

## **SUPPLEMENTARY EXPLANATORY STATEMENT**

Issued by authority of the Minister for Home Affairs

*Aviation Transport Security Act 2004*

*Transport Security Legislation Amendment (Serious Crime) Regulations 2021*

### **Purpose of the Supplementary Explanatory Statement**

The purpose of this Supplementary Explanatory Statement is to provide additional information regarding:

- whether any safeguards apply in relation to protecting personal information about individuals who hold an aviation security identification card (ASIC) or maritime security identification card (MSIC) under sections 13, 14 and 15 of the *AusCheck Regulations 2017* (AusCheck Regulations), as amended by the Amending Regulations (items 5, 7, 8, 9 and 10 of Schedule 1 to the Amending Regulations refer). These provisions include disclosing information to an issuing body about whether there has been a material change in the person's criminal history and whether the *Privacy Act 1988* applies to the disclosure of that information;
- safeguards and limitations on the Secretary's exercise of a discretion under new subregulation 6.42A(1) of the *Aviation Transport Security Regulations 2005* (Aviation Regulations) and new subregulation 6.08LE(1) of the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Maritime Regulations), as inserted by, and the availability of independent merits review in relation to those provisions (items 29 and 56 of Schedule 1 to the *Transport Security Legislation Amendment (Serious Crime) Regulations 2021* (the Amending Regulations) refer); and
- the reversal of the evidential burden of proof in relation to new subregulation 6.07K(2) of the Maritime Regulations (item 44 of Schedule 1 to the Amending Regulations refers).

This is done in accordance with paragraph 15J(1)(c) of the *Legislation Act 2003* and is in response to a request from the Senate Standing Committee for the Scrutiny of Delegated Legislation, as part of their review of the instrument.

The additional detail does not alter the assessment of compatibility with human rights set out in the initial Explanatory Statement for the Amending Regulations.

### **Amendments to the Explanatory Statement**

Item [5] – Subsection 13(3)

*At the end of the description for subsection 13(3), insert the following:*

Personal information collected by the discrete area within the Department of Home Affairs (the Department) that performs the AusCheck function (AusCheck), including the outcome of a background check for the aviation and maritime security schemes, is protected under the *AusCheck Act 2007* (AusCheck Act) and AusCheck Regulations. Sections 13 and 14 of the AusCheck Act are relevant to how information is collected, retained and shared, with

section 15 of the AusCheck Act covering the protection of information. These sections of the AusCheck Act have been designed and developed to ensure that the acts and practices of the Secretary, AusCheck and delegates in relation to the disclosure of personal information, are consistent with the Australian Privacy Principles (APP), which are the cornerstone of the *Australian Privacy Act 1988* (Privacy Act).

#### *Privacy Act and AusCheck Act*

The Privacy Act applies in relation to this item, and to items 7, 8, 9 and 10. However, the effect of these items is that disclosure of personal information by AusCheck to an issuing body in those particular circumstances will be required by law.

APP 6 of Part 3 of Schedule 1 to the Privacy Act generally governs the use and disclosure of personal information by an APP entity, such as the Department (and by extension, AusCheck by virtue of being a discrete area within the Department). In particular, subclause 6.1 provides that an APP entity must not use or disclose personal information about an individual that was collected for a particular purpose for another purpose, unless the individual has consented or an exception applies. Paragraph (b) of subclause 6.2 provides an exception to the prohibition on use or disclosure where a disclosure is required or authorised by or under Australian law. In effect, this means the amendments in items 5, 7, 8, 9 and 10 have the consequence that the required disclosures will be an exception to APP 6.

However, the personal information the Secretary must disclose to issuing bodies under items 5, 7, 8, 9 and 10 will also be *AusCheck scheme personal information* (as defined in subsection 4(1) of the AusCheck Act). The use and disclosure of AusCheck scheme personal information is subject to even more stringent safeguards under sections 13, 14 and 15 of the AusCheck Act.

In particular, subsection 15(1A) of the AusCheck Act provides that it is a criminal offence punishable by two years' imprisonment if a person obtains information that is AusCheck scheme personal information and the person discloses that information to someone else, unless an exception under subsection 15(2) applies. Importantly, the offence in subsection 15(1A) continues to apply to the on-disclosure of AusCheck scheme personal information. The effect of this is that, where AusCheck scheme personal information is disclosed to an issuing body in accordance with the amended regulations as set out in items 5, 7, 8, 9 and 10, it will be an offence for the issuing body to disclose the AusCheck scheme personal information unless an exception in subsection 15(2) applies. The exceptions in subsection 15(2) include:

- with consent;
- where disclosure is to the individual to whom the AusCheck scheme personal information relates;
- disclosure that is taken to be authorised by section 13, authorised under section 14 or required or authorised by another law; or
- a disclosure to Australian Federal Police for the purposes of the AusCheck scheme.

Disclosures (and use) authorised by section 14 are generally for the purposes of, or in connection with, the AusCheck scheme, or for specific purposes, such as for the purposes of responding to an incident that poses a threat to national security or the performance of functions relating to law enforcement or national security by the Commonwealth, a State or

Territory (or an authority of Commonwealth, a State or Territory).

Therefore whilst items 5, 7, 8, 9 and 10 will have the effect that the disclosure of information by the Secretary to the issuing body in the circumstances is an exception to APP 6, given the more limited purposes for which AusCheck scheme personal information can be used and disclosed under the AusCheck Act and the offence provision in subsection 15(1A) of the AusCheck Act, the information disclosed is subject to more rigorous safeguards.

#### *Other safeguards*

Section 13 of the AusCheck Regulations specifies what information must be shared and with whom, when AusCheck provides advice about a background check for an individual for aviation and maritime security purposes. Subsections 13(2), 13(3) and 13(4) specifically set out what advice relating to criminal history must be given; for example, only the advice that the individual has an *unfavourable criminal history* must be given to an issuing body, thereby providing the relevant safeguards.

Previously, subsection 13(3) made it mandatory for the Secretary to provide a document setting out the aviation-security-relevant offences to which the qualified criminal record relates, if the Secretary advised the issuing body under subsection 13(2) that the individual had a qualified criminal record. This requirement was never applicable in relation to the maritime scheme.

New subsection 13(3) has repealed that mandatory requirement and specifies instead that, if the individual is an ASIC or MSIC holder and the issuing body was previously advised in relation to a background check that the individual had a *unfavourable criminal history*, the Secretary must also advise the issuing body whether or not there has been a material change in the person's criminal history. In effect, all that the Secretary is required to provide is advice that there is or is not a material change in the specific applicant's criminal history since the last time a background check was made in relation to the applicant. That is, there is no requirement that the Secretary must set out the offences that would represent a material change in the criminal history, as the previous version of subsection 13(3) required. Therefore, new subsection 13(3) operates as an effective safeguard to protect an individual's privacy in relation to their criminal history.

Further, subsection 13(4) provides that, if the Secretary advises the issuing body under subsection 13(2) that the individual has an *unfavourable criminal history*, the Secretary must inform the individual of that advice and the reasons for that advice. In effect, the individual would receive a list of offences that are the 'reasons' for the advice given to the issuing body, but the issuing body would not receive the list of offences. There are no provisions within the AusCheck Act or Regulations for this information to be provided to an issuing body, which is an additional safeguard of an individual's privacy.

Item [29] – Subregulation 6.42A(1)

*At the end of the description for subregulation 6.42A(1), insert the following:*

The amendments made by new subregulation 6.42A(1) provide the Secretary with an additional ground to direct an issuing body to suspend an ASIC in circumstances where a person has been convicted of an aviation-security-relevant offence and has not yet been sentenced for the offence.

Previously, this power was limited to circumstances where the Secretary considered the person a threat to aviation security.

The grounds for considering suspension of an ASIC were expanded by new subregulation 6.42A(1) to permit the Secretary to also consider whether the person may use aviation in connection with serious crime, which reflects the additional purpose of the *Aviation Transport Security Act 2004* introduced by the *Transport Security Amendment (Serious Crime) Act 2021*.

Operationally, the Secretary would need to be informed, either by the cardholder themselves or by other means, that the cardholder has been convicted of an aviation-security-relevant offence. Noting that the cardholder is only obligated to self-report offences where they have been convicted of a relevant offence, the use of this power is very limited.

The safeguards applying to the exercise of these powers under subregulation 6.42A(1) are outlined in subregulation 6.42A(2), as amended by item 30 (which amends the chapeau of subregulation 6.42A(2)).

Under paragraphs 6.42A(2)(a) to (e), the Secretary must consider:

- (a) the type of offence for which the holder was convicted and the circumstances in which the offence was committed;
- (b) the effect the suspension may have on the holder's employment;
- (c) the location of the area where the holder is employed;
- (d) whether the holder is employed in a landside security zone or airside area; and
- (e) anything else relevant that the Secretary knows about.

Currently, under paragraph 8.02(3)(e) of the Aviation Regulations, an application may be made under the *Administrative Appeals Tribunal Act 1975* (AAT Act) to the Tribunal for review of a decision of the Secretary to direct the suspension of an ASIC.

#### Item [44] – **Subregulation 6.07K(2)**

- 1. At the end of the paragraph that ends with the words ‘with the addition of the reference to a passenger.’, insert the following:**

The offence in subregulation 6.07K(1) is a strict liability offence carrying a 5 penalty unit penalty that provides that a person who has been given a disqualifying notice by the Secretary, or Secretary AGD, under regulation 6.08D must not enter a maritime security zone.

Maritime security zones are established in relation to ports, ships, and offshore facilities as part of a controlled, legislative scheme that incorporates safeguards against an unlawful interference with maritime transport and offshore facilities.

A person is only given a disqualifying notice under regulation 6.08D if they are an applicant for an MSIC and their background check reveals that they have been convicted of a *tier 1 offence* (as defined in subregulation 6.07B(1), see item 42), or the security assessment of the

person is adverse and is not a qualified security assessment. A person who has been convicted of a tier 1 offence or who has an adverse security assessment would be considered a risk to maritime security if they held an MSIC that permitted unescorted access to maritime security zones.

New subregulation 6.07K(2) has the effect that if a person is a visitor to a maritime security zone for the purpose of boarding or leaving a vessel as part of a recreational activity, or as a passenger, the offence set out in subregulation 6.07K(1) does not apply to the person.

**2. At the end of the paragraph that ends with the words ‘as that is something within their knowledge.’, insert the following:**

As referred to in the note following new subregulation 6.07K(2), subsection 13.3 of the *Criminal Code* provides that the evidential burden is on a defendant who wishes to rely on any exception or exemption to an offence. To be able to rely on the defence provided under subregulation 6.07K(2), a person who has been given a disqualifying notice could, for example, present a ticket or evidence of a booking to board a vessel as a passenger for a cruise where the cruise vessel is moored within a maritime security zone as evidence of being or having been a visitor to the zone for recreational purposes. While this information may not be solely in the possession of the defendant, it would be at least be readily available to the defendant, as opposed to the prosecution or a third party.

Also, it would be difficult for the prosecution to prove a negative; that is, to prove a matter (to the requisite standard) where the evidence that would normally establish the existence or otherwise of that matter was not publically available. For example, trying to prove that a person who has been given a disqualifying notice was *not* a visitor to a maritime security zone, or was a visitor to a maritime security zone but *not* for the purpose of boarding or leaving a vessel as part of a recreational activity, or as a passenger. Undertaking these investigations, and preparing the relevant evidence for a prosecution – if such evidence were even available – could take significant time and therefore attract significant cost.

**3. At the end of the paragraph that ends with the words ‘evidence establishing a reasonable possibility that these defences are made out.’, insert the following:**

Even if information in support of their defence is provided by the defendant, the prosecution must still disprove the matters in question beyond reasonable doubt. As was previously the case, the legal burden of proof remains with the prosecution.

As also noted in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, another reason justifying the reversal of the burden is where it relates to an offence that carries a relatively low penalty. As mentioned above, the offence attracts a penalty of 5 penalty units.

Overall, the availability of the defence strikes an appropriate balance in providing defendants a fair trial while not being so unduly or unjustly onerous on the prosecution as to make prosecutions in the public interest impossible. This approach is entirely consistent with the guidance set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The amendments to subregulation 6.07K(2) do not change the operation of the regulation or the evidentiary burden placed on the person. Rather, the changes were implemented to provide clarity, and the provision substantially replicates the former subregulation 6.07K(2).

Item [56] – Subregulation 6.08LE(1)

*At the end of the description for subregulation 6.08LE(1), insert the following:*

Similarly to the amendments made by item 29 above, the amendment made by item 56 provides the Secretary with an additional ground to direct an issuing body to suspend an MSIC in circumstances where a person has been convicted of a maritime-security-relevant offence and has not yet been sentenced for the offence.

Previously, this power was limited to circumstances where the Secretary considered the person a threat to security related to maritime transport or an offshore facility.

The grounds for considering suspension of an MSIC were expanded to permit the Secretary to also consider whether the person may use maritime transport or an offshore facility in connection with serious crime, which reflects the additional purpose of the *Maritime Transport and Offshore Facilities Security Act 2003* introduced by the *Transport Security Amendment (Serious Crime) Act 2021*.

Operationally, the Secretary would need to be informed, either by the cardholder themselves or by other means, that the cardholder has been convicted of a maritime-security-relevant offence. Noting that the cardholder is only obligated to self-report offences where they have been convicted of a relevant offence, the use of this power is very limited.

The safeguards applying to the exercise of these powers under subregulation 6.08LE(1) are outlined in subregulation 6.08LE(2), as amended by item 57 (which amends the chapeau of subregulation 6.08LE(2)).

Under paragraphs 6.08LE(2)(a) to (e), the Secretary must consider:

- (a) the type of offence the holder was convicted of and the circumstances in which the offence was committed; and
- (b) the effect the suspension may have on the holder's employment; and
- (c) if the holder is employed in a maritime security zone—the location of the maritime security zone; and
- (d) whether the holder is employed in a port security zone, ship security zone, on-board security zone or offshore security zone, and the type of area in which the holder is employed; and
- (e) anything else relevant that the Secretary knows about.

Similar to the amendment made by item 29, under regulation 6.08Z of the Maritime Regulations, an application may be made under the AAT Act for review of a decision of the Secretary to direct the suspension of an MSIC.