

EXPLANATORY STATEMENT

Select Legislative Instrument 2006 No. 100

Minute No. 17 of 2006 – Minister for Transport and Regional Services

Subject - *Aviation Transport Security Act 2004*

Aviation Transport Security Amendment Regulations 2006 (No. 3)

Section 133 of the *Aviation Transport Security Act 2004* (the Act) provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carry out or giving effect to the Act.

The *Aviation Transport Security Regulations 2005* (the Principal Regulations) set out, in part, the eligibility requirements for a person to be issued with an Aviation Security Identification Card (ASIC). The Principal Regulations were amended by the *Aviation Transport Security Amendment Regulations 2005 (No.5)* and the *Aviation Transport Security Amendment Regulations 2006 (No.2)* to strengthen the disqualifying criteria for being issued with an ASIC to include a pattern of criminality for non-custodial aviation security relevant offences and to provide that the assessment of a person's eligibility to hold an ASIC must be undertaken by the Secretary of the Department of Transport and Regional Services (the Secretary). These amendments came into effect on 6 March 2006.

The purpose of the proposed Regulations is to:

- allow the Secretary to undertake a one off assessment of the criminal history records of all persons who held a valid ASIC as at 5 March 2006. The assessment would take account of the strengthened eligibility criteria that came into effect on 6 March 2006;
- authorise the disclosure of personal information of those ASIC holders by ASIC issuing bodies, the Secretary, the Australian Federal Police and State and Territory police forces;
- authorise the cancellation of an ASIC where an ASIC holder is determined to be ineligible to hold an ASIC under the strengthened disqualifying criteria and, in certain circumstances, the issue of a new ASIC subject to conditions; and
- establish a process for notifying the issuing body and the ASIC holder of the outcome of the assessment.

Attachment A outlines the scope of the proposed Regulations.

Further details of the proposed Regulations are set out in Attachment B.

The Act does not specify any conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

The proposed Regulations would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The proposed Regulations would commence on the day after they are registered.

The Minute recommends that Regulations be made in the form proposed.

Authority:

Section 133 of the *Aviation Transport Security Act 2004*

ATTACHMENT A

Government decisions in 2005 to further strengthen the existing Aviation Security Identification Card (ASIC) scheme have resulted in the disqualifying criteria for an ASIC being strengthened. This has been achieved by:

- removing grandfathering provisions that allowed existing employees to be issued with an ASIC regardless of whether they had an adverse criminal record; and
- the introduction of a pattern of criminality test that takes into account non-custodial sentences and provides for more frequent background checking / monitoring where a lower level of criminal activity is evident. The pattern of criminality test came into effect on 6 March 2006.

From 6 March 2006 all new ASIC applications are being assessed by the Secretary of the Department of Transport and Regional Services (the Secretary) under the strengthened criteria. However there may be a number of existing ASIC holders who would be ineligible to hold an ASIC under the strengthened criteria. To ensure all ASIC holders meet the requirements under the strengthened criteria all existing ASIC holders need to have their criminal histories reassessed against the strengthened criteria.

The personal information of transitional ASIC holders that is required for the assessment will not exceed that previously provided in the ASIC holder's original application and will only be disclosed between an issuing body, the Secretary, the Australian Federal Police and the police forces and police services of each State and Territory.

Where the Secretary determines that an ASIC holder has an adverse criminal record against the current disqualifying criteria, the ASIC will be cancelled. Where the Secretary determines that an ASIC holder has a pattern of criminality that fails the criminality test, the ASIC will be cancelled and a new one issued for a shorter duration.

The proposed Regulations would amend the *Aviation Transport Security Regulations 2005* (the Principal Regulations) to specify that:

- the Secretary has the authority to conduct a one off assessment of the criminal histories of all current ASIC holders who were issued an ASIC prior to 6 March 2006;
- ASIC issuing bodies are authorised to disclose the personal information of all persons who were issued with an ASIC prior to 6 March 2006 to the Secretary;
- the AFP is authorised to undertake a once only criminal history record check for each transitional ASIC holder and to provide a criminal history certificate for each person who has recorded convictions to the Secretary for assessment. Where a criminal history certificate exists but has no entries, electronic advice would be provided by the AFP to the Secretary;
- the AFP and the police force or police service of each State and Territory are authorised to disclose personal information about a transitional ASIC holder to each other for the purposes of carrying out a criminal history record check

and determining the person's eligibility to hold an ASIC against the strengthened criteria;

- where a person does not have a criminal record, or the person does not have an adverse criminal record, the Secretary must advise the issuing body of this outcome;
- where a person has an adverse criminal record, i.e. the person does not meet the disqualifying criteria under subregulation 6.28(2A), the Secretary must direct the issuing body to cancel the ASIC and advise the ASIC holder that the issuing body has been directed to cancel the ASIC;
- where a person has a qualified criminal record, i.e. the person has a pattern of criminality under subregulation 6.28(6), the Secretary must direct the issuing body to cancel the ASIC, approve the issuing of another ASIC for a period no longer than 12 months and advise the ASIC holder of this;
- an application may be made by an issuing body for a review of a decision of the Secretary to direct an issuing body to cancel an ASIC; and
- an application may be made under the *Administrative Appeals Tribunal Act 1975* for review of a decision of the Secretary to direct an issuing body to cancel an ASIC or refuse to exempt an issuing body from giving effect to a direction.

Extensive consultation has been undertaken with the aviation industry through regular regional consultative and industry forums - the Aviation Security Advisory Forum, Regional Industry Consultative Meetings and the Identity Working Group. These forums allow consultation with key stakeholders including the Australian Airports Association, the Regional Aviation Association of Australia, Recreational Aviation Australia, the Aircraft Owners and Pilots Association of Australia and ASIC Issuing Bodies. Consultation has indicated that the proposed amendments would be welcomed by industry.

ATTACHMENT B**Details of the proposed *Aviation Transport Security Amendment Regulations 2006* (No. 3)****Regulation 1 - Name of Regulation**

This regulation provides that the title of the Regulations is the *Aviation Transport Security Amendment Regulations 2006 (No. 3)*.

Regulation 2 - Commencement

This regulation provides for the Regulations to commence on the day after they are registered.

Regulation 3 - Amendment of the *Aviation Transport Security Regulations 2005*

This regulation provides that the *Aviation Transport Security Regulations 2005* ('the Principal Regulations') are amended as set out in Schedule 1.

Schedule 1 - Amendments**Item [1] –regulation 6.02**

The proposed amendment to regulation 6.02 removes the reference to an assessment by the Secretary of the Department of Transport and Regional Services (the Secretary) of the criminal record certificate to determine whether the person has an adverse criminal record, and the guidance as to the definition of 'adverse criminal record' to clarify that the assessment undertaken is not in itself a background check, but an activity associated with one of the listed background checks. New regulation 6.02 provides that a reference in Part 6 to background checking is a reference to any one of the processes listed. This removes the requirement that all the process listed must be satisfied in relation to background checking as not all processes will be applicable to all ASIC applications.

Item [2] –regulation 6.26A

The proposed subregulation 6.26A provides guidance that for the purposes of Division 6.5 the definition of an 'adverse criminal record' has the same meaning as in subregulation 6.28(2A).

Items [3], [4] and [5] -regulation 6.27A

The proposed amendment to subparagraph 6.27A(3)(a)(i) specifies that if the Secretary determines that a person has an adverse criminal record, based on an assessment of a criminal history certificate provided by the Australian Federal Police (AFP), the Secretary must issue a notice to the issuing body that includes a statement that the Secretary's assessment was based on a criminal history certificate received from the AFP. This is to provide clarification that the assessment undertaken by the Secretary is based only on an assessment of the criminal history certificate provided by the AFP.

The proposed amendment to paragraph 6.27A(3)(b) specifies that if the Secretary determines that a person has an adverse criminal record, the Secretary must issue a notice to the person that includes a statement that the issuing body has been directed not to issue the ASIC because the person has an adverse criminal record based on a criminal history certificate received from the AFP. This is to provide clarification that the assessment undertaken by the Secretary is based only on the criminal history certificate provided by the AFP.

The proposed omission of subregulation 6.27A(5) is a technical drafting change to relocate the guidance provided regarding the definition of an 'adverse criminal record' to proposed regulation 6.26A. The effect has not been altered.

Item [6] –subparagraph 6.28(1)(d)(ii)

The proposed amendment to subparagraph 6.28(1)(d)(ii) provides that a notice provided by the Secretary to an issuing body to advise that, based on an assessment of a criminal history certificate received from the AFP, the person does not have an adverse criminal record must include the statement that the person does not have a criminal record based on the criminal history certificate received from the AFP.

This is to provide clarification that the assessment undertaken by the Secretary to determine if a person has an adverse criminal record is based only on the criminal history certificate provided by the AFP.

Item [7] –regulations 6.42A, 6.42B, 6.42C, 6.42D, 6.42E, 6.42F and 6.42G

The proposed subregulation 6.42A(1) provides that Subdivision 6.5.3 deals with transitional ASIC holders.

The proposed paragraph 6.42A(2)(a) provides that the Secretary may request issuing bodies to provide personal information about transitional ASIC holders in order for the AFP to conduct criminal records checks in relation to these holders.

The proposed paragraph 6.42A(2)(b) provides that the Secretary may assess the criminal records of any transitional ASIC holders who have criminal records to determine whether they have an adverse criminal record, a qualified criminal record or no criminal record.

The proposed paragraph 6.42A(2)(c) provides that the Secretary may cancel the ASIC held by any holder who has an adverse criminal record or a qualified criminal record.

The proposed subregulation 6.42A(3) provides guidance that the definition of a 'qualified criminal record' has the meaning given in subregulation 6.42D(3) and defines that a 'transitional ASIC holder' is a person who is the holder of an ASIC and whose eligibility to hold the ASIC was not assessed under subregulation 6.27A(1), which requires that the Secretary must undertake the assessment, based on a criminal history certificate provided by the AFP.

The proposed inclusion of the note to subregulation 6.42A(3) provides extra guidance that subregulation 6.27A(1) commenced on 6 March 2006 and applies to an

application for the issue of an ASIC made, but not finally determined before 6 March 2006 or made after 5 March 2006.

The proposed subregulation 6.42B(1) provides that as soon as practicable after the commencement of this regulation, the Secretary must give an issuing body that has issued an ASIC to a transitional ASIC holder a notice to provide specified personal information about the holder to the Secretary. This request for information will not exceed the information previously provided by the transitional ASIC holder in their original application.

The proposed subregulation 6.42B(2) provides that as soon as practicable after an issuing body receives a notice from the Secretary seeking personal information regarding transitional ASIC holders, the issuing body must give the information specified in the notice to the Secretary in the form approved by the Secretary.

The proposed subregulation 6.42B(3) provides that as soon as practicable after the Secretary receives the information from the issuing body, the Secretary must give the AFP a written request for a criminal records check to be conducted in relation to the transitional ASIC holders. The written request must ask for either a criminal history certificate to be produced, if the holder has a criminal record, or a written notice to the effect that the holder does not have a criminal record.

The proposed paragraph 6.42C(1)(a) would authorise an issuing body, for the purposes of enabling the AFP to conduct a criminal records check in relation to a transitional ASIC holder, to disclose personal information in relation to the holder to the Secretary.

The proposed paragraph 6.42C(1)(b) would authorise the Secretary, for the purposes of enabling the AFP to conduct a criminal records check in relation to a transitional ASIC holder, disclose personal information in relation to the holder to the AFP.

The proposed subregulation 6.42C(2) would authorise the AFP, for the purposes of conducting a criminal records check in relation to a transitional ASIC holder, to disclose personal information in relation to the holder to the police force or police services of each State and Territory.

The proposed paragraph 6.42C(3)(a) would authorise the AFP, for the purposes of enabling the Secretary to determine whether a transitional ASIC holder has an adverse criminal record, a qualified criminal record, or no criminal record, to disclose personal information about the holder to the Secretary.

The proposed paragraph 6.42C(3)(b) would authorise the police force or police services of each State and Territory, for the purposes of enabling the Secretary to determine whether a transitional ASIC holder has an adverse criminal record, a qualified criminal record, or no criminal record, to disclose personal information about the holder to the AFP.

The proposed subregulation 6.42C(4) would authorise the Secretary, for the purposes of giving a notice to the issuing body as to whether the transitional ASIC holder has an adverse criminal record, a qualified criminal record or no criminal record, to disclose personal information received from the AFP about the holder to the issuing body.

The proposed subregulation 6.42D(1) provides that this regulation applies if the Secretary receives a criminal history certificate from the AFP under proposed subregulation 6.42B(3) in relation to a transitional ASIC holder.

The proposed subregulation 6.42D(2) provides that the Secretary of the Department of Transport and Regional Services must as soon as practicable conduct an assessment, based on the certificate to determine whether the holder has an adverse criminal record or a qualified criminal record.

The proposed subregulation 6.42D(3) inserts a definition for a 'qualified criminal record'. The definition provides that a person has a 'qualified criminal record' if they have been convicted twice or more of aviation-security-relevant offences and no sentence of imprisonment was imposed for any of those convictions and none of those convictions occurred within the 12 months ending on the date when the criminal history certificate was made.

This provides for more frequent background checking of individuals who have a pattern of non-custodial offences by limiting the validity of the card to a period of up to 12 months from the date of the criminal history certificate.

The proposed subregulation 6.42E(1) provides that regulation 6.42E applies if, in response to a request made by the Secretary under proposed subregulation 6.42B(3), the Secretary receives written notification from the AFP to the effect that the holder does not have a criminal record or the Secretary determines, under proposed subregulation 6.42D(2), that the holder does not have an adverse criminal record or a qualified criminal record.

The proposed subregulation 6.42E(2) provides that the Secretary must give the ASIC issuing body that issued an ASIC to the holder a notice stating that either the Secretary has received written notice from the AFP to the effect that the holder does not have a criminal record, or that the Secretary has conducted an assessment based on a criminal history certificate received from the AFP, and based on the certificate received, the holder does not have an adverse criminal record or a qualified criminal record.

The proposed subregulation 6.42F(1) provides that regulation 6.42F applies if the Secretary determines, under proposed subregulation 6.42D(2), that a transitional ASIC holder has an adverse criminal record.

The proposed subregulation 6.42F(2) provides that the Secretary must give the ASIC issuing body that issued an ASIC to the holder a notice that includes:

- a statement that the Secretary conducted an assessment, based on a criminal history certificate provided by the AFP, to determine whether the person has an adverse criminal record, and based on the certificate received, the holder has an adverse criminal record; and
- a direction to cancel the ASIC.

The proposed subregulation 6.42F(3) provides that the Secretary must issue a notice to the ASIC holder stating that the issuing body has been given a direction to cancel the ASIC because, based on a criminal history certificate received from the AFP, the holder has an adverse criminal record.

The proposed inclusion of the note to proposed subregulation 6.42F(3) provides extra guidance that under the *Administrative Appeals Tribunal Act 1975*, notice of decision and the rights to review of the decision must be given to a person whose interests are affected by a reviewable decision.

The proposed subregulation 6.42G(1) provides that regulation 6.42G applies if the Secretary determines, under proposed subregulation 6.42D(2), that a transitional ASIC holder has a qualified criminal record and the ASIC held by the holder will expire later than 12 months ending on the date when the criminal history certificate was made.

The proposed subregulation 6.42G(2) provides that the Secretary must give the ASIC issuing body that issued an ASIC to the holder a notice that includes:

- a statement that the Secretary conducted an assessment, based on a criminal history certificate provided by the AFP, to determine whether the person has a qualified criminal record, and based on the certificate received, the holder has a qualified criminal record;
- a direction to cancel the ASIC; and
- approval to issue another ASIC to the holder subject to the condition that the ASIC issued to the holder has an expiry date that is not later than 12 months from the end of the month in which the criminal history certificate was made.

The cancellation and reissue of the ASIC will ensure that a transitional ASIC holder who has a qualified criminal record will undergo more frequent background checking.

The proposed subregulation 6.42G(3) provides that the Secretary must issue a notice to the ASIC holder stating that the issuing body has been given a direction to cancel the ASIC because, based on a criminal history certificate received from the AFP, the holder has a qualified criminal record and that the issuing body has been given approval to issue another ASIC subject to the condition that the expiry date is not later than 12 months after the end of the month in which the criminal history certificate was made.

The proposed inclusion of the note to proposed subregulation 6.42G(3) provides extra guidance that under the *Administrative Appeals Tribunal Act 1975*, notice of decision and the rights to review of the decision must be given to a person whose interests are affected by a reviewable decision.

Item [8] –paragraph 6.43(2)(aa)

The proposed paragraph 6.43(2)(aa) provides that an issuing body must immediately cancel an ASIC that it has issued if the issuing body has received a notice from the Secretary that directs it to cancel the ASIC because the holder has an adverse criminal assessment or a qualified criminal assessment, based on an assessment of a criminal history certificate received from the AFP.

Item [9] –regulation 6.43A

The proposed subregulation 6.43A(1) provides that an issuing body may apply to the Secretary, in writing, for an exemption from giving effect to a direction to cancel an ASIC based on a criminal history certificate received from the AFP.

The proposed subregulation 6.43A(2) provides that if the Secretary requires further information to deal with an application, the Secretary may ask the issuing body, in writing, to provide the information.

The proposed subregulation 6.43A(3) specifies actions that the Secretary must take within 30 days after receiving the application (or, if the Secretary asks for more information under proposed subregulation 6.43A(2), within 30 days after receiving the information). These actions are to comply with proposed regulation 6.43B and give the issuing body a notice that states whether the issuing body is exempted from giving effect to the direction and, if the Secretary refuses to exempt the issuing body the direction, the reasons for the decision.

The proposed inclusion of the note to proposed subregulation 6.43A(3) provides extra guidance that under the *Administrative Appeals Tribunal Act 1975*, notice of decision and the rights to review of the decision must be given to a person whose interests are affected by a reviewable decision.

The proposed subregulation 6.43A(4) provides that the Secretary is taken to have refused to approve the exemption from giving effect to the direction if he or she has neither approved, or refused to approve, the exemption within the period allowed by proposed subregulation 6.43A(3).

The proposed subregulation 6.43A(5) sets out the issues that the Secretary must consider before exempting or refusing to exempt to give effect to a direction.

The proposed subregulation 6.43A(6) allows the Secretary to put a condition on an approval for an exemption to give effect to a direction. This condition must be stated in the notification to the issuing body mentioned in proposed subregulation 6.43A(3).

Items [10] and [11] –subregulation 8.02(3)

The proposed amendment to paragraph 8.02(3)(b) is a technical drafting amendment to allow for additional decisions by the Secretary in relation to the cancellation of ASICs to be appealable under the *Administrative Appeals Tribunal Act 1975*.

The proposed paragraphs 8.02(3)(c) and (d) would have the effect that an application may be made under the *Administrative Appeals Tribunal Act 1975* to the Tribunal for review of a decision of the Secretary to direct an issuing body to cancel an ASIC or to refuse to exempt an issuing body from giving effect to a direction from the Secretary to cancel an ASIC.