

# Explanatory Statement

*National Gallery Act 1975*

## National Gallery Regulations 2018

Issued by the authority of the Minister for the Arts

### Purpose

The purpose of the *National Gallery Regulations 2018* (the Regulations) is to repeal and remake the current *National Gallery Regulations 1982*, with some changes to reflect current drafting practice and ensure that the Regulations continue to be fit for purpose. In particular, the Regulations:

- increase the financial thresholds above which the National Gallery of Australia (National Gallery) requires the approval of the Minister to purchase and dispose of certain assets;
- provide for the Council of the National Gallery to authorise and place conditions on the sale, supply, disposal, possession and control of liquor on the National Gallery's premises;
- provide for the Director of the National Gallery to appoint security officers; and
- create certain offences relating to the protection of the collection, control of land and buildings and supply of liquor on the National Gallery's premises.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. The Regulations commence the day after they are registered.

### Authority

The *National Gallery Act 1975* (the Act) establishes the National Gallery as Australia's primary agency for the collection, preservation and provision of access to, Australia's national collection of works of art. The National Gallery's functions are to develop and maintain a national collection, and to exhibit (or make available for others to exhibit) the national collection and other works of art in the National Gallery's possession.

Section 46 of the Act enables the Governor-General to make regulations, not inconsistent with the Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act. Section 46 specifically provides for the regulations to regulate the conduct of persons on gallery land or buildings; fix charges for entry onto gallery land and buildings; and prescribe penalties (not exceeding 5 penalty units) for offences against the regulations.

Section 38 of the Act restricts the National Gallery's power to purchase and dispose of assets exceeding certain financial thresholds. It relevantly provides that the National Gallery must not, without the approval of the Minister: acquire any property, right or privilege; dispose of any property, right or privilege; or enter into a contract for the construction of a building that exceeds the amount specified in the Act (or any higher amount that is prescribed by regulations).

Section 45 of the Act enables regulations to be made for and in relation to the sale, supply, disposal, possession or control of liquor on the National Gallery's premises in the Australian Capital Territory.

The Act does not specify any preconditions that need to be met before the power to make the Regulations may be exercised.

The notes on the provisions of the Regulations are set out in Attachment A.

### Consultation

The National Gallery of Australia was consulted in advance of drafting the instrument to confirm the desired policy and operational outcomes that the remade Regulations will support. The Council was provided with an opportunity to comment on the final draft in January 2018. The Council did not raise any issues.

The Office of Best Practice Regulation has confirmed that the preparation of a Regulation Impact Statement is not necessary, as the amendments have a nil or low impact on business or the economy or individuals.

### Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment B.

**Attachment A****Notes on the National Gallery Regulations 2018****Part 1—Preliminary****Section 1 – Name**

This section provides that the name of the Regulations is the *National Gallery Regulations 2018*.

**Section 2 – Commencement**

This section provides for the Regulations to commence on the day after they are registered on the Federal Register of Legislation.

**Section 3 – Authority**

This section provides that the Regulations are made under the *National Gallery Act 1975*.

**Section 4 – Schedules**

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

**Section 5 - Definitions**

This section provides definitions of terms used in the Regulations.

The note in the section highlights that a number of terms used in the instrument are defined in the Act, including Council, Director, Gallery, and national collection. These terms have the same meaning in the Regulations as under the Act, pursuant to section 13 of the *Legislation Act 2003*.

*Act* is defined to mean the *National Gallery Act 1975*.

*Assistance animal* is defined to have the same meaning as in the *Disability Discrimination Act 1992* which, at the time of preparation of the explanatory statement, is a dog or other animal that is:

- accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a persons with a disability to alleviate the effect of the disability; or
- accredited by an animal training organisation that are prescribed by regulations made under that Act; or
- trained:
  - to assist a person with a disability to alleviate the effect of the disability; and
  - to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

**Authorised liquor supplier** is defined to mean a person who is authorised under section 8 of the Regulations to sell or supply liquor.

**Council notice** is defined to have the meaning given by subsection 18(1) of the Regulations. section 18 provides for the Council to issue a notice specifying prohibitions, conditions or restrictions relating to Gallery land, a Gallery building or Gallery material.

**Gallery building** is defined to mean a building on Gallery land.

**Gallery contractor** means a contractor of the gallery or a contractor or employee of another Gallery contractor.

**Gallery land** is defined to mean land that is made available to the Gallery under subsection 8(1) of the Act (which enables the Minister to make available to the Gallery land owned by the Commonwealth) or otherwise owned by or under control of the Gallery.

**Gallery material** is defined to mean a Gallery work of art, other material that is owned by the Gallery or under its control, or any structure, equipment or material that it kept by the Gallery for exhibition or display, or research, educational or publicity activities.

**Gallery work of art** means a work of art forming part of that national collection or under the control of the Gallery.

**Liquor** is defined have the same meaning as in section 45 of the Act, which means wine, spirits, ale, beer, porter, cider, perry or any liquid containing alcohol ordinarily used or fit for use as a beverage.

**Prohibited article** is defined to mean:

- an implement, other than a pen or pencil, that could be used to damage or conceal Gallery material; or
- a camera or associated equipment; or
- a bag, case, parcel or other container that cannot be wholly enclosed within a cube each side of which is 300 millimetres in length.

**Security officer** is defined to mean a staff member appointed under subsection 12(1) of the Regulations to be a security officer.

**Staff member** is defined to mean a member of staff of the Gallery, a Gallery contractor who is an individual or a volunteer.

**Volunteer** means an individual who works for the Gallery on a voluntary basis.

## **Part 2—Purchase and disposal of assets**

### **Section 6 – Power to purchase and dispose of assets**

Paragraph 38(a) of the Act provides that the Gallery shall not, without the approval of the Minister, acquire any art for a consideration exceeding \$450,000 or, if a higher amount is prescribed by regulation, that higher amount. Subsection 6(1) of the Regulations prescribes a higher amount of \$10,000,000 for paragraph 38(a) of the Act. This is the same amount as is currently prescribed by Regulation 3 of the National Gallery Regulations 1982.

Paragraph 38(b) of the Act provides that the Gallery shall not, without the approval of the Minister, acquire any property, right or privilege, other than a work of art, for a consideration exceeding \$250,000 or, if a higher amount is prescribed by regulation, that higher amount. Paragraph 38(c) of the Act imposes equivalent restrictions in relation to the disposal of such property, rights or privileges. Paragraph 38(d) of the Act provides that the Gallery shall not, without the approval of the Minister, enter into a contract for the construction of a building, where the Gallery is to pay an amount exceeding \$100,000, or, if a higher amount is prescribed, that higher amount.

Subsection 6(2) of the Regulations prescribes a higher amount of \$2,000,000 for each of paragraphs 38(b), (c) and (d) of the Act. This is an increase from the amounts currently prescribed by Regulation 3 of the National Gallery Regulations 1982, which is \$1,000,000 for each of those paragraphs. The higher amount is intended to provide commercial flexibility and reduce administrative burden on the National Gallery, while maintaining appropriate Ministerial oversight of gallery expenditure.

## **Part 3—Supply of liquor**

### **Section 7 – Purposes of this Part**

This section provides that Part 3 is made for the purposes of subsection 45(1) of the Act. Subsection 45(1) of the Act provides that the regulations may make provision for and in relation to the sale, supply, disposal, possession or control of liquor on premises in the Australian Capital Territory owned by or under the control of the National Gallery.

### **Section 8 – Authorisation to supply liquor**

Section 8 relates to authorising the sale or supply of liquor on Gallery land, or in a Gallery building, and sets out what must be specified in an authorisation. This framework is required because, events may be held at the Gallery where alcohol may be served, for example.

Subsection 8(1) provides the Council may, in writing, authorise a person, or class of persons to sell or supply liquor on Gallery land, or in a Gallery building. Subsection 8(2) provides that the council must specify in the authorisation the part of the Gallery land or Gallery building where liquor may be sold or supplied and the hours during which liquor may be sold or supplied. Subsection 8(3) provides that the Council may specify in the authorisation conditions to which the authorisation is subject.

The Regulations do not provide for merits review of a decision made under section 8, on the basis that the grant of a liquor authorisation relates to commercial decisions made by the Gallery, and it is not clear that an appropriate remedy would be available in circumstances where the Council decided not to authorise a particular person to sell or supply liquor on gallery land or in a gallery building. This is consistent with the position under the current National Gallery Regulations 1982 and under similar regulations governing the supply of liquor in certain other national cultural institutions (such as the National Portrait Gallery of Australia).

### **Section 9 – Supply of liquor**

#### *Authorisations*

Section 9 creates several offences regarding the sale or supply of liquor on Gallery land or in a Gallery building. These offences are required to ensure that the sale and supply of liquor is controlled, and safe (noting that subsection 45(2) of the Act excludes the law of the Australian Capital Territory relating to the sale, supply and disposal of liquor for premises in respect of which regulations are in force).

Subsection 9(1) provides that it is an offence if a person sells or supplies liquor on Gallery land, or in a Gallery building. The penalty for this offence is 5 penalty units.

However, subsection 9(2) provides that the offence provision in subsection 9(1) does not apply to a person:

- selling or supplying liquor if they are authorised by the Council to sell or supply liquor under subsection 8(1) (s. 9(2)(a)); or
- supplying liquor (other than by selling it) that was sold or supplied to that person on Gallery land, or in a Gallery building, by an authorised liquor supplier (s. 9(2)(b)).

The note under subsection 9(2) provides that in any prosecution for an offence under subsection 9(1), a defendant intending to rely on an exception in subsection 9(2) bears an evidential burden in relation to the matters in subsection (2). This means the defendant must raise evidence that his or her conduct fell within the exception. If the defendant discharges this evidential burden, the prosecution must disprove the matter beyond reasonable doubt.

Placing the evidential burden on the defendant in this case is appropriate as the matters required to be established—either that the person is themselves authorised or that the liquor was sold or supplied to that person by an authorised liquor supplier — are matters within the knowledge of the defendant.

Subsection 9(3) provides that it is an offence if a person is an authorised liquor supplier, and sells or supplies liquor on Gallery land, or in a Gallery building, and does not comply with the conditions to which their authority as an authorised liquor supplier is subject. This is because the intention is that an authorised liquor supplier only supply liquor in compliance with their authorisation. The penalty for this offence is 5 penalty units.

#### *Adulterated liquor*

Subsection 9(4) provides that it is an offence if a person on Gallery land, or in a Gallery building sells or supplies liquor and the liquor is adulterated. This is to ensure that the liquor being supplied is genuinely the product described. The penalty for this offence is 5 penalty units.

#### *Intoxicated persons and minors*

Subsection 9(5) provides that it is an offence if a person on Gallery land, or in a Gallery building, sells or supplies liquor to another person and the other person is intoxicated or under 18 years of age. This is consistent with laws of the Australian Capital Territory which prohibit the supply of alcohol to intoxicated persons. The penalty for this offence is 5 penalty units.

Subsection 9(6) provides that a person may refuse to sell or supply liquor to another person on Gallery land, or in a Gallery building if the other person does not satisfy the first person of the other person's age. This provision puts it beyond doubt that a person supplying liquor may refuse service if they are not satisfied the person is older than 18 years of age.

### **Section 10 – Buying or obtaining liquor**

Subsection 10(1) provides that it is an offence for a person who is under 18 to buy or obtain liquor on Gallery land or in a Gallery building. The penalty for this offence is 5 penalty units.

Subsection 10(2) creates an offence for a person to send another person, who is under 18, to buy or obtain liquor on their behalf. The penalty for this offence is 5 penalty units.

## **Part 4—Conduct of persons on Gallery land and in Gallery buildings**

### **Section 11 – Purposes of this Part**

This section provides that for the purposes of paragraph 46(a) of the Act, Part 4 regulates the conduct of persons on Gallery land or in Gallery buildings. Paragraph 46(a) of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, for regulating the conduct of persons on any land or building owned by, or under the control of, the Gallery.

### **Section 12 – Security officers**

Section 12 relates to the appointment and identification of security officers.

Subsection 12(1) enables the Director to appoint, by way of a written instrument, a staff member (other than a volunteer) to be a security officer. This may include a member of the staff of the Gallery or a Gallery contractor (see the definition of *staff member* at section 5 above). Requiring security officers to be appointed by written instrument ensures that persons who are conferred powers under the instrument are appointed through a formal process which requires consideration by the Director. The Director must only appoint persons as security officers if the Director is reasonably satisfied that they have the appropriate training to carry out the role.

Subsection 12(2) provides that the Director must issue an identity card to a security officer appointed under Subsection 12(1). This is because security officers have special powers under the Regulations, for example, to direct people to leave the premises and / or apprehend people in certain circumstances. It is important in these circumstances that security officers are appropriately identified.

Subsection 12(3) provides that the identity card must contain a recent photograph of the person to whom it is issued and be in the approved form (if any). Subsection 12(4) provides that a security officer must carry the identity card at all times when performing functions or exercising powers as a security officer so that they can be identified as such to members of the public.

Subsection 12(5) provides that a person commits an offence of strict liability if they cease to be a security officer, and do not return their identity card to the Director, within 14 days of so ceasing. The penalty for this offence is 1 penalty unit. This is a strict liability offence, as penalising persons for not returning identity cards is intended to encourage the prompt return of identity cards. This strict liability offence recognises that access to identity cards by individuals who are not appointed security officers weakens the security of the Gallery. This could have impacts on public safety, the safety of staff members, and the safety of the national collection.

Subsection 12(6) provides that an offence is not committed if the identity card was lost or destroyed.

The note under subsection 12(6) provides that in any prosecution for an offence under subsection 12(5), a defendant intending to rely on the exception in subsection 12(6) has the evidential burden of showing that the identity card was lost or destroyed. This could be



discharged, for example, by providing evidence that the card was reported as lost or destroyed. It is appropriate that the defendant bear the evidential burden in this case as the matters required to be established — that the person’s identity card was lost or destroyed — are matters peculiarly within the knowledge of the defendant.

### **Section 13 – Powers of security officers – directions to leave**

Section 13 provides that in certain circumstances, a security officer may direct a person or group of people to leave the premises, or any part of the premises. These powers are required to ensure the safety and wellbeing of members of the public, staff members or Gallery material.

Subsection 13(1) sets out the grounds on which a security officer may exercise the power to issue a direction to leave. Those grounds are if the security officer has reasonable grounds for believing that:

- public safety or the safety of staff members is, or may be, endangered by the continued presence of the person or the group on Gallery land or in a Gallery building; or
- the conduct of the person or group on Gallery land or in a Gallery building is likely to cause offence to members of the public or staff members; or
- the person or group intends to commit, is committing, or has committed, an offence against the Regulations.

Subsection 13(2) provides power for a security officer to direct members of the public or staff members to leave Gallery land or a Gallery building if they believe, on reasonable grounds, that the safety of the public or staff is endangered for any reason.

### **Section 14 – Powers of security officers – apprehension**

Section 14 provides that in certain circumstances, a security officer may apprehend a person, using such force as is reasonably necessary. These powers are required to ensure the safety and wellbeing of members of the public, staff members or Gallery material.

Subsection 14(1) sets out the grounds on which a security officer may exercise the power to apprehend a person. Those grounds are if the security officer has reasonable grounds for believing that a person on Gallery land, or in a Gallery building:

- intends to interfere with, is interfering with, or has interfered with, Gallery material; or
- intends to damage, is damaging, or has damaged, Gallery land, a Gallery building or Gallery material; or
- is refusing to comply with a direction given by a security officer in the performance of the officer’s duties.

Subsection 14(2) allows the security officer to apprehend the person, using as much force as is reasonably necessary. The appointment of security staff is generally limited to personnel of security firms where those firms have successfully tendered for the provision of security services. Firms are engaged on the basis of their proven track records and the security qualifications of personnel among other considerations. Granting these powers ensures that the Gallery is able to appropriately protect members of the public, Gallery staff and Gallery material including a public collection of over 153,000 works of art valued at over \$6 billion.

Subsection 14(3) is the power for a security officer to either remove the person from Gallery land or a Gallery building or hold the person in custody until the person can be taken into the custody of a member of a police force.

Subsection 14(4) provides that a person who is held in the custody of a security officer under subsection 14(3) must be delivered into the custody of a member of a police force as soon as practicable.

### **Section 15 – Powers of security officers – vehicles and similar devices**

This section provides that a security officer may direct a person who is apparently in charge of a vehicle, motor cycle, bicycle or a similar device for transportation that is on Gallery land, to park the vehicle or device in a specified place on Gallery land, or not to park the vehicle or device on Gallery land, or not to park the vehicle in a specified place on Gallery land. This power is required to ensure the safety of members of the public, staff members or Gallery material.

### **Section 16 – Powers of security officers – possible prohibited articles**

This section enables a security officer to direct a person who is carrying an article that appears to be a prohibited article on Gallery land or in a Gallery building to submit the article for inspection or to leave the article in a designated area. Leaving an article that appears to be prohibited in a designated location ensures that the article is not taken onto Gallery land, or into a Gallery building, and allows for the person to collect it upon exiting the Gallery.

### **Section 17 – Powers of security officers – offence**

This section provides that a person commits an offence if the person is on Gallery land or in a Gallery building and they do not comply with a direction from a security officer. The purpose of this offence is to enhance the effectiveness of the directions given by security officers. Encouraging compliance with directions helps to ensure that Gallery premises are safe and secure for members of the public and staff members. The penalty for this offence is 5 penalty units.

### **Section 18 – Council notices**

Section 18 sets out the power for the Council to issue a Council notice, sets out what such a notice must contain, and provides for an offence for contravention of a notice.

Subsection 18(1) enables the Council to, by legislative instrument, issue a notice that specifies a prohibition, condition or restriction relating to Gallery land, a Gallery building or Gallery material. In accordance with other similar collecting institutions and international standards of art museum management, the control of persons at the Gallery will be necessary on such issues as the use of cameras and equipment, the safety of the national collection, the conduct of the public and the control of food, liquid and animals in the building. This section enables the Gallery flexible control over its land, buildings, collection and exhibitions to accommodate changing standards of art museum management, appropriate function and event management and technological advances. A notice issued under this subsection is not intended to target particular classes of persons and will apply to all patrons of the Gallery equally.

Subsection 18(2) provides that the notice must be set out in the legislative instrument, must state that it has been issued by the authority of the Council and must specify a prohibition, condition or restriction relating to Gallery land, a Gallery building or Gallery material.

Subsection 18(3) provides that a person commits an offence if they are on Gallery land or in a Gallery building, a copy of a Council notice is displayed in accordance with subsection (4), a prohibition, condition or restriction specified in a Council notice applies to the person, and the person does not comply with the prohibition, condition or restriction. The penalty for contravening a notice is 5 penalty units.

Subsection 18(4) provides that for the purposes of paragraph (3)(b) a notice must be clearly displayed in a way that gives adequate notice to the public and must be displayed at either or both of the entrances to the area of the Gallery building or Gallery land to which it relates, and the location to which it relates.

### **Section 19 – Damaging Gallery material and property**

Subsection 19(1) provides that it is an offence for a person to touch a Gallery work of art or interfere with Gallery material while on Gallery land or in a Gallery building. The purpose of this offence is to act as a deterrent to touching a Gallery work of art or interfering with a Gallery material. The penalty for committing such an offence is 5 penalty units.

Subsection 19(2) provides that it is an offence to engage in conduct that damages Gallery material while on Gallery land or in a Gallery building. The purpose of this offence is to act as a deterrent to conduct which may damage Gallery material. The penalty for committing such an offence is 5 penalty units. Subsection 19(3) provides that recklessness or negligence is the fault element under paragraph (2)(c). Where recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element, in accordance with clause 5.4 of the Criminal Code.

Subsection 19(4) provides that it is an offence to attach an article to a Gallery building or wall or fence, or write on a Gallery building, fixture, fitting, wall or fence. The purpose of the offence is to act as a deterrent for attaching articles to or writing on a Gallery building, fixture, fitting, wall or fence. The penalty for committing such an offence is 5 penalty units. Subsection 19(5) provides that it is an offence to damage a Gallery building, fixture, fitting, wall, fence, plant or garden. The purpose of the offence is to act as a deterrent to such conduct. The penalty for committing such an offence is 5 penalty units. Subsection 19(6) provides that the fault element under paragraph (5)(b) is recklessness or negligence. As noted above, proof of intention or knowledge will be sufficient to satisfy the fault element of recklessness.

Subsection 19(7) provides that section 19 does not limit section 29 of the *Crimes Act 1914* which concerns destroying or damaging Commonwealth property.

### **Section 20 – Selling articles**

This section establishes that it is an offence for a person on Gallery land or in a Gallery building to engage in conduct that exposes or causes to be exposed for show, sale or hire any article for use or consumption by a member of the public. The penalty for committing such an offence is 5 penalty units.

## **Section 21 – Animals**

Section 21 provides that in certain circumstances, a person will commit an offence if bringing an animal that belongs to the person or is in their charge, into a Gallery building. This is to ensure that Gallery buildings are both hygienic and safe for members of the public and staff members as well as reducing the potential for damage to Gallery material, while still providing access to the Gallery to people who require an assistance animal, or police force members performing their duties.

Subsection 21(1) establishes it as an offence for a person to allow an animal belonging to them, or in their charge, to enter or remain in a Gallery building. However, subsection 21(2) provides that subsection 21(1) does not apply if the person is a person with a disability and the animal is an assistance animal (defined in section 5 above), or the person is a member of a police force acting in accordance with their duties.

There is a note under subsection 21(2) which provides that in any prosecution for an offence under subsection 21(1), a defendant intending to rely on the exception in subsection 21(2) has the evidential burden of showing that an exception applies. This could be discharged, for example, by providing evidence to show that the animal is an assistance animal. It is appropriate that the defendant bear the evidential burden as the matters required to be established – that the person has a disability and an assistance animal; or that a person is a police officer etc – are matters within the knowledge of the person.

Subsection 21(3) creates an offence if a person allows an assistance animal belonging to them, or in their charge, to enter or remain in a Gallery building, and the animal is not restrained on a lead or by other reasonable means. The penalty for these offences are 5 penalty units.

## **Section 22 – Food and liquids**

Subsection 22(1) provides that a person commits an offence if they bring food or liquid into a Gallery building, or consume food or liquid in a Gallery building.

However, subsection 22(2) provides that subsection 22(1) does not apply:

- if the food or liquid is medication; or
- to bringing water into a Gallery building if the water is in a sealed container; or
- to consuming water while seated or while in a foyer of a Gallery building, and at least 2 metres away from Gallery material; or
- to bringing food or liquid into a Gallery building for the purpose of feeding an infant if the food or liquid is in a sealed container; or
- to bringing food or liquid into, or consuming food or liquid in, an area designated for consuming food or liquid.

The note under subsection 22(2) provides that in any prosecution for an offence under subsection 22(1), a defendant intending to rely on the exception in subsection 22(2) has the evidential burden of showing that an exception applies. This could be discharged, for example, by providing evidence such as a medical certificate stating that the food or liquid is medication. It is appropriate that the defendant bear the evidential burden as the matters required to be established are peculiarly within the knowledge of the person.

### **Section 23 – Smoking**

This section provides that it is an offence if a person smokes on Gallery land or in a Gallery building. This offence is required for the health of members of the public and staff members, and to prevent damage to Gallery material. The penalty is 5 penalty units.

### **Section 24 – Prohibited articles**

Subsection 24(1) provides that it is an offence if a person brings a prohibited article into a Gallery building, or if a person uses a prohibited article in a Gallery building. The penalty for committing this offence is 5 penalty units.

However, subsection 24(2) provides that subsection (1) does not apply to:

- bringing a prohibited article into a Gallery building if the person deposits the item, as soon as practicable, at the place in the Gallery building designated for that purpose; or
- bringing a camera or camera bag into a Gallery building, or using a camera, for non-commercial purposes.

There is a note under subsection 24(2) which provides that in any prosecution for an offence under subsection 24(1), a defendant intending to rely on the exception in subsection 24(2) has the evidential burden of showing that an exception applies. This could be discharged, for example, by providing evidence that the prohibited article was deposited at the place in the Gallery building designated for prohibited articles. It is appropriate that the defendant bear the evidential burden as the matters required to be established – such as whether an item has been deposited as soon as practicable or that a camera was used for non-commercial purposes - are peculiarly within the knowledge of the person.

## **Section 25 – Defences**

Section 25 provides for certain defences to prosecutions under Parts 3 or 4 of the Regulations, being essentially that the Council has consented in writing to the conduct or that the person was acting in accordance with their duties as a member of the Council, the Director or a staff member. These defences are required to ensure that where a person is acting in accordance with their duties, or in accordance with written consent from the Council, they are not prosecuted for an action that would otherwise constitute an offence under the instrument.

Subsection 25(1) provides that a person charged with an offence under Part 3 or Part 4 has a defence to that prosecution if, when the relevant conduct was engaged in by the person, the Council had consented, in writing, to the conduct.

Subsection 25(2) provides that a person charged with an offence under Part 3 or Part 4 has a defence to a prosecution if the person is a member of the Council, the Director, or a staff member and that person is acting in accordance with their duties.

The note under subsection 25(2) provides that in any prosecution for an offence under subsection 25(1), a defendant intending to rely on the exception in subsection 25(2) has the evidential burden of showing that an exception applies. This could be discharged, for example, by providing evidence that they were acting in accordance with their duties as a Council member, Director or staff member of the Gallery. These are matters within the knowledge of the defendant.

## **Part 5—Entry charges**

### **Section 26 – Entry charges**

Section 26 relates to the charging of entry charges and generally provides that no charge is paid for entry into a Gallery building or onto Gallery land, unless it is for a special exhibition or event, or parking. This is because free admission increases audience access to the national collection.

Subsection 26(1) provides that for the purposes of paragraph 46(b) of the Act, no charge is fixed for entry by a person into a Gallery building or onto Gallery land. Subsection 26(2) provides that the Gallery is not prevented from fixing charges for special exhibitions or other special events under paragraph 7(2)(gb) of the Act, or for parking in a Gallery building or on Gallery land.

## **Part 6—Transitional provisions**

### **Section 27 – Definitions**

This section provides that *old regulations* is defined to mean the *National Gallery Regulations 1982*, as in force immediately before the commencement of this section.

### **Section 28 – Authorisation to supply liquor**

This section provides that an authority given under subregulation 9(1) of the old regulations and in force immediately before the commencement of this section has effect, from that commencement, as if it were an authorisation given under section 8 of this instrument. This is to ensure that existing authorisations in force continue to exist under the new regulations.

### **Section 29 – Security officers**

Subsection 29(1) provides that an appointment made under subregulation 5(1) of the old regulations, and in force immediately before the commencement of this section has effect, from that commencement, as if it had been made under subsection 12(1) of this instrument.

Subsection 29(2) provides that an identity card under subregulation 5(2) of the old regulations and in force immediately before the commencement of this section has effect, from that commencement, as if it had been issued under subsection 12(2) of this instrument. This is to ensure that existing appointments, and identity cards in force continue to have effect under the new regulations.

### **Section 30 – Council notices**

This section provides that a notice issued by the authority of the Council under the old regulations, and in force immediately before the commencement of this section has effect, from that commencement, as if it had been issued under subsection 18(1) of this instrument. This is to ensure that existing Council notices in force continue to exist under the new regulations.

### **Section 31 – Consent of Council**

This section provides that for the purposes of subsection 25(1), it does not matter whether consent was given before, on or after the commencement of this section. This makes it clear that it does not matter when consent was provided by the Council for the purposes of relying on that consent for a defence.



**Schedule 1 – Repeals**

Schedule 1 repeals the *National Gallery Regulations 1982*, which is due to sunset on 1 April 2018, so it can be replaced with this new instrument.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### National Gallery Regulations 2018

#### *Overview of the Regulations*

The *National Gallery Act 1975* (the Act) establishes the National Gallery as Australia's primary agency for the collection, preservation and provision of access to Australia's national collection of works of art. The National Gallery's functions are to develop and maintain a national collection, and to exhibit (or make available for others to exhibit) the national collection and other works of art in the National Gallery's possession.

The purpose of the *National Gallery Regulations 2018* (the Regulations) is to repeal and remake the current *National Gallery Regulations 1982*, with some changes to reflect current drafting practice and ensure that the Regulations continue to be fit for purpose. In particular, the Regulations would:

- increase the financial thresholds above which the National Gallery of Australia (National Gallery) requires the approval of the Minister to purchase and dispose of certain assets;
- provide for the Council of the National Gallery to authorise and place conditions on the sale, supply, disposal, possession and control of liquor on the National Gallery's premises;
- provide for the Director of the National Gallery to appoint security officers; and
- create certain offences relating to the protection of the collection, control of land and buildings and supply of liquor on the National Gallery's premises

#### *Human rights implications*

The Regulations are compatible with the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

The instrument engages the following rights:

- the right to security of the person and freedom from arbitrary detention in Article 9 of the *International Covenant on Civil and Political Rights* (the ICCPR)
- the right to take part in cultural life under Article 15(1)(a) of the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR)
- the presumption of innocence in Article 14(2) of the ICCPR.

### ***Right to security of the person and freedom from arbitrary detention***

Article 9 of the ICCPR provides for the right to security of the person and freedom from arbitrary detention. This right requires that persons not be subject to arrest and detention except as provided for by law, and that neither the arrest nor the detention is arbitrary. Arrest or detention may be permissible under domestic law, but nevertheless be arbitrary. Arbitrary is not to be equated with being against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

Section 14 of the Regulations provides that in certain circumstances, a security officer may apprehend a person, using such force as is reasonably necessary. The circumstances in which a security officer may exercise the power is limited to when the officer has reasonable grounds for believing that the person on Gallery premises:

- intends to interfere, is interfering, or has interfered with Gallery material;
- intends to damage, is damaging, or has damaged Gallery material; or
- is refusing to comply with a direction given by a security office in the performance of the officer's duties.

If a security officer apprehends a person for the reasons discussed above, under subsection 14(3) the security officer may remove the person from the Gallery premises, or hold the person in custody until the person can be taken into the custody of a member of the police force.

The Regulations provide that a security officer is to be appointed, in writing, by the Director and is to be provided with an identity card. A security officer is required under the Regulations to carry the identity card at all times when they are performing their functions, or exercising their powers, and will thus clearly be identifiable to the public when performing their duties (section 12).

A security officer has several powers to direct persons on Gallery land to do certain things, in particular a security officer can direct a person:

- to leave the Gallery, if the officer has reasonable grounds to believe that the person's conduct may endanger public safety, cause offence to persons, or commit an offence against the Regulations (section 13);
- who is apparently in charge of a vehicle, motor cycle, bicycle or similar transportation device on Gallery land to park in certain places, or not to park in certain places (section 15); or
- to submit for inspection possible prohibited articles, or leave such articles in designated places (section 16).

It is noted that the power in section 14 is not one of arrest, but one of apprehension. While not strictly a power of arrest, the apprehension of the person can still lead to interference with the personal liberty of the person and as such it has been assessed against Article 9 of the ICCPR. While the apprehension is permissible under domestic law, being authorised by section 14 if the power is enlivened, it may nevertheless be arbitrary if it is vague, or allows for the exercise of powers in broad circumstances that are not sufficiently defined, or is not reasonable or necessary in all circumstances.

Under section 14 it is clearly defined when a security officer can exercise the power to apprehend a person. The power can only be exercised if the security officer has reasonable grounds for believing that a person is, has or will, interfere or damage Gallery material, or is refusing to comply with a direction of a security officer issued in their duties.

The test of 'reasonable grounds for believing' is an objective test that requires consideration of all of the particular circumstances. It requires that objectively, in the circumstances, there must be reasonable grounds for believing that the conduct mentioned above is about to, has, or is occurring before the security officer can exercise the power. The subjective belief of the security officer is not relevant to determining whether the power is enlivened.

The first two bases on which a security officer can exercise the power relates to the protection of Gallery material from interference and/or damage by a person. Works of art held by the Gallery make up the national collection and many are invaluable in terms of their significance and importance to Australia, and the Australian public. Many of the works of art are also valued at significant amounts of money. In light of the national significance and value of works of art, in order to protect the national collection, it is reasonable, necessary and proportionate for a security officer to have a power to apprehend a person who they reasonably believe is, has or will, interfere or damage Gallery material.

The third basis on which a security officer can exercise the power to apprehend is when they reasonably believe a person is refusing to comply with a direction of a security officer. The direction powers of security officers are primarily directed to the safety of the public and staff members, and to prevent Gallery material being damaged or interfered with. If a person is refusing to abide by a lawful direction of a security officer, the continued conduct may endanger the public or staff members, or could present a risk to Gallery material. In these circumstances it is reasonable, necessary and proportionate for a security officer to have a power to apprehend a person to protect the public and staff members, and the national collection.

In addition to the reasonableness threshold being met the power can be exercised by a security officer, subsection 14(2) makes it clear that when apprehending the person, the security officer can only use such force as is reasonably necessary. This places a further limit on the apprehension power to ensure that the power is exercised reasonably and proportionately in the circumstances.

A further limitation on the power is that the security officer, once they have apprehended the person, is to remove the person from the Gallery premises, or hold them in the custody of a security officer until the person can be taken into the custody of a member of a police force. If a person is held in the custody of security officer they must be delivered into the custody of a member of a police force as soon as practicable. This limitation means that the apprehension is for a finite period of time, until the person has been removed from the Gallery premises where they can no longer endanger the public, the staff, or the national collection, or until they have been taken into custody by a member of a police force exercising their arrest and custodial powers.

While the apprehension power may engage the right to security of the person and freedom from arbitrary detention, it can only be exercised in limited circumstances. Those circumstances are directed to the safety of the public, staff members, and the protection of the national collection. Before the power can be exercised, objectively there must be reasonable

grounds for believing that one of the three limited circumstances existed. Further, whilst the power is being exercised, it is subject to important restrictions to ensure only such force as is necessary to apprehend the person is used, and that the apprehension is limited for the time it takes to remove the person from the Gallery premises, or until the person is taken into the custody of a member of the police force.

Accordingly, to the extent the apprehension power is a limitation on the right to security of the person and freedom from arbitrary detention, for the reasons discussed above, it is reasonable, necessary and proportionate.

### ***Right to take part in cultural life***

Article 15 of the ICESCR protects the right of all persons to take part in cultural life. The Regulation regulates access to the National Gallery, and as such engages the right to take part in cultural life

The UN Committee on Economic, Social and Cultural Rights has stated culture encompasses: ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions. The same Committee has stated that in order to assure enjoyment of the right to take part in cultural life, countries should provide cultural services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sports stadiums.

Section 26 relates to entry charges that can be imposed for access to the National Gallery and provides that there is no charge fixed for entry by a person into the Gallery premises. However, section 26 provides that this does not prevent the Gallery from charging for special exhibitions or other special events, or for parking on Gallery premises.

As an institution that is established to develop and maintain a national collection of works of art of national significance to Australia, and the Australian public, the National Gallery has promoted participation in cultural life for decades. The National Gallery is a place where Australians can celebrate and protect important aspects of our national cultural heritage. Providing for free entry for the public to access and view the national collection continues with that tradition and enhances the right to take part in the cultural life of Australia.

While the Gallery can fix charges for entry for special exhibitions or other special events, this is expected to be used when there is a cost associated with bringing to the Gallery an exhibition or an event, which, without charging an entry fee, would otherwise prevent the Gallery from showing the exhibition or putting on the event. While charges may be fixed for these special exhibitions or events, the charges will not be so high as to prevent entry into the Gallery, and there will be concession entry fees for those who qualify.

As the Gallery has taken the approach of facilitating access to the national collection by not fixing a fee for general access, or only fixing reasonable fees for access to special exhibitions or special events which would not otherwise have been possible had a fee not been imposed, it is promoting the right to take part in cultural life. As such, to the extent that the Regulations engage the right to take part in cultural life, they promote and are compatible with that right.

### *Presumption of innocence*

Article 14 of the ICCPR protects the right to be presumed innocent until proven guilty according to law. It provides that the presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt. Article 14 of the ICCPR is engaged because the Regulations contain a strict liability offence which limits the presumption of innocence.

Subsection 12(5) of the Regulation provides that a person commits an offence of strict liability if they cease to be a security officer, and do not return their identity card to the Director, within 14 days of it ceasing. This offence is a strict liability offence, recognising that access to identity cards by individuals who are not appointed security officers weakens the security of the Gallery. The offence is intended to significantly enhance the prompt return of identity cards from persons who are no longer security officers, in order to promote the safety of the public, staff members, and the safety of the national collection. The penalty for conviction of the offence is 1 penalty unit.

Subsection 12(6) creates an exception to the offence in subsection 12(5), which provides that the offence does not apply if the identity card was lost or destroyed. The evidential burden on proving that the identity card was lost or destroyed is on the defendant. That is, in order for the exception to apply, the defendant must prove that there was a reasonable possibility that the card was lost or destroyed.

While subsection 12(5) limits the presumption of innocence, it does so for legitimate reasons. In particular the strict liability nature of the offence is necessary to ensure individuals who are not appointed security officers do not have access to identity cards and hold themselves out as such, particularly given the significant powers security officers can exercise under the Regulations. Making the offence strict liability will act as a strong incentive for persons to return their identity cards to the Director within the 14 day period.

While an offence of strict liability, it is open to the defendant to prove the exception to the offence if they can show that there was a reasonable possibility that the card was lost or destroyed. This could be discharged, for example, by providing evidence that the card was reported as being lost or destroyed. The existence of this exception to the offence is important, as it means that the person can prove they did not commit the offence.

It is also important to note that the penalty should a person be convicted of this offence is on the low end of the spectrum, being 1 penalty unit. This is another factor that goes to the reasonableness of the strict liability nature of the offence, that as a maximum, only 1 penalty unit can be imposed on a person.

Finally, it is noted that subsections 9(2), 22(2), 23(2), 25(2) and 26(2) of the Regulation provide for exceptions to various offences. For the exceptions to apply, the defendant has the evidential burden of proof to prove the matters mentioned in the subsections. However, these exceptions do not relate to offences of strict liability which limit the presumption of innocence. That is, the prosecution is still required to prove the offences beyond reasonable doubt. Only once an offence has been established beyond a reasonable doubt, the defendant can prove an exception to the offence. As such, the offences to which these exceptions relate,

and the reversal of the evidential burden onto the defendant to prove an exception to the offence, do not limit the presumption of innocence.

For the reasons discussed above, to the extent that the strict liability offence in subsection 12(5) is a limitation on the presumption of innocence, it is reasonable, necessary and proportionate and in pursuit of a legitimate object. Accordingly, to the extent the Regulation engages the right to the presumption of innocence, it is compatible with that right.

### ***Conclusion***

The Regulations are compatible with human rights. To the extent that they limit any human rights, those impacts are reasonable, necessary and proportionate.