of the Department of Home Affairs rather than to the Secretary AGD.

Item [55] – Paragraph 6.08LC(1)(a)

This item would repeal paragraph 6.08LC(1)(a), and substitute a proposed new paragraph 6.08LC(1)(a), that would operate to provide that the Secretary may apply for a background check on a person who is an applicant for, or the holder of, an MSIC if the Secretary considers on reasonable grounds that the person has been convicted of a *maritime-security-relevant offence*.

This item substantially replicates the substance of current paragraph 6.08LC(1)(a), except to the extent that it removes a reference to a person who has been convicted of a *disqualifying offence*. The amendment proposed by this item is consequential to the proposed repeal of the definition of *disqualifying offence* in these proposed Regulations.

Item [56] – Subregulation 6.08LE(1)

This item repeals subregulation 6.08LE(1) of Division 6.1A of Part 6 of the Maritime Regulations, and replace it with a new subregulation 6.08LE(1). Currently subregulation 6.08LE(1) empowers the Secretary to direct an issuing body to suspend an MSIC if the holder is convicted of a *maritime-security-relevant offence* and they have not yet been sentenced for the offence.

New subregulation 6.08LE(1) provides that the Secretary can direct an issuing body to suspend an MSIC if (a) the holder is convicted, but not yet sentenced, of a *maritime-security-relevant offence*, or the Secretary reasonably considers that either (b)(i) the holder constitutes a threat to the security of maritime transport or offshore facilities, or (b)(ii) that there is a risk that the holder may use maritime transport or offshore facilities in connection with serious crime.

The Secretary may “reasonably consider” that the holder constitutes a threat to the security of maritime transport or offshore facilities, or that there is a risk that the holder may use maritime transport or offshore facilities in connection with serious crime as result of a background check that establishes that a person has an *adverse criminal record* in relation to a *maritime-security-relevant offence*, taking the seriousness of the offence and the circumstances of the offending into account.

The purpose and effect of the amendment made by this item is to introduce an additional ground for the discretionary suspension of a person’s MSIC to cater for circumstances where the Secretary of the Department of Home Affairs reasonably considers that there is a risk that the holder of the MSIC may use maritime transport or offshore facilities in connection with serious crime. Additionally, this amendment has the purpose and effect of aligning the provision with the equivalent provision in the Aviation Regulations. This is achieved by ensuring it caters for the circumstance where the Secretary of the Department of Home Affairs reasonably considers that a person may constitute a threat to the security of maritime transport and offshore facilities.

Item [57] – Subregulation 6.08LE(2)

This item amends the chapeau of subregulation 6.08LE(2) of Division 6.1A of Part 6 of the Maritime Regulations, by repealing the chapeau and substituting it with the words ‘In considering whether subparagraph (1)(b)(i) or (ii) applies, the Secretary must consider:’.

This item is consequential to the amendment proposed by item 56 above, which introduces new subparagraphs 6.08LE(1)(b) (i) or (ii).

The purpose and effect of this amendment is to include both grounds set out in new subparagraphs 6.08LE(1)(b)(i) or (ii) in relation to the Secretary considering the exercise of the power to impose a discretionary suspension of a person’s MSIC.

Item [58] – Regulation 6.08LG

This item would repeal regulation 6.08LG of Division 6.1A of Part 6 of the Maritime Regulations, and substitute a new regulation 6.08LG to deal with the period of suspension of an MSIC.

New regulation 6.08LG

New subregulation 6.08LG(1) operates to provide that, unless subregulation 6.08LG(2) applies, the suspension of an MSIC continues until the MSIC is cancelled or expires.

New subregulation 6.08LG(2) provides that if (a) the Secretary notifies the issuing body that issued the MSIC of the outcome of a background check of the MSIC holder; and (b) the issuing body is not required under regulation 6.08M to cancel the MSIC the suspension of the MSIC ends on the day after the issuing body is notified.

The note following proposed subregulation 6.08LG(2) provides that provisions relating to the conduct of a background check when the holder of an MSIC has been

convicted of a *maritime-security-relevant offence* include regulations 6.08BA and 6.08LB of the Maritime Regulations, and section 8 of the AusCheck Regulations.

The purpose and effect of the amendment made by this item is to make clear that if an MSIC has been suspended, the MSIC continues to be suspended until the MSIC is cancelled or has expired, unless the Secretary has notified the issuing body that the card does not need to be cancelled under regulation 6.08M. This amendment does not alter the application or operation of the previous regulation 6.08LG, except to the extent that it removes a reference to the formerly defined *qualified criminal records*.

Item [59] – Paragraphs 6.08M(1)(e) and (ea)

This item repeals paragraphs 6.08M(1)(e) and (ea) of Division 6.1A of Part 6 of the Maritime Regulations, and substitutes new paragraphs 6.08M(1)(e) and (ea).

New paragraph 6.08M(1)(e)

New paragraph 6.08M(1)(e) operates to provide that, an issuing body must immediately cancel an MSIC issued by the body if, subject to subregulation (1A), the issuing body has received a notice from the Secretary that the holder has an *adverse criminal record*.

New paragraph 6.08M(1)(ea)

New paragraph 6.08M(1)(ea) operates to provide that an issuing body must immediately cancel an MSIC issued by the body if the Secretary advises the issuing body that a background check of the holder has been cancelled under section 11A of the AusCheck Regulations.

In part the amendments made by this item are consequential to changes in administrative arrangements to the extent that it is now made clear that the relevant Secretary advising the issuing body is the Secretary of the Department of Home Affairs. The amendments made by this item are also consequential to the amendments proposed to the definition of *adverse criminal record* by item 43, above.

The purpose and effect of this amendment is to clarify and simplify two of the circumstances in which an issuing body must immediately cancel an MSIC it has issued.

Item [60]– Subparagraph 6.08M(1)(h)(i)

This item repeals subparagraph 6.08M(1)(h)(i) of Division 6.1A of Part 6 of the Maritime Regulations, and substitute new subparagraph 6.08M(1)(h)(i).

New subparagraph 6.08M(1)(h)(i) would, in conjunction with subparagraph 6.08M(1)(h)(ii), operate to provide that an issuing body must immediately cancel an MSIC issued by the body if: the holder notifies the Secretary or the issuing body under regulation 6.08LB that the holder has been convicted of and sentenced for a maritime-security-relevant offence and the holder does not consent to a background check or does not comply with subregulation 6.08LB(2) and, if requested, subregulation 6.08LB(3).

In part, the amendments made by this item are consequential to changes in administrative arrangements to the extent that it is now made clear that the relevant Secretary being notified by the MSIC holder is the Secretary of the Department of Home Affairs. The amendments made by this item are also consequential to the amendments proposed to the definition of *maritime-security-relevant offence* by item 41, above.

The purpose and effect of this amendment is to clarify and simplify one of the circumstances in which an issuing body must immediately cancel an MSIC it has issued.

Item [61] – Subregulation 6.08M(1) (note)

This item repeals the note following subregulation 6.08M(1) Division 6.1A of Part 6 of the Maritime Regulations.

Previously, the note refers to the definition of *disqualifying offence*, repealed by proposed item 39, above.

The purpose and effect of this amendment is to remove a note that is made redundant because it refers to a repealed definition.

Item [62] – Subregulations 6.08M(1A) and (1B)

This item repeals subregulations 6.08M(1A) and (1B), and substitutes a new subregulation 6.08M(1A) which provides that an issuing body must not cancel an MSIC that was:(a) issued with the approval of the Secretary under regulation 6.08F; or (b) reinstated under regulation 6.08MC; if (c)the notice that the holder has an adverse criminal record relates to an application for a new MSIC; or (d) the Secretary advises the issuing body that there has been no material change in the holder’s criminal history.

The purpose and effect of this amendment is to simplify and clarify the circumstances in which an issuing body must not cancel an MSIC if the issuing body receives notice, given under paragraph 6.08M(1)(e), that the MSIC holder has an *adverse criminal record*, if the circumstances are that the notice that the holder has an adverse criminal record relates to an application for a new MSIC, or the Secretary advises the issuing body that there has been no material change in the holder’s criminal history.

Item [63] – Subregulation 6.08M(6)

This item amends regulation 6.08M of Division 6.1A of Part 6 of the Maritime Regulations, to repeal subregulation 6.08M(6).

Previously, subregulation 6.08M(6) provides that, in this regulation, *imprisonment* has the meaning given by subregulation 6.08LG(4).

This amendment is consequential to the repeal of subregulation 6.08LG(4) effected by item 58, above.

Item [64] – Subregulation 6.08MA(1)

This item amends subregulation 6.08MA(1) of Division 6.1A of Part 6 of the Maritime Regulations, to omit “(ea)”, and to substitute “(e)”.

This amendment is consequential to the amendment proposed by item 59, above, which repeals and substitutes paragraphs 6.08M(1)(e) and (ea).

The purpose and effect of this amendment is to ensure that the reference in subregulation 6.08MA(1) is to the relevant paragraph, as amended by item 59.

Item [65] – Paragraph 6.08MC(1)(a)

This item amends paragraph 6.08MC(1)(a) of Division 6.1A of Part 6 of the Maritime Regulations, to omit “(ea)”, and to substitute “(e)”.

This amendment is consequential to the amendment proposed by item 59, above, which repeals and substitutes paragraphs 6.08M(1)(e) and (ea).

The purpose and effect of this amendment is to ensure that the reference in paragraph 6.08MC(1)(a) is to the relevant paragraph, as amended by item 59.

Item [66] – At the end of subregulation 6.08O(3)

This item amends regulation 6.08O of Division 6.1A of Part 6 of the Maritime Regulations to add the words “, or the use of maritime transport or offshore facilities in connection with serious crime” at the end of subregulation 6.08O(3).

This item would allow the Secretary, under subregulation 6.08O(2), to notify the employer of the former holder of the MSIC, or a maritime industry participant, that the holder’s MSIC has been cancelled if the Secretary considers that doing so could prevent maritime transport or offshore facilities being used in relation to serious crime (in addition to notifying those persons in relation to unlawful interference under current arrangements in regulation 6.08O).

The purpose and effect of this amendment is to reflect the additional new purpose of Part 6 of the Maritime Act – to prevent the use of maritime transport or offshore facilities in connection with serious crime.

Item [67] – Schedule 1

This item would repeal current Schedule 1 to the Maritime Regulations, and insert a new Schedule 1 to deal with *maritime-security-relevant offences*, as noted in the definition of *maritime-security-relevant offence* in subregulation 6.07B(1).

The note following the heading for Schedule 1 directs the reader to the definitions of *maritime-security-relevant offence*, *tier 1 offence*, *tier 2 offence* and *tier 3 offence* in subregulation 6.07B(1).

New Schedule 1

This item inserts a new Schedule 1, with three clauses and a table for each of those clauses listing *maritime-security-relevant offences* that would or may affect a person’s eligibility to continue to hold, or to be issued, an MSIC.

The offences are tiered, to represent the significance or seriousness of the offence and are commensurate with the threat to maritime transport and offshore facility security or risk that maritime transport or an offshore facility may be used in connection with serious crime that a conviction, or a sentence of imprisonment, for such an offence would signify.

Clause 1 of Schedule 1 - tier 1 offences

Clause 1 deals with *tier 1 maritime -security-relevant offences*. The table in Clause 1 lists ten *tier 1 maritime -security-relevant offences*.

Tier 1 maritime -security-relevant offences represent significant national or international offences such as offences involving terrorism, hijacking or destroying a vessel or offshore facility, or an act involving piracy at sea.

A person convicted of a *tier 1 maritime-security-relevant offence* mentioned in an item in the table in Clause 1 will have an *adverse criminal record* and would be disqualified from holding (ineligible to hold) an MSIC, as such a person having access to security zones of a port, or an offshore facility, would constitute a threat to maritime security or would pose an unacceptable risk that maritime transport or an offshore facility may be used in connection with serious crime.

A conviction for a *tier 1 maritime-security-relevant offence* may be disclosed by an applicant for an MSIC during the application process without prompt or request, or it may be discovered during a background check. Alternatively, a person – whether the holder of, or an applicant for, an MSIC – with a conviction for a *tier 1 maritime-security-relevant offence* must notify the issuing body or the Secretary under regulation 6.08LB.

Clause 2 of Schedule 1 - tier 2 offences

Clause 2 deals with *tier 2 maritime-security-relevant offences* for which a conviction is adverse. The table in Clause 2 lists five offences that are *tier 2 maritime-security-relevant offences*.

Tier 2 maritime-security-relevant offences represent serious transport related or criminal offences.

A person convicted of a *tier 2 maritime-security-relevant offence* mentioned in an item in the table in Clause 2 would have an *adverse criminal record* and may be ineligible to be issued an MSIC, or may have their MSIC suspended under regulation 6.08LE if they are the holder of an MSIC and paragraph 6.08LE(1)(b) applies (see item 29, above).

Clause 3 of Schedule 1 - tier 3 offences

Clause 3 deals with *tier 3 maritime-security-relevant offences* for which a conviction and sentence of imprisonment is adverse. A person convicted of a *tier 3 offence* mentioned in an item in the table in Clause 3 and sentenced to imprisonment for that offence would have an *adverse criminal record*.

The table in Clause 3 lists 26 offences that are *tier 3 maritime-security-relevant offences*.

Tier 3 maritime-security-relevant offences are serious criminal offences such as murder, supply of drugs, arson and offences relating to sexual exploitation of a child.

The purpose and effect of this amendment is to introduce new *maritime-security-relevant offence* categories of *tier 1 offences*, *tier 2 offences*, and *tier 3 offences* to ensure that a person who, under regulation 6.08LE, is considered to be a threat to maritime security or who is considered to be a risk that maritime transport or an offshore facility may be used in connection with serious crime, does not hold an MSIC.

Item [68] – In the appropriate position in Schedule 2

This Item inserts New Part 11 in Schedule 2 to the Maritime Regulations, which deals with amendments made by the proposed Regulations, and would insert new regulations 112, 113, and 114.

New regulation 112

New regulation 112 deals with terms defined for Part 11. New regulation 112 operates to provide that:

- ***amended Regulations*** means the Maritime Regulations as amended by the amending Regulations.
- ***amending Regulations*** means the *Transport Security Legislation (Serious Crime) Regulations 2021*.
- ***convicted*** has the same meaning as in Division 6.1A of the amended Regulations.
- ***old Regulations*** means the Maritime Regulations as in force immediately before the commencement of the amending Regulations.

The purpose and effect of this amendment is to provide clarity for certain terms used within Part 11 of the Maritime Regulations.

New regulation 113

New regulation 113 deals with the continued application of the *old Regulations*.

Subregulation 113 (1) provides that despite the amendments made to the Maritime Regulations by the *amending Regulations*, the *old Regulations* would continue to apply in relation to (a) an application for a background check made before the commencement of the *amending Regulations*, (b) an application made to the Secretary under regulation 6.08F that (i) is made before the commencement of the *amending Regulations*; or (ii) relates to the outcome of a background check to which the *old Regulations* apply; and (c) an application made to the Secretary under regulation 6.08MA before the commencement of the *amending Regulations*; and (c) an application made to the Secretary under regulation 6.08MA before the commencement of the *amending Regulations*.

The purpose and effect of the amendment made by this item is to make clear that if an application for a background check, or under regulation 6.08F or regulation 6.08MA was made before the *Transport Security Legislation (Serious Crime) Regulations 2021* commences, the *old Regulations* will apply to those applications.

New regulation 114

New regulation 114 is an application provision that deals with a person's obligation to report a past conviction for a *maritime-security-relevant offence*.

Subregulation 114 (1) makes it clear that regulation 114 applies to a person who is the holder of, or an applicant for, an MSIC when the *amending Regulations* commence in certain circumstances.

If, before the *amending Regulations* commence, the holder of, or an applicant for, an MSIC was convicted of and sentenced for a *tier 1 or a tier 2 maritime-security-relevant offence*, or convicted of, and sentenced to imprisonment for, a *tier 3 maritime-security-relevant offence*, and the offence was not previously a *maritime-security-relevant offence*, subregulation 114(1) applies.

The purpose and effect of subregulation 114(1) is to make clear that an obligation to report a past conviction for a *tier 1, tier 2 or tier 3 maritime-security-relevant offence* under the *amending Regulations* applies to any person who is the holder of, or an applicant for, an MSIC when the *amending Regulations* commence.

Subregulation 114(2) provides that the person must notify the issuing body for the MSIC or the Secretary, in writing, of the matters in paragraphs 6.08LB(2)(a) to (e) in relation to the offence and sets the timeframe for giving notice. A person must notify the Secretary within 30 days after the day the *amending Regulations* commence.

Subregulation 114(3) makes it an offence if the person is required to notify an issuing body or the Secretary under subregulation 114(2) in relation to an offence, and the person fails to comply with the requirement. This offence carries a 20 penalty unit penalty.

In considering the application of the subregulation 114(3) offence to all holders of, or an applicants for, an MSIC the *Commonwealth Guide to Framing Offences, Infringement Notices and Enforcement Powers* (the Guide) was consulted.

The 20 penalty unit penalty is considered an appropriate penalty to impose in regard a failure to comply with the requirement to report a *tier 1, tier 2 or tier 3 maritime-security-relevant offence*, because:

In considering the application of the subregulation 114(3) offence to all holders of, or an applicants for, an MSIC the *Commonwealth Guide to Framing Offences, Infringement Notices and Enforcement Powers* (the Guide) was consulted.

The 20 penalty unit penalty is considered an appropriate penalty to impose in regard a failure to comply with the requirement to report a *tier 1, tier 2 or tier 3 maritime-security-relevant offence*, because:

- paragraph 113F(3)(c) of the Maritime Act sets out the maximum penalty for an offence permitted to be prescribed in the Regulations for a person as 50 penalty units, and this offence is punishable by a fine which does not exceed that threshold;
- the penalty for this offence is similar to others imposed within the Maritime Regulations, and is the same as that imposed under existing regulation 6.08LB which imposes an obligation on applicants for, and holders of, MSICs in relation to notifying of a conviction for an *maritime-security-relevant offence*
- this offence and its penalty has a strong element of specific and general deterrence to the offence which operates to encourage compliance with the particular activity of reporting a conviction and sentence for a *tier 1* or *tier 2 maritime-security-relevant offence*, or a conviction of, and sentence of imprisonment for, a *tier 3 maritime-security-relevant offence*;
- this offence and its penalty is imposed for the purposes of safeguarding against unlawful interference with maritime transport or offshore facilities and to prevent the use of maritime transport or offshore facilities in connection with serious crime;
- the penalty for this offence is commensurate with the risk to maritime security that a failure to comply with the obligation to report such offences may pose;
- a lesser penalty may not provide a deterrent to the commission of the offence due to the higher possible gains that could be made by the use of maritime transport or offshore facilities in connection with serious crime; and
- this is a reasonable penalty to impose, as it has the necessary element of specific and general deterrence to the offence whilst not being a manifestly excessive penalty for an offence.

Subregulation 114(4) provides that: (a) paragraph 6.08BA(c); (b) subregulations 6.08LB(3) to (5); (c) regulation 6.08LBA; and (d) paragraph 6.08M(1)(h) of the *amended Regulations* apply in relation to notification under subregulation 114(2) as if it were notification under subregulation 6.08LB(2).

The purpose and effect of proposed subregulation 114(4) is to make clear that the matters set out in paragraph 6.08BA(c), subregulations 6.08LB(3) to (5), regulation 6.08LBA and paragraph 6.08M(1)(h) would apply in relation to notification given by the holder of, or an applicant for, an MSIC under subregulation 114(4).