

Chapter 2

Key provisions of the bill and issues raised

2.1 This chapter first discusses the key provisions of the bill that would reform four areas of the ASIC/MSIC eligibility criteria by:

- Harmonising the ASIC and MSIC schemes into one integrated eligibility criteria;
- Creating a tiered approach to offences within the eligibility criteria;
- Introducing consideration of imprisonment thresholds within the eligibility criteria; and
- Including offences relating to serious and organised criminal activity within the eligibility criteria.

2.2 This chapter then discusses the issues and concerns raised by witnesses and submitters. Witnesses and submitters were broadly supportive of the bill's aims, but raised issues and concerns including:

- Consultation on the development of the bill;
- Concerns that the bill could make Australian transport infrastructure less secure;
- Concerns that the bill could adversely impact employment in the aviation and maritime sectors;
- That penalties for offences outlined by the bill exceed the recommended penalties on the Guide to Framing Commonwealth Offences; and
- That the bill treats crews on Flag of Convenience shipping and Australian crews differently, thereby disadvantaging local workers.

2.3 Lastly, this chapter sets out the Committee's views and recommendations.

Key provisions of the bill

Harmonising the eligibility criteria

2.4 The bill would harmonise the ASIC and MSIC schemes into one integrated set of eligibility criteria. Currently, each scheme has its own eligibility criteria which are at times inconsistent. For instance, an applicant with convictions relating to firearms offences is currently eligible for an ASIC, but not for an MSIC under the current criteria.¹

1 Attorney General's Department, *Submission 5*, p. 4.

A tiered approach to offences

2.5 The bill would create a tiered approach within the ASIC/MSIC eligibility criteria. These tiers would be based upon a risk assessment conducted by the Attorney General's Department (AGD) of what level of risk an individual might pose in aviation and maritime environments, given not all offences pose equal risks. The AGD summarised these tiers in its submission:

Tier 1 contains disqualifying offences. Persons convicted of Tier 1 offences will be disqualified from being issued an ASIC or MSIC and will not have access to a discretionary assessment. These persons will continue to have access to appeal the decision by application to the Australian Government's Administrative Appeals Tribunal (AAT).

Tiers 2-5 contain offences that would result in an adverse criminal record and the person being unable to be issued an ASIC or MSIC following the initial application. These persons will be eligible to apply for an ASIC or MSIC discretionary assessment.²

Imprisonment thresholds within the eligibility criteria

2.6 The bill also introduces consideration of any terms of imprisonment that applicants have been given for previous offences. This is a significant change from the current ASIC/MSIC eligibility criteria, as noted in the Department of Infrastructure and Regional Development's (the Department) submission:

Under current eligibility criteria, an ASIC or MSIC applicant's status is based solely on the presence of a relevant offence in the applicant's criminal history. Under the new proposed criteria, less serious criminal offences will only become an aviation or maritime-security relevant offence when a significant term of imprisonment has been imposed, while more serious offences will only require conviction.³

2.7 According to the AGD, this is because:

Courts have information relevant to a particular case before them, including details of the offending conduct and the individual's particular circumstances (including previous convictions). Given this, the courts are in the best position to determine the seriousness of a particular offence and it is appropriate that the sentence handed down by a court is viewed as indicative of the seriousness of that specific offence.⁴

2 Attorney General's Department, *Submission 5*, p. 4.

3 Department of Infrastructure and Regional Transport, *Submission 4*, p. 4.

4 Department of Infrastructure and Regional Transport, *Submission 4*, p. 3.

Offences relating to serious and organised crime

2.8 Lastly, an additional purpose would be added to the eligibility criteria to address the risk that serious and organised crime poses to Australia's transport infrastructure. This would capture offences arising from:

- Anti-criminal organisation legislation;
- The illegal sale and possession of firearms and other weapons;
- Foreign incursion and recruitment offences;
- The illegal importation of goods; and
- Interfering with goods under control of the Australian Border Force.⁵

Issues raised

2.9 Witnesses and submitters raised several issues to the Committee, which will be discussed in turn.

Consultation

2.10 Some witnesses argued that the bill was developed with insufficient consultation with relevant stakeholders. For example, Mr Dean Summers, International Transport Workers' Federation (ITF) Coordinator, Maritime Union of Australia (MUA), told the Committee that the MUA had not been consulted on the proposed reforms. He went on to note that although the Department holds a regular consultative forum, the proposed reforms had not been submitted to it:

The Office of Transport Security holds a consultative forum every now and then. They will say that ... this list of eligibility criteria has been put before that forum. The actual list I have seen has not been put before that forum. [Rather] it is produced and given to us as a *fait accompli*. If we do not like it we can complain to our local member of parliament.⁶

2.11 Similarly, Mr Jarrod Michael, Industrial Officer, Australian Maritime Officers Union (AMOU) claimed that:

I have not had the discussion with the department or anyone else that I can use to justify to our members that this [reform] is necessary.⁷

5 Department of Infrastructure and Regional Transport, *Submission 4*, p. 4.

6 Mr Dean Summers, International Transport Workers' Federation Coordinator, Maritime Union of Australia, *Committee Hansard*, 30 March 2016, pp 3-4.

7 Mr Jarrod Moran, Industrial Officer, Australian Maritime Officers' Union, *Committee Hansard*, 30 March 2016, p. 4.

2.12 The Department responded by noting that consultation on ASIC/MSIC reforms began in August 2011:

Consultation included a range of discussion papers as well as presentations and agenda items at various industry forums. They included industry participants from the aviation and maritime sectors. That includes unions and the ASIC and MSIC issuing bodies.⁸

2.13 Furthermore, the Department pointed to discussion papers that were circulated as part of prior consultations:

In December 2012 we released an industry discussion paper called *The assessment of relevant offences in the ASIC and MSIC schemes: options*. Then in March 2014 we released a comparison between the proposed and current lists of ASROs and MSROs, which are aviation security relevant offences and maritime security relevant offences.⁹

2.14 More specifically, regarding consultation with the MUA, the Department noted that:

We have not had any feedback on the proposed criteria. I have discussed them directly with the MUA; they have had no feedback.¹⁰

Security concerns

2.15 Some stakeholders raised concerns that the bill would make Australian transport infrastructure less secure.

2.16 For example, the MUA objected to the bill's additional purpose of combatting serious and organised crime, commenting that this may dilute its purpose aimed at preventing terrorist acts. The MUA argued that the bill:

... dilutes the focus to the most urgent and diabolical threat to our nation which is a possible terrorist act coming through our maritime or aviation borders [sic].¹¹

2.17 The MUA added that:

... in this very elevated time of terrorism, there should be a specific and dedicated focus on counterterrorism and its effects. We think sharing this

8 Ms Sachi Wimmer, Executive Director, Office of Transport Security, Department of Infrastructure and Regional Development, *Committee Hansard*, 30 March 2016, p. 10.

9 Ms Wimmer, *Committee Hansard*, 30 March 2016, p. 10.

10 Mr Richard Farmer, General Manager, Maritime, Identity and Surface Security, Office of Transport Security, Department of Infrastructure and Regional Development, *Committee Hansard*, 30 March 2016, p. 14. The Department provided evidence of extensive consultation with industry and union stakeholders, including several consultations with the MUA since 2011 on the proposed eligibility criteria. For details, see Department of Infrastructure and Regional Development, answer to question on notice, 13 April 2016 (received 15 April 2016).

11 Maritime Union of Australia, *Submission 1*, p. 1.

responsibility with the organised crime authorities dilutes the purpose and the intent of the maritime security legislation.¹²

2.18 The Australian Services Union (ASU) held that given the large number of MSIC/ASIC applicants, there could be delays of up to two months in the application process. Temporary cards, they suggested, could compromise the security of Australia's ports and airports as 'employees can effectively work in controlled zones for up to two months without a background check on a temporary card'.¹³

2.19 The MUA also claimed that the bill does not address the security threat that middle and upper management of ports could potentially pose, since:

A wharf is a very sterile area, full of steel boxes with seals on them and no manifest available to anybody, so you do not know if there are cigarettes or tyres or ice inside a container. I do not know, and none of the workers on the wharf know either. But who does know? That goes to one of the points in the gaps in security. It goes to the levels of workers who are exempt from the MSIC scheme, and that is middle and upper management. They may work a few blocks away or down in the city centre, but they place ships in different ports, they place workers on this thing, they put containers here or over there, and they are responsible for security and contracting security firms. There is a gap in security.¹⁴

2.20 The Department disagreed that the bill dilutes the counter-terror aspect of the ASIC and MSIC schemes. The Department explained that reforms to the eligibility criteria would not change the fundamental integrity of security assessments, since:

The process for assessing national security outcomes is that, basically, the new eligibility criteria do not affect the national security assessment component of the background check. It is done by ASIO and is very separate from the criminality checks that are undertaken at the moment which are a part of the current process. We are talking about changing those eligibility criteria. They will continue to be undertaken through the law enforcement agencies and specifically CrimTrac, which is the national body that takes all of the criminal backgrounds checking from all of the state and territory police forces and brings them together nationally.¹⁵

2.21 Moreover, the Department argued that the bill would actually strengthen the security assessment component of the ASIC and MSIC schemes, as:

... the national security assessment is not dependent on the presence of a conviction in an applicant's criminal history; it has no connection. It is a very separate assessment. ASIO is looking at the terrorism threat that a

12 Mr Summers, *Committee Hansard*, 30 March 2016, p. 1. See also Mr Moran, *Committee Hansard*, p. 1.

13 Australian Services Union, *Submission 3, Attachment 1*, pp 5-6.

14 Mr Summers, *Committee Hansard*, 30 March 2016, p. 7.

15 Ms Wimmer, *Committee Hansard*, 30 March 2016, p.7.

person poses as opposed to the criminality and, really, the inclusion of offences such as foreign incursion and recruitment in the eligibility criteria will enhance the scheme's ability to exclude persons convicted of offences of the highest severity, and that might be most closely linked to a terrorist activity.¹⁶

2.22 In response to the ASU's argument that the bill does not address the security risk posed by temporary ASIC/MSICs, the Department noted that the proposed process would actually expedite the application process:

The shift in focus from low level or minor offences to higher risk offences related to serious or organised crime means that more applicants are expected to be found initially eligible for an ASIC or MSIC. This will mean these people may be issued their ASIC or MSIC quicker...¹⁷

Employment concerns

2.23 Some witnesses argued that the bill could unjustly punish some MSIC applicants who have prior convictions for minor offences. For example, the MUA claimed that:

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.¹⁸

2.24 Mr Dean Summers, MUA, told the Committee that applicants with prior convictions have:

... already done their time and paid their penalty to society and, yet, are potentially being penalised again by not being able to work in their chosen areas.¹⁹

2.25 The Department and the AGD made the case that the bill would actually improve the ASIC and MSIC schemes for most applicants who had prior convictions, as the bill harmonises the ASIC and MSIC eligibility criteria. According to the AGD:

An individual who has operational need to apply for a card under one scheme while already having a valid card under the other would not be required to undergo a separate check. This provides greater mobility between the two schemes and improved employment outcomes.²⁰

2.26 In response to the MUA and AMOU's argument that the bill would punish applicants with prior convictions, the AGD argued that the introduction of

16 Ms Wimmer, *Committee Hansard*, 30 March 2016, p. 16.

17 Department of Infrastructure and Regional Transport, *Submission 4*, p. 4.

18 Maritime Union of Australia, *Submission 1*, p. 2.

19 Mr Summers, *Committee Hansard*, p. 1.

20 Attorney General's Department, *Submission 5*, p. 4.

imprisonment thresholds in the eligibility criteria would improve employment outcomes for most applicants with prior convictions. For example, they stated that:

... for offences involving theft the current threshold under the aviation scheme is any form of imprisonment. Under the revised criteria an individual would need to be sentenced to 30 months or more imprisonment before being found ineligible to hold an ASIC or MSIC. This recognises that serious theft-related convictions indicate a high-level of significant criminality that is incompatible with trusted access to secure areas.²¹

2.27 The Department expanded on this, explaining that modelling had been conducted using a total sample of roughly 32 000 individual applications (equivalent to three months' applications). This modelling found that currently, 'approximately 500 [applicants] are found initially ineligible.'²² However under the bill's proposed reformed eligibility criteria this would improve, and:

... approximately 320 of these applicants would be found eligible for an ASIC or MSIC on initial application. Conversely, the analysis showed that due to the serious nature of their offences, approximately 30 existing cardholders would be found ineligible to be issued with an ASIC or MSIC.²³

2.28 The AGD claimed this change was as a result of the proposed eligibility criteria eliminating:

... the lower-level criminal offences that do not indicate high levels of risk to national security or serious and organised crime, but are more frequently seen on criminal histories, such as dishonesty or theft-related offences.²⁴

2.29 The Department also pointed to improved and expedited processing times for applicants being positive for both employers and workers in the maritime and aviation sectors.²⁵

Penalties

2.30 In its examination of the bill, the Standing Committee for the Scrutiny of Bills (SCSB) highlighted to the Committee that:

Subsection 38AB(3) provides that the regulations made under this section may prescribe penalties for offences against those regulations. The subsection provides that for an offence committed by an operator the maximum penalty is 200 penalty units; for an industry participant, 100 penalty units; and for an accredited air cargo agent or any other person,

21 Attorney General's Department, *Submission 5*, p. 5.

22 Department of Infrastructure and Regional Transport, *Submission 4*, p. 4.

23 Department of Infrastructure and Regional Transport, *Submission 4*, p. 4.

24 Attorney General's Department, *Submission 5*, p. 5.

25 Department of Infrastructure and Regional Transport, *Submission 4*, p. 4.

50 penalty units. The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers suggests that penalties that exceed 50 penalty units should not normally be imposed by regulations.²⁶

2.31 Regarding this, the Department considered that the provisions of the bill are consistent with the requirements in the Guide to Framing Commonwealth Offences, since:

The maximum penalty imposed in the bill for natural persons (identified as "any other persons" in the bill) is 50 penalty units, which is consistent with the requirements under the Guide. However, in accordance with the Guide, higher maximum penalties are prescribed for industry roles undertaken by corporate entities. 'Aviation industry participants' and 'maritime industry participants' are corporate entities such as port operators or airlines.²⁷

Flags of convenience

2.32 Some submitters argued that instead of reforming the ASIC and MSIC schemes, the government should address the more serious security threat posed by Flag of Convenience (FOC) shipping. For example, the MUA argued that:

There has been a huge spike in FOC ships on the Australian coast and vulnerabilities were described in the Border Force's submission to the parallel ongoing inquiry, into flag-of-convenience ships, with the impact that the FOC ships have on the Australian coast. There is exposure of our critical infrastructure - oil and gas production, exploration and storage - to foreign workers seeking to replace Australian workers working around our oil and gas sector, as a political attack on Australian transport unions. There are aviation and maritime cabotage security vulnerabilities where foreign aviation workers do not require ASICs.²⁸

2.33 The Department rejected this argument on the grounds that the ASIC and MSIC schemes do not discriminate between Australian and foreign workers, noting that:

If they [foreign workers] are eligible for an MSIC or an ASIC then they also will go through exactly the same check. If they do not require an ASIC or an MSIC they will continue to need to be escorted through secure zones at ports and airports.²⁹

Committee view

2.34 It is the view of the Committee that the bill has a positive security outcome. The bill addresses the threat which serious and organised crime poses to Australian

26 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2016*, pp 86-87.

27 Department of Infrastructure and Regional Transport, *Submission 4*, p. 5.

28 Mr Summers, *Committee Hansard*, 30 March 2016, p. 2.

29 Ms Wimmer, *Committee Hansard*, 30 March 2016, p. 16.

transport infrastructure, and gives effect to an element of the government's plan to tackle Australia's ice problem.

2.35 The bill does not dilute the national security assessment, but strengthens it by adding foreign incursion and recruitment to the offences captured by the eligibility criteria. Furthermore, the evidence received by the Committee suggests that the bill would lessen the threat vector for temporary ASICs and MSICs by reducing wait times for applicants.

2.36 The evidence offered by the Department shows that consultation on the bill was appropriate.

2.37 Regarding the matters referred to the Committee by the SCSB, the weight of evidence provided by the Department shows that the penalties within the bill are consistent with the requirements in the Guide to Framing Commonwealth Offences.

2.38 Although it is not the bill's purpose, the Committee is also of the view that the bill would provide positive employment outcomes for applicants. Reduced wait times would benefit all employers and employees, while the integrated ASIC/MSIC eligibility criteria would provide greater labour mobility between the aviation and maritime sectors.

2.39 The Department's modelling of employment outcomes was particularly persuasive, specifically its impressive sample size of 32 000, and the positive impact it suggested the bill would have on the employment prospects of aviation and maritime workers who have prior convictions.

2.40 The Committee does not find concerns about FOC shipping relevant to the bill. The Committee notes that the issue is currently the subject of inquiry for the Rural and Regional Affairs and Transport References Committee.

Recommendation 1

2.41 **The Committee recommends that the bill be passed.**

Senator the Hon Bill Heffernan

Chair

