

The Senate

Legal and Constitutional Affairs
Legislation Committee

Transport Security Amendment (Serious
Crime) Bill 2019 [Provisions]

March 2020

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List of recommendations

Recommendation 1

2.42 The committee recommends that the bill be amended to incorporate a criminal intelligence assessment in the background check process for the ASIC and MSIC schemes.

Recommendation 2

2.43 Subject to recommendation 1, the committee recommends that the Senate pass the bill.

Chapter 1

Introduction

- 1.1 On 28 November 2019 the Senate referred the provisions of the Transport Security Amendment (Serious Crime) Bill 2019 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 21 February 2020.¹ On 10 February 2020 the Senate extended the committee's reporting date to 25 March 2020.²
- 1.2 The referral followed a recommendation of the Selection of Bills Committee.³ The report of the Selection of Bills Committee included reasons for recommending the referral:

To ensure that the Bill sufficiently achieves its intent of addressing criminal activity at Australia's security controlled airports, security regulated seaports, and security regulated offshore oil and gas facilities.⁴

Conduct of this inquiry

- 1.3 Details of the inquiry were advertised on the committee's webpage. The committee also invited a number of organisations and individuals to submit to the inquiry. The committee received nine submissions, two of which were accepted in confidence. The submissions are listed at Appendix 1.
- 1.4 The committee held a public hearing in Canberra on 26 February 2020. The witnesses who appeared at that hearing are listed at Appendix 2.

Acknowledgements

- 1.5 The committee thanks all submitters and witnesses for their contribution to this inquiry.

Structure of this report

- 1.6 This report consists of two chapters:
- This chapter provides administrative details relating to the inquiry and outlines the key provisions of the bill.
 - Chapter 2 examines the key issues raised in evidence and provides the committee's view.

¹ *Journals of the Senate*, No. 31, 28 November 2019, pp. 974–976.

² *Journals of the Senate [Proof]*, No. 39, 10 February 2020, p. 1283.

³ Selection of Bills Committee, *Report No. 9 of 2019*, 28 November 2019, [p. 3].

⁴ Selection of Bills Committee, *Report No. 9 of 2019*, 28 November 2019, Appendix 6.

Purpose of the bill

- 1.7 The bill was introduced into the House of Representatives on 23 October 2019 by the Minister for Home Affairs, the Hon Peter Dutton MP.⁵ When introducing the bill into the Parliament, the minister stated:

Serious and organised crime is a major threat to the Australian way of life. It causes enormous human suffering and is estimated by the Australian Criminal Intelligence Commission to cost the Australian economy more than \$47 billion per annum.⁶

- 1.8 The minister further outlined the purpose of the bill in relation to the existing aviation and maritime security identification card schemes (ASIC and MSIC schemes):

The ASIC and MSIC schemes are essential in ensuring security within Australia's transport network. Persons who hold an ASIC or MSIC card are able to access the most secure areas of Australia's airports and seaports. To attain an ASIC or MSIC card, a background check is required. However, at present, the background check only determines whether a person may be a threat to aviation or maritime security. It does not consider whether the person has a history of involvement in serious crime. This leaves our airports and seaports vulnerable to exploitation by serious criminals. The Australian Criminal Intelligence Commission (ACIC) has identified that almost 300 ASIC or MSIC card holders have known criminal links to organised motorcycle gangs and other serious and organised crime groups on the ACIC's National Criminal Target List.

...

The bill will address such criminality at our airports and seaports by broadening the Aviation Transport Security Act 2004 and the Maritime Transport and Offshore Facilities Security Act 2003 beyond their present focus on security to include provisions aimed at addressing crime.⁷

Key provisions of the bill

- 1.9 The bill would amend the *Aviation Transport Security Act 2004* (the Aviation Act) and the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act). There is one schedule in the bill.

- 1.10 The explanatory memorandum states that the bill would:

- create an additional purpose for the Aviation and Maritime Acts, to prevent the use of aviation and maritime transport or offshore oil and gas facilities in connection with serious crime

⁵ *House of Representatives Votes and Proceedings*, No. 26, 23 October 2019, p. 383.

⁶ The Hon Peter Dutton MP, Minister for Home Affairs, *House of Representatives Hansard*, 23 October 2019, p. 5087.

⁷ The Hon Peter Dutton MP, Minister for Home Affairs, *House of Representatives Hansard*, 23 October 2019, p. 5087.

- provide for the making of regulations for this additional purpose, which will support strengthening of the eligibility criteria under the aviation and maritime security identification card (ASIC and MSIC) schemes to target serious criminal offences
- allow for regulations made for the additional purpose to prescribe penalties for offences against the regulations of up to 200 penalty units, consistent with penalty provisions across the ASIC and MSIC schemes
- clarify and align the legislative basis for undertaking background checks of individuals under the Aviation and Maritime Acts, and
- make technical amendments to improve the operation of the Aviation and Maritime Acts.⁸

Creating an additional purpose for the legislation

1.11 The bill would create an additional purpose in the Aviation Act to prevent the use of aviation in connection with serious crime.⁹ This would be given effect by various amendments to the Aviation Act.¹⁰ Notably, the bill would insert new division 4A into part 3 of the Aviation Act.¹¹ Proposed section 38AA in that division provides that '[t]he purpose of this Division is to prevent the use of aviation in connection with serious crime.'

1.12 The explanatory memorandum states that this purpose:

...is different to the general purposes of the Aviation Act, to prevent unlawful interference with aviation and to meet Australia's obligations under the Convention on International Civil Aviation, as outlined in section 3 [of the Aviation Act].¹²

1.13 The bill would create an additional purpose in the Maritime Act to prevent the use of maritime transport or offshore facilities in connection with serious crime.¹³ This would be given effect by various amendments to the Maritime Act.¹⁴ Notably, the bill would insert a new division 6 into part 6 of the

⁸ Explanatory memorandum to the Transport Security Amendment (Serious Crime) Bill 2019 (explanatory memorandum), p. 1.

⁹ Explanatory memorandum, p. 1.

¹⁰ This includes amendments to the note to subsection 3(1) of the *Aviation Transport Security Act 2004* (the Aviation Act) in item 1 of the Transport Security Amendment (Serious Crime) Bill 2019 (the bill); amendments to section 4 of the Aviation Act at item 2 of the bill; amendments to section 27 of the Aviation Act at item 3 of the bill; and proposed section 38AA of the Aviation Act at item 4 of the bill.

¹¹ Item 4 of the bill. Also see explanatory memorandum, p. 4.

¹² Explanatory memorandum, p. 4.

¹³ Explanatory memorandum, p. 1.

¹⁴ This includes the proposed note to subsection 3(1) of the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act) at item 7 of the bill; amendments to section 101 of the Maritime Act at item 8 of the bill; and proposed section 113E of the Maritime Act at item 17 of the bill.

Maritime Act.¹⁵ Proposed section 113E in that division provides that '[t]he purpose of this Division is to prevent the use of maritime transport or offshore facilities in connection with serious crime.'

1.14 The explanatory memorandum states that this purpose:

...is different to the general purpose of the Maritime Act, to prevent unlawful interference with maritime transport or offshore facilities, as outlined in subsection 3(1).¹⁶

1.15 The explanatory memorandum states that the new divisions proposed for each Act are intended to facilitate new eligibility criteria for the ASIC and MSIC schemes. These criteria would mean that a person is not eligible for an ASIC or MSIC if they have been convicted of certain serious crimes, and are to be harmonised across both the ASIC and MSIC schemes.¹⁷

1.16 The explanatory memorandum states that the additional purpose would be limited to specific regulation-making powers in the Acts that enable the ASIC and MSIC schemes, and would not apply generally to all provisions in those Acts.¹⁸

Providing for regulations for the additional purpose

1.17 The bill would provide for the making of regulations in relation to the proposed purposes of the Aviation Act and the Maritime Act.¹⁹ The relevant regulations are the Aviation Transport Security Regulations 2005 (the aviation regulations) and the Maritime Transport and Offshore Facilities Regulations 2003 (the maritime regulations).

1.18 The explanatory memorandum states that regulations made under the proposed provisions would 'support strengthening of the eligibility criteria under the aviation and maritime security identification card...schemes to target serious criminal offences'.²⁰ The explanatory memorandum further states that the new eligibility criteria, to be specified in regulations, would:

...introduce new offence categories such as offences relating to: anti-gang or criminal organisation legislation; illegal importation of goods; interfering with goods under customs control; and foreign incursion and

¹⁵ Item 17 of the bill. Also see explanatory memorandum, p. 9.

¹⁶ Explanatory memorandum, p. 9.

¹⁷ Explanatory memorandum, p. 4 and p. 9.

¹⁸ Explanatory memorandum, p. 1.

¹⁹ Explanatory memorandum pp. 4–5 and pp. 9–10. Also see proposed subsection 38AB(1) of the Aviation Act at item 4 of the bill; and proposed subsection 113F(1) of the Maritime Act at item 17 of the bill.

²⁰ Explanatory memorandum, p. 1. Also see proposed subsection 38AB(2) of the Aviation Act at item 4 of the bill and proposed subsection 113F(2) of the Maritime Act at item 17 of the bill.

recruitment. It is intended that Commonwealth, State and Territory offences will be captured.²¹

Regulations to prescribe penalties for offences against the regulations

1.19 The bill provides for regulations to prescribe penalties for offences against those regulations.²² Under the bill, the maximum penalty that may be prescribed by regulations depends on the person committing the offence, and ranges from 50 penalty units to 200 penalty units.²³

1.20 In relation to the proposed maximum penalty provisions in the Aviation Act, the explanatory memorandum states:

By prescribing maximum penalties, new subsection 38AB(3) provides for discretion to be applied in making regulations imposing penalties. It also takes into consideration the need to provide an appropriate level of deterrence for the relevant classes of offenders. The penalty limits under subsection 38AB(3) are consistent with existing penalties that may be prescribed in relation to offences concerning access to secure aviation areas and zones that already exist in other provisions of Part 3 of the Aviation Act.²⁴

1.21 The explanatory memorandum acknowledges that the maximum penalties of 100 and 200 penalty units exceed the maximum recommended to be imposed by regulations under the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, but states:

Such a strong deterrent is appropriate to enact in delegated legislation:

- because of the security-sensitive nature of the aviation environment, which may be targeted by criminal enterprises to facilitate the movement of illicit goods, and
- to align with other regulation-making provisions of the Aviation Act.²⁵

1.22 The explanatory memorandum also notes that:

...the higher maximum penalties would apply to a limited number of persons, being selected aviation industry participants, and not to the general public. This means that the enhanced deterrence is tailored specifically to an appropriate cohort of persons, and not the public at large.²⁶

²¹ Explanatory memorandum, p. 2.

²² Explanatory memorandum, p. 1. Also see proposed subsection 38AB(3) of the Aviation Act at item 4 of the bill and proposed subsection 113F(3) of the Maritime Act at item 17 of the bill.

²³ Explanatory memorandum, p. 5 and p. 10. Also see proposed subsection 38AB(3) of the Aviation Act at item 4 of the bill and proposed subsection 113F(3) of the Maritime Act at item 17 of the bill.

²⁴ Explanatory memorandum, p. 5.

²⁵ Explanatory memorandum, pp. 5–6.

²⁶ Explanatory memorandum, p. 6.

- 1.23 The explanatory memorandum makes similar comments regarding the maximum penalty provisions proposed for the Maritime Act.²⁷

Severability provisions

- 1.24 The bill includes severability provisions in relation to both the Aviation Act and the Maritime Act.²⁸ In relation to the Aviation Act, the explanatory memorandum states that the bill would insert a severability provision:

...to indicate that the Aviation Act has effect as if its operation were expressly confined to matters incidental to the execution of any of the legislative powers of the Parliament in section 51 of the Constitution or the executive power of the Commonwealth in section 61 of the Constitution.²⁹

- 1.25 The explanatory memorandum makes similar comments regarding the severability provisions proposed for the Maritime Act.³⁰

Background

The existing ASIC and MSIC schemes

- 1.26 The Department of Home Affairs (the department) explained that ASICs and MSICs are:

...nationally consistent identification cards that show the holder has met the minimum security requirements to remain unmonitored within a secure area or security zone area at airports, seaports and offshore facilities respectively.³¹

- 1.27 To be eligible for an ASIC or MSIC, a person must:

...have an operational need to access these secure areas and zones or work in a security sensitive position (e.g. screening officers, check-in staff, baggage handlers, stevedores, port and dock workers, truck drivers and seafarers on Australian regulated ships), and successfully pass a background check every two years.³²

- 1.28 As at 10 December 2019, there were approximately 148,727 validly issued ASICs and 105,503 validly issued MSICs.³³

- 1.29 AusCheck undertakes a background check for each person who applies for an ASIC or MSIC. A background check includes:

²⁷ Explanatory memorandum, p. 10.

²⁸ Proposed subsection 132(8) of the Aviation Act at item 6 of the bill and proposed subsection 208(9) of the Maritime Act at item 18 of the bill.

²⁹ Explanatory memorandum, p. 6.

³⁰ Explanatory memorandum, p. 10.

³¹ Department of Home Affairs, *Submission 3*, p. 4.

³² Department of Home Affairs, *Submission 3*, p. 4.

³³ Department of Home Affairs, *Submission 3*, p. 4.

...a national security assessment by the Australian Security Intelligence Organisation (ASIO), a criminal history check by the Australian Criminal Intelligence Commission (ACIC) to determine if an applicant has an unfavourable criminal history (such as an adverse criminal record) and, if required, an immigration check by the Department to assess the applicant's right to work.³⁴

- 1.30 Currently, whether a person has an adverse criminal record depends on certain factors, including the type of offence they committed and whether they are seeking an ASIC or MSIC. Generally speaking, a person will have an adverse criminal history if they have been convicted and sentenced to imprisonment for an aviation-security-related-offence or a maritime-security-related-offence.³⁵ In some circumstances, applicants with an adverse criminal record may apply to the Secretary of the department for a discretionary assessment, which would consider the person's individual circumstances, and which may be appealed to the Administrative Appeals Tribunal.³⁶

Previous iterations of the bill

- 1.31 There have been two previous iterations of this bill, both called the Transport Security Amendment (Serious or Organised Crime) Bill 2016 when introduced:
- One bill in the 44th Parliament (the first 2016 bill).
 - One bill in the 45th Parliament (the second 2016 bill).
- 1.32 On introduction, the first and second 2016 bills were identical to each other (but had different commencement provisions, second reading speeches, and explanatory memoranda).³⁷
- 1.33 The first 2016 bill was introduced into the House of Representatives on 11 February 2016 and was passed by that House on 16 March 2016.³⁸ It subsequently lapsed at prorogation of the 44th Parliament.
- 1.34 The second 2016 bill was introduced into the House of Representatives on 31 August 2016 and was passed by that House on 13 February 2017.³⁹ The

³⁴ Department of Home Affairs, *Submission 3*, p. 4.

³⁵ Department of Home Affairs, *Submission 3*, p. 7 and pp. 9–11. Also see regulation 6.01 of the Aviation Transport Security Regulations 2005 and schedule 1 of the Maritime Transport and Offshore Facilities Security Regulations 2003.

³⁶ Department of Home Affairs, *Submission 3*, p. 7 and pp. 9–11.

³⁷ Mary Anne Nielsen, Transport Security Amendment (Serious Crime) Bill 2019, *Bills Digest No. 64, 2019–20*, Parliamentary Library, Canberra, 4 December 2019, p. 2.

³⁸ *House of Representatives Votes and Proceedings*, No. 173, 11 February 2016, p. 1899; *House of Representatives Votes and Proceedings*, No. 183, 16 March 2016, p. 1995.

³⁹ *House of Representatives Votes and Proceedings*, No. 2, 31 August 2016, p. 52; *House of Representatives Votes and Proceedings*, No. 31, 13 February 2017, pp. 523–525.

Senate passed the bill with amendments on 27 March 2017.⁴⁰ The House of Representatives disagreed with those amendments on 30 March 2017, but made further amendments—which replaced references to 'serious or organised crime' with 'serious crime'—in place of some of the Senate's amendments.⁴¹ The second 2016 bill lapsed at the end of the 45th Parliament on 1 July 2019.

1.35 The current bill is substantially the same as the second 2016 bill, as amended by the House of Representatives.⁴² However, the department has stated that current bill has been amended:

- 'to capture new classes of ASICs and MSICs (white ASICs and white MSICs) that have been introduced into the Aviation and the Maritime Regulations'; and
- to 'align the regulation-making powers supporting the MSIC scheme in the [maritime regulations] with correlating powers supporting the ASIC scheme in the [aviation regulations]'.⁴³

Previous inquiries regarding aviation and maritime security

1.36 A number of parliamentary and other inquiries have considered the security of the aviation and maritime industries, including the following.

Parliamentary Joint Committee on Law Enforcement

1.37 The Parliamentary Joint Committee on Law Enforcement (PJCLE) held an inquiry from 2009 to 2011 titled *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime*. The PJCLE recommended that:

...the Attorney-General's Department, in consultation with the Australian Crime Commission, reviews the list of relevant security offences under the ASIC and MSIC schemes to assess whether any further offences are required in order to effectively extend those schemes to protect the aviation and maritime sectors against the threat of infiltration by serious and organised criminal networks.⁴⁴

⁴⁰ *Journals of the Senate*, No. 35, 27 March 2017, pp. 1180–1185.

⁴¹ *House of Representatives Votes and Proceedings*, No. 46, 30 March 2017, pp. 699–702.

⁴² Mary Anne Nielsen, Transport Security Amendment (Serious Crime) Bill 2019, *Bills Digest No. 64, 2019–20*, Parliamentary Library, Canberra, 4 December 2019, p. 2.

⁴³ Department of Home Affairs, *Submission 3*, p. 6.

⁴⁴ Parliamentary Joint Committee on Law Enforcement, *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime*, June 2011, p. 93.

National Ice Taskforce

- 1.38 The National Ice Taskforce was established in April 2015 'to advise the Government on the development of a National Ice Action Strategy'.⁴⁵ The taskforce recommended:

The Commonwealth Government should continue to protect the aviation and maritime environments against organised crime by strengthening the eligibility criteria for holders of Aviation Security Identification Cards and Maritime Security Identification Cards; and establishing a legal mechanism to enable compelling criminal intelligence to be used in determining suitability of workers to hold such a card.⁴⁶

Rural and Regional Affairs and Transport Legislation Committee

- 1.39 In May 2016 the Rural and Regional Affairs and Transport Legislation Committee reported on the first 2016 bill.
- 1.40 The majority of the committee recommended that the bill be passed.⁴⁷ Senator Glenn Sterle and Senator Alex Gallacher presented additional comments stating that Labor was considering amendments to the bill.⁴⁸ The Australian Greens presented a dissenting report which recommended that the bill not be supported in its then form and that the government consult further with the sector to develop alternative solutions.⁴⁹

Rural and Regional Affairs and Transport References Committee

- 1.41 In March 2017 the Rural and Regional Affairs and Transport References Committee reported on an inquiry into airport and aviation security. This report included consideration of the second 2016 bill.⁵⁰

⁴⁵ National Ice Taskforce, *Final Report of the National Ice Taskforce*, 2015, p. 1.

⁴⁶ National Ice Taskforce, *Final Report of the National Ice Taskforce*, 2015, p. 140.

⁴⁷ Rural and Regional Affairs and Transport Legislation Committee, *Transport Security Amendment (Serious or Organised Crime) Bill 2016 [Provisions]*, April 2016, p. 13.

⁴⁸ Senator Glenn Sterle and Senator Alex Gallacher, 'Additional comments from Senator Sterle and Senator Gallacher', in Rural and Regional Affairs and Transport Legislation Committee, *Transport Security Amendment (Serious or Organised Crime) Bill 2016 [Provisions]*, April 2016, p. 15.

⁴⁹ Senator Janet Rice, 'Dissenting Report: Australian Greens', in Rural and Regional Affairs and Transport Legislation Committee, *Transport Security Amendment (Serious or Organised Crime) Bill 2016 [Provisions]*, April 2016, p. 18.

⁵⁰ Rural and Regional Affairs and Transport References Committee, *Airport and aviation security*, March 2017, pp. 61–67.

Consideration by other parliamentary committees

Senate Standing Committee for the Scrutiny of Bills

1.42 The Senate Standing Committee for the Scrutiny of Bills (the scrutiny committee) commented on earlier iterations of the bill in previous parliaments.⁵¹

1.43 Regarding the current bill, the scrutiny committee raised concerns about the bill providing for significant matters and penalties to be in delegated legislation.⁵² At the scrutiny committee's request, the minister provided advice regarding the appropriateness of the approach taken by the bill.⁵³ This advice included the following points:

- the current ASIC and MSIC eligibility criteria, for offences relating to unlawful interference, are prescribed in the Aviation and Maritime Regulations, and it would be incongruous for guidance about eligibility criteria to be included in the principal Acts for some offences (relating to serious crime) and not for others (relating to unlawful interference)
- maintaining the detail of the ASIC and MSIC schemes, including the eligibility criteria, in the Aviation and Maritime Regulations means that the reader of the legislation is able to review the schemes in a single piece of legislation and enhances the readability and understanding of the legislative schemes
- any amendment to provide high level guidance for the eligibility criteria in the primary legislation would trigger significant consequential amendments to the Aviation and Maritime Acts for other provisions enabling the prescription of the ASIC and MSIC schemes, which would unnecessarily delay the passage of the 2019 Bill.
- making these amendments would also be contrary to the intended purposes of the Bill and the consultation already undertaken in relation to the Bill and the eligibility criteria, and
- the prescription of the eligibility criteria in the Aviation and Maritime Regulations would provide suitable flexibility to respond to changes in the threat environment at security controlled airports, seaports and offshore facilities. For example, this may include the creation of State or Territory criminal laws that are considered appropriate for inclusion in the eligibility criteria.⁵⁴

⁵¹ Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), *Alert Digest No. 2 of 2016*, 24 February 2016, pp. 86–87; Scrutiny of Bills Committee, *Fifth report of 2016*, 3 May 2016, pp. 391–393; Scrutiny of Bills Committee, *Alert Digest No. 6 of 2016*, 14 September 2016, pp. 38–40; Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2017*, 10 May 2017, pp. 64–65; Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2017*, 14 June 2017, pp. 153–156.

⁵² Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, 13 November 2019, pp. 29–31.

⁵³ Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, 5 December 2019, pp. 56–58.

⁵⁴ Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, 5 December 2019, p. 57.

1.44 The scrutiny committee reiterated its view that:

...significant matters, such as the requirements relating to access to relevant aviation and maritime transport zones, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. While noting the minister's advice, the committee emphasises that it does not generally consider that flexibility, or consistency with an existing regulatory regime, to be sufficient justification for including significant matters in delegated legislation.⁵⁵

1.45 The scrutiny committee further reiterated its view that 'serious offences and penalties should be contained in primary legislation to allow for appropriate levels of parliamentary scrutiny'.⁵⁶

1.46 The scrutiny committee drew its concerns to the attention of senators, and left to the Senate as a whole:

...the appropriateness of leaving significant matters, such as such as the requirements relating to access to relevant aviation and maritime transport zones and offence provisions prescribing penalties up to 200 penalty units, to delegated legislation.⁵⁷

Parliamentary Joint Committee on Human Rights

1.47 The Parliamentary Joint Committee on Human Rights (the human rights committee) considered earlier iterations of the bill and stated that they did not raise human rights concerns.⁵⁸

1.48 The human rights committee commented on the current bill for 'advice only'.⁵⁹ Its comments related to the right to work, and it stated:

The [human rights] committee notes the legal advice that altering the eligibility criteria for persons to gain access to areas or zones relating to aviation, maritime transport or offshore facilities may engage and limit the right to work (as persons denied access would be unable to be employed in such areas or zones), which has not been considered in the statement of compatibility. However, the [human rights] committee considers that the limitation appears to pursue a legitimate objective, is rationally connected to that objective and a proportionate means of achieving that objective.⁶⁰

⁵⁵ Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, 5 December 2019, p. 59.

⁵⁶ Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, 5 December 2019, p. 59.

⁵⁷ Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, 5 December 2019, p. 59.

⁵⁸ Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament*, 23 February 2016, pp. 1–2; Parliamentary Joint Committee on Human Rights, *Report 7 of 2016*, 11 October 2016, pp. 99–100.

⁵⁹ Parliamentary Joint Committee on Human Rights, *Report 1 of 2020*, 5 February 2020, pp. 91–93.

⁶⁰ Parliamentary Joint Committee on Human Rights, *Report 1 of 2020*, 5 February 2020, p. 93.

1.49 The human rights committee also stated that if the bill is passed, then it will assess subsequent regulations for compatibility with human rights.⁶¹

Note on references

1.50 In this report, references to *Committee Hansard* are to proof transcripts. Page numbers may vary between proof and official transcripts.

⁶¹ Parliamentary Joint Committee on Human Rights, *Report 1 of 2020*, 5 February 2020, p. 93.

Chapter 2

Key issues

2.1 This chapter outlines key issues raised in evidence, as follows:

- The need for the bill.
- Adding an additional purpose to the *Aviation Transport Security Act 2004* (the Aviation Act) and the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act).
- The proposed eligibility criteria to be prescribed in regulations in relation to the aviation and maritime security identification card (ASIC and MSIC) schemes.
- Possible other gaps in security at airports and seaports.

2.2 The chapter concludes by providing the committee's view.

The need for the bill

2.3 A number of industry participants expressed some support for the bill. For example, Sydney Airport submitted that the Department of Home Affairs (the department) has engaged with the airport about the bill, and it supports the bill's passage through Parliament.¹

2.4 Airservices Australia submitted that the bill is 'a necessary step in ensuring the integrity of security-sensitive environments around our ports'. It stated:

The proposed strengthening of background checks to include a history of serious crime will strengthen our ability to adequately scrutinise individuals including those who may intentionally seek to abuse the privilege the access an ASIC provides.²

2.5 The Australian Airline Pilots Association recognised that 'the presence of serious crime affiliates at airports creates another vector for airside access by malignant actors'. It submitted that it supports 'the thrust of the Bill while noting that the real details will emerge in the relevant regulations'.³ It also suggested that the provisions inserting an additional purpose into the Aviation Act should refer to 'preventing the access to aviation infrastructure in connection with serious crime'.⁴

2.6 In contrast, the Maritime Union of Australia (the Maritime Union), which represents employees who are required to hold MSICs, submitted that the

¹ Sydney Airport, *Submission 1*, [p. 1].

² Airservices Australia, *Submission 5*, [p. 1].

³ Australian Airline Pilots Association, *Submission 2*, p. 2.

⁴ Australian Airline Pilots Association, *Submission 2*, p. 2.

proposed expansion of maritime-security-related-offences is 'not consistent or appropriate'. It also stated:

The settings for transport workers' background checks are already at the highest level for counter terrorism. There has been no case made to interfere and expand this simply to satisfy other agendas of Australia's crime agencies.⁵

- 2.7 The Australian Council of Trade Unions took issue with the level of consultation, and submitted that it:

...shares the concerns expressed by our affiliated unions that the changes proposed in this bill have been developed without the typical level of consultation with affected workers and their unions – consultation which has typically resulted in more effective and well-targeted security legislation in the transport field.⁶

- 2.8 The department outlined the need for the bill, submitting that the current eligibility criteria for an ASIC or MSIC:

...do not provide for offences unrelated to unlawful interference with aviation and maritime security, and offshore facilities to be considered when assessing suitability to access security- sensitive areas. This has resulted in individuals with serious criminal histories, including convictions for involvement with a criminal organisation or gang and illegal importation of goods, being cleared to work at airports, seaports and offshore facilities.⁷

- 2.9 Ms Vanessa Holben, First Assistant Secretary, Aviation and Maritime Security, Department of Home Affairs, told the committee that modelling conducted by the department indicated that approximately 300 current card holders would not be eligible under the proposed eligibility criteria.⁸ Ms Holben also provided the following example:

[A] current cardholder applied for an MSIC in 2019 and was considered eligible under the existing criteria; from 2005 to 2018 this applicant was convicted of three separate offences, one of those being carrying dangerous goods on board an aircraft. Under the new criteria, that person would not be eligible, given the differentiation of those offences in the criteria.⁹

- 2.10 Mr Michael Phelan APM, Chief Executive Officer at the Australian Criminal Intelligence Commission (ACIC), provided ACIC data 'in relation to people we believe to be or know are or suspect are involved in serious and organised crime, and how many of them have ASICs and MSICs' (noting that this is not

⁵ Maritime Union of Australia, *Submission 6*, p. 6.

⁶ Australian Council of Trade Unions, *Submission 7*, [p. 1].

⁷ Department of Home Affairs, *Submission 3*, p. 6.

⁸ Ms Vanessa Holben, First Assistant Secretary, Aviation and Maritime Security, Department of Home Affairs, *Committee Hansard*, 26 February 2020, p. 14 and p. 16.

⁹ Ms Holben, Department of Home Affairs, *Committee Hansard*, 26 February 2020, p. 24.

the same as data regarding the proposed eligibility criteria, which would consider past convictions for serious crime). He advised that:

- 60 of the 2 900 people on the ACIC's National Criminal Target List hold an ASIC or MSIC;
- 167 of the 7 400 people on the ACIC's National Gangs List hold an ASIC or MSIC; and
- 49 people who are relatives of the above groups hold an ASIC or MSIC.¹⁰

2.11 The department advised that it consulted 'across the aviation and maritime sectors' during development of the bill, and that consultation began in August 2011. It also stated that it has consulted with 'relevant government agencies' including the ACIC, Australian Federal Police (AFP), Australian Security Intelligence Organisation, and state and territory police and justice agencies.¹¹

Adding an additional purpose to the Aviation Act and Maritime Act

2.12 Mr Dean Summers, International Transport Workers' Federation Coordinator, Maritime Union, stated that the current legislation 'focuses solely on counterterrorism', and expressed concern about 'competing agendas and competing forces if you have got a dual system working under one piece of legislation'.¹² He advanced that:

...the thrust of our submission and our position is that maritime security is so very important that it shouldn't be shared with policing. This shouldn't be piggybacked on the back of an existing system that's been ongoing for 15 years.¹³

2.13 The Maritime Union also referred to the proposal as 'mission creep' that 'dilutes the focus' on counterterrorism activities.¹⁴ It further stated that it understands that 'there are no parallel additions to the US and Canadian models which are closely designed with the Australian legislation'.¹⁵

2.14 The department submitted that the proposed introduction of an additional purpose 'does not reduce the effectiveness of the counter-terrorism aspects of the ASIC and MSIC schemes'. It explained that, under the bill:

¹⁰ Mr Michael Phelan APM, Chief Executive Officer, Australian Criminal Intelligence Commission, *Committee Hansard*, 26 February 2020, pp. 17–18.

¹¹ Department of Home Affairs, *Submission 3*, p. 8.

¹² Mr Dean Summers, International Transport Workers' Federation Coordinator, Maritime Union of Australia, *Committee Hansard*, 26 February 2020, p. 4.

¹³ Mr Summers, Maritime Union of Australia, *Committee Hansard*, 26 February 2020, p. 3.

¹⁴ Maritime Union of Australia, *Submission 6*, p. 3. Also see Australian Council of Trade Unions, *Submission 7*, [p. 1].

¹⁵ Maritime Union of Australia, *Submission 6*, p. 6. Also see Mr Summers, Maritime Union of Australia, *Committee Hansard*, 26 February 2020, p. 3.

...a national security assessment will remain as a component of a background check and is not dependant on the presence of a conviction in an applicant's criminal history. In practice, the process for assessing national security outcomes will not change and will continue to be undertaken by [the Australian Security Intelligence Organisation] under the *Australian Security Intelligence Organisation Act 1979*, which is not being amended by the Bill.¹⁶

The proposed eligibility criteria to be prescribed in regulations

- 2.15 The Maritime Union submitted that an ASIC or MSIC is 'essentially a "Right to Work Card" and causes many existing employees much anxiety every time their card comes up for renewal'.¹⁷ It further stated:

To deny a worker an ID card because at some stage in their past they may have been charged with any form of assault, tax evasion or the like is blatantly unfair and completely irrelevant in this context.

...

If the intent is to target serious crime, then this list of convictions must match the intent. The union could consider that serious crimes which attract serious prison sentences in excess of 5 years are a concern.¹⁸

- 2.16 Mr Summers of the Maritime Union gave an example of a discretionary MSIC holder who applied for renewal of his card 90 days before it expired, but received the renewed card 'only a matter of hours before he could go and catch the plane and fly to his job'.¹⁹ Mr Summers stated:

His crime was 31 years ago, when he got into a fight in a Queensland pub...Since then he's had no other convictions, he's kept it squeaky clean and every time that card comes up for renewal he has to go through the same process. Why it takes government agencies 90 days is beyond me.²⁰

- 2.17 Mr Summers also expressed concern that the eligibility criteria would be prescribed in regulations, rather than primary legislation, and referred to:

[t]he comparative ease in which the regulations can be changed, and that the competing agenda that I mentioned before can be expanded by a government from time to time. We're not accepting that it even should be legislated, but because it's going to be regulated then it is so much easier to expand that list.²¹

¹⁶ Department of Home Affairs, *Submission 3*, p. 7. Also see Ms Holben, Department of Home Affairs, *Committee Hansard*, 26 February 2020, p. 13.

¹⁷ Maritime Union of Australia, *Submission 6*, p. 2.

¹⁸ Maritime Union of Australia, *Submission 6*, p. 3.

¹⁹ Mr Summers, Maritime Union of Australia, *Committee Hansard*, 26 February 2020, p. 7.

²⁰ Mr Summers, Maritime Union of Australia, *Committee Hansard*, 26 February 2020, p. 2.

²¹ Mr Summers, Maritime Union of Australia, *Committee Hansard*, 26 February 2020, p. 5.

- 2.18 Councillor Dominic Wy Kanak submitted that any criminal background checking 'must necessarily encounter the over-incarceration rates of Aboriginal Torres Strait Islander Peoples'.²²
- 2.19 The department submitted that the proposed eligibility criteria would 'target serious criminal offences' and would 'apply a consistent approach to assessing risks in the aviation and maritime environment'.²³ The department also provided the committee with the proposed eligibility criteria, which would take a tiered approach.²⁴
- 2.20 Mr Steve Webber, Assistant Secretary of the National Security and Law Enforcement Legal Branch at the department, confirmed that the regulations implementing the proposed criteria would be a disallowable instrument.²⁵
- 2.21 Ms Holben, representing the department, advised that the average timeframe for AusCheck to undertake the checking to issue an ASIC or MSIC is 'around 8.3 days', though this may be longer if the person 'meets the threshold for the department to look at a discretionary card process'.²⁶ Ms Holben also confirmed that the existing process for discretionary ASICs and MSICs would continue to exist.²⁷ She stated that approximately 400 discretionary cards are issued each year, and on average 90 per cent of discretionary review applications are approved.²⁸

Possible other gaps in security at airports and seaports

- 2.22 The Australian Airline Pilots Association submitted that with the 'clear exception of excessive screening of aircrew...airside access is still a very porous barrier'. It raised concerns that:

...the inconsistent standard of access controls applied at Australian airports has the potential to largely negate any gains in enhanced background checking as a prerequisite for ASIC issue.

On the other hand, if the investigative activities of serious crime agencies highlight the deficiencies of access control to airside, we would be delighted.²⁹

²² Cr Dominic Wy Kanak, *Submission 4*, p. 2.

²³ Department of Home Affairs, *Submission 3*, pp. 6–7.

²⁴ Department of Home Affairs, *Submission 3*, p. 7 and p. 12.

²⁵ Mr Steve Webber, Assistant Secretary, National Security and Law Enforcement Legal Branch, Department of Home Affairs, *Committee Hansard*, 26 February 2020, p. 21.

²⁶ Ms Holben, Department of Home Affairs, *Committee Hansard*, 26 February 2020, p. 27.

²⁷ Ms Holben, Department of Home Affairs, *Committee Hansard*, 26 February 2020, p. 22.

²⁸ Department of Home Affairs, Letter correcting evidence provided at the public hearing on 26 February 2020 (received 18 March 2020), [p. 2].

²⁹ Australian Airline Pilots Association, *Submission 2*, p. 2.

2.23 Mr Summers of the Maritime Union advanced:

There are huge gaps in maritime security in that there is no Australian shipping industry left. None of the fuel—zero fuel—is transported around our coast by Australian seafarers. I have seen ships that have operated on this coast for 10 years without leaving the coast, with foreign seafarers manning those ships coming through the airports and the crew changing. Those ships come in and out of ports that I can drive a car through and go to the gangway and go straight up to see the captain on. They are very porous borders.³⁰

2.24 The Maritime Union expressed concern about the security implications of flag of convenience ships, including the 'porous and substandard level of background check on foreign workers through the Maritime Crew Visa'.³¹ Mr Summers also told the committee that:

...senior managers, who never go inside the physical gates, don't have to have background checks. So those people who are most able to direct, divert and influence cargoes coming in and out aren't background checked.³²

2.25 The Maritime Union concluded that the bill 'appears to provide crime agencies even more influence in granting of security ID cards while ignoring the more difficult questions around international transport imperatives'.³³

2.26 Mr Phelan of the ACIC acknowledged that some illegal substances are imported through flag of convenience ships, but explained that the MSIC scheme provides some protection against such illegal importation:

The supply chain for importing drugs is a long supply chain. That supply chain exists overseas—so you've got things we can or can't control through to manufacture. There is a logistics supply chain into Australia; it may be a flag-of-convenience ship that brings it here. But, once it's landed, it's still got to get from the port through to distribution. That component is essential to the supply chain as well. There you have your logistics operators and the people working on the wharves...³⁴

2.27 Mr Phelan proffered a reason that flag of convenience ships are not covered by the existing ASIC and MSIC scheme, namely that it would be difficult to verify criminal history information.³⁵

³⁰ Mr Summers, Maritime Union of Australia, *Committee Hansard*, 26 February 2020, p. 3.

³¹ Maritime Union of Australia, *Submission 6*, pp. 4–5.

³² Mr Summers, Maritime Union of Australia, *Committee Hansard*, 26 February 2020, p. 10.

³³ Maritime Union of Australia, *Submission 6*, p. 6.

³⁴ Mr Phelan, Australian Criminal Intelligence Commission, *Committee Hansard*, 26 February 2020, p. 19.

³⁵ Mr Phelan, Australian Criminal Intelligence Commission, *Committee Hansard*, 26 February 2020, p. 19.

- 2.28 Mr Phelan suggested that the proposed ASIC and MSIC eligibility criteria consider criminal intelligence, as well as an applicant's criminal history. He stated:

The bill currently does not cover intelligence. I suggest that the bill needs to go further to make provision to give effect to the National Ice Taskforce's recommendations and to actually cover criminal intelligence, because for us convictions are not always an indicator of criminality.

...

I suggest it does need to be strengthened. It will have to be if you want criminal intelligence checks. Criminal intelligence checks are different than criminal history checks; therefore, you want a robust system around criminal intelligence, such as what it means, what the thresholds are and how it can be properly tested in some sort of tribunal.³⁶

- 2.29 When questioned why criminal intelligence checks are required in addition to criminal history checks, Mr Phelan clarified:

I can give some specific examples in camera, but on the public record I can say that there are individuals at both the airstream and the airport who we know are associated with, have links with, serious and organised crime, who have facilitated transactions through the ports and who have not been charged.

...

I'm talking about members of criminal groups who have not yet been convicted. I'm talking about members of bikie gangs who we know transport cash, pick up drugs, facilitate meetings, provide security at meetings, operate as lookouts at the ports and airports and facilitate things like baggage handling and cargo, even to the extent that they look and see which ones have law enforcement interest. So you can tell, for example, which items have moved off to be checked and you can quickly put up the flag and say: 'Don't go anywhere near that container. It's dead.' Those people may not have been convicted of anything, but they are associations that provide a serious risk for us.³⁷

- 2.30 Mr Phelan further commented on the level of crime taking place through Australian ports and airports that 'at least \$10 billion worth of drugs at the retail level is coming through ports and airstream, both cargo and passenger movement'.³⁸

³⁶ Mr Phelan, Australian Criminal Intelligence Commission, *Committee Hansard*, 26 February 2020, pp. 24–25.

³⁷ Mr Phelan, Australian Criminal Intelligence Commission, *Committee Hansard*, 26 February 2020, p. 25.

³⁸ Mr Phelan, Australian Criminal Intelligence Commission, *Committee Hansard*, 26 February 2020, p. 25.

- 2.31 Mr Ian McCartney, Deputy Commissioner Investigations at the AFP, acknowledged that the AFP has 'been on the record before in terms of exploring this other option', but was not suggesting amendments to the bill.³⁹
- 2.32 Ms Leanne Loan, Assistant Secretary of Maritime, Training and Card Security at the department, clarified that the proposed scheme is:
- ...a convictions based scheme, so the eligibility criteria are an objective assessment based on convictions that a person has been given as a result of their criminal offending. The offences that are proposed to be included in the eligibility criteria going forward are those that are of the most serious nature and pose a direct risk to our airports and seaports. And in our proposed third tier, they also allow us to look at the sentence of imprisonment that the court will have awarded to a particular individual—the seriousness with which the court has viewed that particular offending.⁴⁰

Committee view

- 2.33 The committee strongly supports efforts to make Australia's borders safe and secure. Illegal activity at the border, including serious or organised crime, can cause enormous harm to the Australian community. The ASIC and MSIC schemes are key to securing Australia's border from illegal activity, and it is important that legislation appropriately supports the efficacy of those schemes.
- 2.34 The bill would allow the ASIC and MSIC eligibility criteria to appropriately consider whether an applicant has a serious criminal history. It is important that these criteria be prescribed in regulation so that the schemes are appropriately flexible, and the amendments are not unnecessarily delayed.
- 2.35 The committee heard some concerns about the proposed criteria and application processes. However, it is unacceptable that people who pose a serious criminal risk based on their criminal history are able to access the secure areas of airports and seaports. The committee is conscious of the ACIC's advice about the crossover of ASIC and MSIC cardholders with its National Criminal Target List and National Gangs List. The committee also accepts the department's advice that approximately 300 current card holders would not be eligible under the proposed criteria.
- 2.36 The committee acknowledges concerns about expanding the purposes of the Aviation Act and Maritime Act. However, the committee is confident that the existing purposes relating to national security will continue to receive appropriate attention. As the department advised, the process for national security checking of ASIC and MSIC applicants is conducted separately by the

³⁹ Mr Ian McCartney, Deputy Commissioner Investigations, Australian Federal Police, *Committee Hansard*, 26 February 2020, p. 25.

⁴⁰ Ms Leanne Loan, Assistant Secretary, Maritime, Training and Card Security, Department of Home Affairs, *Committee Hansard*, 26 February 2020, p. 28.

Australian Security Intelligence Organisation, and this would continue to be the case.

- 2.37 Some inquiry participants submitted that the bill would not address other security gaps in Australia's borders. To any extent that such gaps might exist, this would not negate the merits of strengthening the ASIC and MSIC schemes, which are a key part of Australia's border security. The committee considers that the bill presents an appropriate and balanced response to the security threats at Australia's borders. The committee also wishes to emphasise its confidence in Australia's border and law enforcement authorities.
- 2.38 Given the importance of securing Australia's borders from serious crime, the committee considers that the bill would make a balanced and important contribution to Australia's security framework.
- 2.39 The committee acknowledges the view of some inquiry participants that the bill should enable criminal intelligence to be used to determine suitability to hold an ASIC or MSIC. While the measures in the bill would facilitate the strengthening of the ASIC and MSIC schemes by ensuring individuals convicted of serious criminal offences do not have unmonitored access in secure areas or zones at airports and seaports, the aviation and maritime environments remain vulnerable to infiltration and exploitation by persons with links to serious and organised crime.
- 2.40 Individuals who hold an ASIC or MSIC and have been granted permission by the facility owner or operator can have unmonitored access to aviation and maritime secure zones. Some of these individuals have concerning criminal associations and no, or minor, criminal convictions. They include prominent organised crime figures with a history of engaging in serious and organised crime and influencing others to do the same. The amendments made by the bill would not cause these individuals to be ineligible to hold a card, but such individuals could be identified through the introduction of a criminal intelligence assessment by the ACIC.
- 2.41 The introduction of a criminal intelligence assessment in the background check process for the ASIC and MSIC schemes would strengthen the schemes by enabling decisions to exclude persons who have links to serious crime, where that person might facilitate or commit crime, from accessing airports and seaports.

Recommendation 1

- 2.42 **The committee recommends that the bill be amended to incorporate a criminal intelligence assessment in the background check process for the ASIC and MSIC schemes.**

Recommendation 2

2.43 Subject to recommendation 1, the committee recommends that the Senate pass the bill.

**Senator Amanda Stoker
Committee Chair**

Appendix 1

Submissions, additional information and answers to questions on notice

Submissions

- 1 Sydney Airport
- 2 Australian Airline Pilots Association
- 3 Department of Home Affairs
- 4 Cr Dominic Wy Kanak
- 5 Airservices Australia
- 6 Maritime Union of Australia
- 7 Australian Council of Trade Unions
- 8 *Confidential*
- 9 *Confidential*

Additional information

- 1 Department of Home Affairs, Letter correcting evidence provided at the public hearing on 26 February 2020 (received 18 March 2020)
- 2 Australian Criminal Intelligence Commission, Letter correcting evidence provided at the public hearing on 26 February 2020 (received 24 March 2020)

Answers to questions on notice

- 1 Department of Home Affairs, answers to questions on notice, 26 February 2020 (received 18 March 2020)

Appendix 2

Public Hearing

Wednesday, 26 February 2020
Committee Room 2S3
Parliament House
Canberra

Maritime Union of Australia

- Mr Dean Summers, ITF Coordinator

Australian Criminal Intelligence Commission

- Mr Michael Phelan APM, Chief Executive Officer

Australian Federal Police

- Mr Ian McCartney APM, Deputy Commissioner Investigations
- Mr Brett Pointing APM, Deputy Commissioner Operations

Department of Home Affairs

- Ms Vanessa Holben, First Assistant Secretary, Aviation and Maritime Security
- Ms Leanne Loan, Assistant Secretary, Maritime, Training and Card Security
- Mr Steve Webber, Assistant Secretary, National Security and Law Enforcement Legal Branch

Labor Senators' dissenting report

Transport Security Amendment (Serious Crime)

Bill 2019

Acknowledgments

- 1.1 The Deputy Chair wishes to acknowledge the participation of Senator Sterle and Senator Sheldon in this inquiry and their extensive knowledge in this legislative area.

Introduction

- 1.2 This Bill amends the two Acts that regulate aviation security and maritime security to add an additional purpose to these Acts – to prevent the use of aviation and maritime transport (including offshore facilities) in connection with 'serious crime'.
- 1.3 Two reasons are given for this change – firstly, to keep a 2013 election commitment made by the Government, and secondly, to implement a recommendation from the National Ice Taskforce Report from December 2015.
- 1.4 Subsequent to the passage of this legislation, the Government proposes to table a new disallowable instrument which would outline a wider system of offences that could impact the right of employees to receive an Aviation Security Identification Card (ASIC) or a Maritime Security Identification Card (MSIC).
- 1.5 The Committee was not provided a copy of this proposed regulation during its examination of the Transport Security Amendment (Serious Crimes) Bill 2019.
- 1.6 Similar bills (Transport Security Amendment (Serious or Organised Crime) Bill 2016) were introduced into the 44th and 45th Parliaments, but both failed to pass the Parliament.

Impact on employment

- 1.7 Mr Dean Summers of the International Transport Workers' Federation (ITF) and the Maritime Union of Australia (MUA) explained to the Committee how the current ASIC/MSIC provisioning system operates, and the devastating impact the system can have on the rights of Australians to work if their ASIC or MSIC is delayed due to bureaucratic bungling:

I have to stress that these are identification cards and not access cards. In order to access security zones, as the government will explain later on, you have to have a security pass. I don't know the figures for how many of our members have to have discretionary cards—that is, they don't make the grade on the first cut. For whatever reason, they've crossed the trip-wire: they've had past convictions that match the discretionary crimes. They

therefore go into a process to get a discretionary card so that they can continue with their work or so they can get work.

Behind me are some seafarers and dockers from Australia who have the cards and who have had different problems with those cards. I was going to have one of our members, Brendan McKeen, who joined a ship yesterday. He put his card in for reapplication almost 90 days prior to having to join his ship. The fact is that the process let him down, and for 90 days he wasn't able to renew his card. When the time came to come back off leave and join his ship, the card still wasn't there. His crime was 31 years ago, when he got into a fight in a Queensland pub—31 years ago. Since then he's had no other convictions, he's kept it squeaky clean and every time that card comes up for renewal he has to go through the same process. Why it takes government agencies 90 days is beyond me.¹

- 1.8 Labor Senators are concerned that the Government has not fully understood, nor taken responsibility for, the impact that these changes to ASICs and MSICs will have:

Senator KIM CARR: Well, if they haven't got a card, they can't work.

Ms Holben (Department of Home Affairs): They cannot work in a secure zone of an airport or a seaport.

Senator KIM CARR: That would effectively mean they're off and they couldn't be employed as they are at the moment.

Ms Holben: Their employment may be different, yes.

Senator KIM CARR: Where would they be working, in your judgement?

Ms Holben: It would be up to the facility operator as to where they might be able to work in that facility.

Senator KIM CARR: But they could also be out of the industry, couldn't they?

Ms Holben: Possibly.²

- 1.9 Mr Summers contended that police and criminal intelligence authorities already have significant powers to investigate and prosecute offenders for serious crime, and that this legislation should not be used as a quasi-tool to penalise workers by removing aviation and waterside workers' right to work:

This amendment will hurt transport workers, because they are already losing work, they're losing money, and a never-ending expansion of the criminal criteria is just an impediment for workers, and a manufactured impediment. If there are 11 or 300 bad eggs out of 250,000 then why isn't there already enough power inside ASIO, the Federal Police and crime agencies to weed those out? It's got to be there already.³

¹ Mr Dean Summers, International Transport Workers' Federation Coordinator, Maritime Union of Australia, *Committee Hansard*, 26 February 2020, pp. 1–2.

² *Committee Hansard*, 26 February 2020, p. 14.

³ Mr Summers, Maritime Union of Australia, *Committee Hansard*, 26 February 2020, p. 12.

Security at the border

1.10 Labor Senators – like all of the witnesses – believe in well-targeted measures that address serious crime.

1.11 Mr Summers highlighted that the Maritime Union of Australia and its membership take their responsibility of security at the border very seriously:

Mr Summers: The Maritime Union of Australia also wants to stress that our interest in maritime security is paramount, because it's our members and transport workers who are injured when there are terrorist attacks on wharfs, airports and transport modes.⁴

Mr Summers: I would invite any member of the committee to come onto a worksite, either at a port or airport, and how see how professional our workers are. They are professional, usually young, men and women just trying to do a job and trying to get through this big hurdle that continues to come up.

Senator HENDERSON: So maintaining the reputation of your workforce is really important, isn't it?

Mr Summers: Of course.⁵

Flag-of-convenience vessels and their crew

1.12 Throughout the hearing, multiple witnesses indicated that the legislation will not apply to flag-of-convenience vessels and their crew. Labor Senators are highly concerned that the Government is seeking to apply one set of rules to Australians, and then excusing foreign crews from those same rules. This concern is compounded by evidence presented to the Committee about serious allegations of criminal activity undertaken by flag-of-convenience crew.

Senator KIM CARR: We're not picking up the experiences from those jurisdictions?

Mr Summers: No.

Senator KIM CARR: The second question is: how does this regime apply to flags of convenience?

Mr Summers: It doesn't. They're completely exempted because they're foreign seafarers, and they just have to have maritime crew visas, available within 24 or 48 hours.

Senator KIM CARR: What sort of percentage of our trade is now carried by foreign ships?

Mr Summers: For our coastal trade, the oil and gas is 100 per cent foreign ships. We've got a few ships, a handful of ships, with Australian registry and Australian seafarers.

⁴ *Committee Hansard*, 26 February 2020, p. 2.

⁵ *Committee Hansard*, 26 February 2020, p. 11.

Senator SHELDON: Mr Summers and I have known each other for 15 years and had a long relationship dealing with matters on our waterfront and on various other ports and aviation and security matters. Questions have been raised by some of the other agencies and also some of the question about when you get an MSIC. You're aware that to get an MSIC card you have to be checked by ASIO.

Mr Summers: That's right: ASIO checked, Australian Federal Police background checked, immigration checked.

Senator SHELDON: How many coastal seafarers who are on flags of convenience are ASIO checked?

Mr Summers: None.⁶

- 1.13 Labor Senators note that the Rural and Regional Affairs and Transport References Committee looked at national security concerns in its inquiry into increasing use of so-called Flag of Convenience shipping in Australia in 2017.
- 1.14 At the time in its submission to the committee, the Department of Immigration and Border Protection argued that certain features of Flag of Convenience registration, regulation and operation make them more open to exploitation from organised crime syndicates or terrorist groups. This created a lack of transparency around ownership, and therefore a lack of accountability, and insufficient regulation and enforcement of standards by the flag state.⁷
- 1.15 This submission ultimately contributed to the committee recommending:
 ...that the Australian Government undertake a comprehensive whole-of-government review into the potential economic, security and environmental risks presented by flag of convenience vessels and foreign crews.⁸

Delegated Legislation

- 1.16 Labor Senators share the deep concerns of Mr Summers of the ITF and the MUA regarding the lack of detail in the primary legislation, with too much scope provided for in delegated legislation with minimal parliamentary oversight.
- 1.17 Labor Senators are also concerned that the scope of MSICs/ASICs could be expanded dramatically with the stroke of a pen through delegated legislation without sufficient safeguards and oversight.

Senator KIM CARR: Are you concerned those matters aren't in the primary legislation? This is a matter concerning this parliament, the

⁶ *Committee Hansard*, 26 February 2020, p. 3.

⁷ Department of Immigration and Border Protection, *Submission 21 to Rural and Regional Affairs and Transport References Committee, Increasing use of so-called Flag of Convenience shipping in Australia*, July 2017, p. 3.

⁸ Rural and Regional Affairs and Transport References Committee, *Increasing use of so-called Flag of Convenience shipping in Australia*, July 2017, p. 68.

amount of material that goes into regulation. Are you concerned about that matter?

Mr Summers: Absolutely we are.

Senator KIM CARR: And what issues specifically are your concerns in that regard?

Mr Summers: The comparative ease in which the regulations can be changed, and that the competing agenda that I mentioned before can be expanded by a government from time to time. We're not accepting that it even should be legislated, but because it's going to be regulated then it is so much easier to expand that list.⁹

- 1.18 Labor Senators are also concerned with a lack of clarity from the Government about what they plan to include in the delegated legislation that may impact worker's rights. Labor considers it unacceptable that an early draft of the delegated legislation is not available, considering the legislation was first promised by the Government in 2013:

Senator KIM CARR: That's the point here, isn't it? If this legislation is passed, people can be removed from their right to work on the basis that someone thinks that they have some links with a criminal organisation, without any appeal rights. That's the proposition.

Mr Summers: Recommendation 24 from the ice says that. And that's where these regulations are heading towards.

CHAIR: This bill doesn't provide a unilateral right to the minister, though.

Senator KIM CARR: Of course it does. That's exactly what happens here, if this legislation is passed in this form. This is what has been rejected in the past, because it's effectively an extension of the power of the state to remove people's right to work.

Mr Summers: Exactly.¹⁰

- 1.19 Senator Sheldon raised a hypothetical situation in the hearing that highlighted Labor Senators' deep concerns about the intent of the legislation and how the regulations could be misused in the future:

Senator SHELDON: The regulation could go to the point of defining 'serious crime'. It goes to the point of defining 'serious crime' in a particular way in the tier system that you just mentioned. That tier system could include what's been proposed before, put before parliament before—that is, that reasons for someone no longer working would be because of intelligence. Intelligence could be provided by an employer; intelligence could be provided by a disgruntled employee with another employee—somebody who doesn't like their race; somebody who doesn't like the colour of their hair—who makes an assertion that they are criminal. It's possible, technically possible.

⁹ *Committee Hansard*, 26 February 2020, p. 5.

¹⁰ *Committee Hansard*, 26 February 2020, p. 8.

Mr Webber (Department of Home Affairs): If that is how the regulations are ultimately drafted. We would have to concede it is possible that the regulations may be drafted in that way.¹¹

Natural justice

- 1.20 Throughout the inquiry, Labor Senators were told that the current system of ASICs and MSICs sees applicants go through ASIO checks, Australian Federal Police background checks, and immigration checks.
- 1.21 Labor Senators are concerned that under the proposed legislation, applicants will lose their right to work on the basis of intelligence rather than a conviction. This will see applicants denied natural justice with their employment put at stake by what could be baseless accusations, and with limited grounds to appeal.
- 1.22 Labor Senators are not satisfied that the Parliament should vote for legislation that has the capacity to take away people's livelihoods on the basis of a suspicion or a belief.

Mr Phelan (Australian Criminal Intelligence Commission): In our briefing in relation to conviction, I was talking about intelligence.

Senator KIM CARR: Intelligence. So they're not even convictions—

Mr Phelan: No—

Senator KIM CARR: It's your suspicion that they've got links to a bikie gang.

Mr Phelan: Some with suspicion, some with belief, some with knowledge.

Senator KIM CARR: Belief?

Mr Phelan: Yes.

Senator KIM CARR: Belief?

Mr Phelan: Yes. Obviously, when it comes to any form of intelligence, intelligence can go from—

Senator KIM CARR: I know. There are lots of jokes we can go to at this point, but we won't, will we? The point is: we are talking about people's livelihoods.

Mr Phelan: Yes.

Senator KIM CARR: You're asking the parliament—that's what the government is doing now; not you personally. We're being asked to agree to legislation that has the capacity to take away people's livelihood on the basis of a suspicion or a belief.¹²

¹¹ *Committee Hansard*, 26 February 2020, p. 21.

¹² *Committee Hansard*, 26 February 2020, p. 17.

Lack of definition

- 1.23 Another serious concern that Labor Senators have with the Bill is that it seeks to tackle 'serious crime', and yet the Bill itself does not actually define what 'serious crime' is.
- 1.24 These definitional deficiencies, combined with vast amounts of regulations surrounding these bills, leave Labor Senators highly concerned:

Senator SHELDON: Ms Holben, what is the definition of serious crime? You've mentioned serious crime as being part of the—

Ms Holben: I'm going to pass to Steve Webber, if you don't mind.

Mr Webber: As I understand the system that is proposed, the definition of serious crime as you generally understand it, where there might be a threshold of one year's imprisonment or five years imprisonment or something like that, is not something that comes into this system. There is a three-tiered approach with different outcomes depending on whether there have been imposed sentences of imprisonment for particular crimes. As I understand it, there is no level of seriousness in particular that's applied. We are talking here about the threshold that might be applied as opposed to—

Senator SHELDON: So there is no definition of serious crime in the legislation?

Mr Webber: No, not in the draft bill.

Senator SHELDON: So we've got a crime bill without a definition of serious crime?

Mr Webber: I think that's correct.

Senator HENDERSON: Are there any other definitions in the—

Mr Webber: The bill contains the mechanisms to allow the system to operate under the regulations. The regulations will then—

Senator SHELDON: Define serious crime?

Mr Webber: contain a mechanism for how those things work.

Senator SHELDON: So you're saying the regulation will then define serious crime?

Mr Webber: It will have the mechanism for reaching the thresholds at which there may be some consequences. As I explained, there is a three-tiered system.

Senator KIM CARR: Mr Webber, you've seen the Scrutiny of Bills report. There's a real issue in this parliament about the amount of material that is now in delegated legislation. Why shouldn't the definition of serious crime be in the primary legislation?¹³

¹³ *Committee Hansard*, 26 February 2020, p. 20

Request for further amendments

1.25 Labor Senators are concerned that this legislation has not been fully developed, nor has it gone through a proper consultation process. This is highlighted by comments from officers at the ACIC and the AFP who suggested that further changes need to be made to the bill.

Mr Phelan: It's very important. You've just touched on the point of intelligence there. The bill currently does not cover intelligence. I suggest that the bill needs to go further to make provision to give effect to the National Ice Taskforce's recommendations and to actually cover criminal intelligence, because for us convictions are not always an indicator of criminality. Also it's a small sample—it's 226 out of a quarter of a million. In order to fortify the system and make it far more robust in protecting the ports and the airstream we would do criminal intelligence assessments on those individuals and provide those assessments to the department—and I've said this a couple of times now; it would be similar to what ASIO do for national security assessments—and then the department would decide, depending on their thresholds, whether it's appropriate to issue an ASIC or MSIC.

If we are going to have a regime of criminal intelligence checks, some legislative reform needs to occur. Our act, for example, has to change because it's not a permitted purpose for us to use the intelligence for. There would need to be some small refinements to the ACC Act as well. Also, I'd like any sort of appeals mechanism—which I'm very much in favour of—if we had the opportunity, to go into the Security Division of the AAT so we can properly put forward the intelligence and it can be robustly tested, similar to security assessments done by the Director-General of Security.

Mr McCartney (Australian Federal Police): That's a position that the AFP would also support.

Senator KIM CARR: Are you not satisfied with the bill?

Mr McCartney: We're satisfied in terms of the improvements, but, as Mr Phelan has suggested, we've been on the record before in terms of exploring this other option.¹⁴

Recommendation 1

1.26 Labor Senators recommend that the Bill NOT be passed.

Senator the Hon Kim Carr
Deputy Chair

Senator Anthony Chisholm
Labor Senator for Queensland

¹⁴ *Committee Hansard*, 26 February 2020, pp. 24–25.

Australian Greens dissenting report

1.1 In 2016, the Senate Rural and Regional Affairs and Transport Legislation Committee issued a report on the provisions of the Transport Security Amendment (Serious or Organised Crime) Bill 2016. The Australian Greens issued a dissenting report, noting serious concerns with that Bill as introduced, including:

- An attempt to make the MSIC card a security card, not just an identification card.
- Changes to the MSIC and ASIC card that were inconsistent and excessively punitive.
- That the Bill did not address significant security concerns highlighted through some of the submissions.

1.2 That dissenting report concluded:

It is indicative of this Government's priorities that they would first look at tackling organised crime by going after worker eligibility rather than strengthening the current regulatory regime on flags of convenience ships that undercut wages and freeze out union representation.¹

1.3 After that Bill lapsed with the prorogation of the Parliament in 2016, an identical bill was introduced, the second Transport Security Amendment (Serious or Organised Crime) Bill 2016. As the Bills Digest notes:

The current Bill, the Transport Security Amendment (Serious Crime) Bill 2019, is substantially the same as the second 2016 Bill and incorporates the Government amendments to that Bill that replaced 'serious or organised crime' with 'serious crime'.²

1.4 Similarly, the Maritime Union of Australia notes:

The MUA has made a similar submission to the Transport Security Amendment (Serious and organised crime) Bill 2016 and there is no evidence that circumstances have changed nor has a case been made to use the Act in an additional way.³

1.5 The Australian Council of Trade Unions also stated:

The ACTU shares the concerns expressed by our affiliated unions that the changes proposed in this bill have been developed without the typical level of consultation with affected workers and their unions – consultation

¹ Senator Janet Rice, 'Dissenting Report: Australian Greens', in Rural and Regional Affairs and Transport Legislation Committee, *Transport Security Amendment (Serious or Organised Crime) Bill 2016 [Provisions]*, April 2016, p. 18.

² Mary Anne Nielsen, Transport Security Amendment (Serious Crime) Bill 2019, *Bills Digest No. 64, 2019–20*, Parliamentary Library, Canberra, 4 December 2019, p. 2.

³ Maritime Union of Australia, *Submission 6*, p. 1.

which has typically resulted in more effective and well-targeted security legislation in the transport field. It is equally troubling that the proposed amendments could be interpreted as increasing the burden placed on workers in the sector in order to maintain their ASIC/MSIC card...⁴

- 1.6 Given that the concerns and issues raised in 2016 have not been substantively addressed, the position of the Australian Greens remains unchanged.

Recommendation 1

- 1.7 That the bill not be supported in its current form.**

Senator Janet Rice
Greens Senator for Victoria

⁴ Australian Council of Trade Unions, *Submission 7*, [p. 1].