

## **Replacement Explanatory Statement**

*National Museum of Australia Act 1980*

### **National Museum of Australia Regulations 2019**

Issued by the authority of the Minister for Communications, Cyber Safety and the Arts

#### **Purpose**

The purpose of the *National Museum of Australia Regulations 2019* (the Regulations) is to repeal and remake the current *National Museum of Australia Regulations 2000* (the Museum Regulations 2000), 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 Museum of Australia (National Museum) requires the approval of the Minister to enter into contracts;
- Authorise the Director of the National Museum to authorise and place conditions on the sale, supply, disposal, possession and control of liquor on the National Museum's premises;
- Provide for the Director of the National Museum to appoint authorised officers, control access to or use of Museum material, and fix entry charges;
- Provide for persons or groups of persons who are prohibited from entering Museum premises to apply to the Administrative Appeals Tribunal for review of that decision; and
- Create certain offences relating to the protection of the national historical collection and other Museum material, damaging Museum premises and property, the sale and supply of liquor on Museum premises, and the conduct of visitors.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. The Regulations commence on 1 October 2019.

#### **Authority**

The *National Museum of Australia Act 1980* (the Act) establishes the National Museum with specific functions, including:

- to develop and maintain a national collection of historical material;
- to exhibit material that relates to Australia's past, present and future; and
- to exhibit or make available for exhibition by others, historical material from the national historical collection or historical material that is otherwise in the possession of the Museum.

Section 44 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters that by this Act are required or permitted to be prescribed, or are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular:

- for regulating, restricting or prohibiting the entry of persons onto any land or building, or any land or building, owned by or under the control of the Museum;
- for regulating the conduct of persons on any such land or building, or any part of any such land or building, including making provision for and in relation to the removal of persons from the same;
- for fixing charges for entry onto any land, or into any building, owned by or under control of, the Museum;
- for regulating, restricting or prohibiting the making, using, printing, publishing, exhibiting, selling or offering for sale of replicas, photographs, representations or copies of historical material forming part of the national historical collection; and
- for prescribing penalties not exceeding 5 penalty units for offences against the Regulations.

Section 37 of the Act limits the National Museum's power to enter into a contract, without the approval of the Minister, for which the Museum is to pay or receive an amount exceeding the financial threshold specified in this section, or any higher amount that is prescribed by the Regulations. Subject to subsection 9(4) of the Act, this contract limit includes transactions relating to the acquisition and disposal of material in the national historical collection.

Subsection 41(1) of the Act provides that the Regulations may make provision for and in relation to the sale, supply, disposal, possession and control of liquor on Museum premises in the Australian Capital Territory owned by or under the control of the Museum. The notes on the provisions of the Regulations are set out in [Attachment A](#).

## **Consultation**

The National Museum was consulted in advance of drafting the instrument to confirm the desired policy and operational outcomes that the remade Regulations will support. The Council of the National Museum was also consulted and has endorsed these Regulations.

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.

The Department of Health was consulted during the drafting of the instrument, to seek its subject expertise regarding the definition and widened policy scope to incorporate the different varieties of e-cigarettes and non-tobacco products into section 27.

**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.

## Notes on the National Museum of Australia Regulations 2019

### Part 1—Preliminary

#### Section 1 Name

This section provides that the name of the Regulations is the *National Museum of Australia Regulations 2019*.

#### Section 2 Commencement

This section provides for the Regulations to commence on 1 October 2019.

#### Section 3 Authority

This section provides that the Regulations are made under the *National Museum of Australia Act 1980*.

#### 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, historical material, Museum, and national historical collection. These terms have the same meaning in the Regulations as under the Act, pursuant to section 13 of the *Legislation Act 2003*.

Definitions in this section are:

*Act* means the *National Museum of Australia Act 1980*.

*assistance animal* has the same meaning as in the *Disability Discrimination Act 1992*.

*authorised liquor supplier* means a person who is authorised under section 8 to sell or supply liquor.

*authorised officer* means a person who is appointed under section 12 to be an authorised officer.

*Director's notice* has the meaning given by subsection 21(1).

*e-cigarette* has the meaning given by subsection 27(3).

*engage in conduct* has the meaning given by the *Criminal Code*.

**liquor** has the meaning given by subsection 41(3) of the Act.

**liquor controlled premises** means premises in the Australian Capital Territory that are owned by or under the control of the Museum.

**Museum building** means a building owned by or under the control of the Museum.

**Museum contractor** means:

- (a) a contractor of the Museum; or
- (b) a contractor or employee of another Museum contractor.

**Museum land** means land owned by or under the control of the Museum.

**Museum material** means:

- (a) material forming part of the national historical collection; or
- (b) other material owned by, or under the control of, the Museum; or
- (c) any structure, equipment or material kept by the Museum for purposes relating to the exhibition or display of, or research, educational or publicity activities in relation to, material referred to in paragraph (a) or (b).

**Museum premises** means a Museum building or Museum land.

**non-tobacco smoking product** has the meaning given by subsection 27(3).

**prohibited article** means:

- (a) an implement, other than a pen or pencil, that could be used to damage or conceal Museum material; or
- (b) a camera or associated equipment; or  
Example: Associated equipment includes a tripod or selfie stick.
- (c) a bag, case, parcel or other container that cannot be wholly enclosed within a cube each side of which is 300 millimetres in length; or

**smokes** has the meaning given by subsection 27(2).

**staff member** means:

- (a) a member of the staff of the Museum mentioned in section 30 of the Act; or
- (b) a person whose services are made available to the Museum under section 31 of the Act; or
- (c) a Museum contractor who is an individual; or
- (d) a volunteer.

**tobacco product** has the meaning given by subsection 27(3).

**vehicle** includes a motor vehicle, motorcycle, bicycle or a similar device for transportation.

**volunteer** means an individual who works for the Museum on a voluntary basis.

## **Part 2—Entering into contracts**

### **Section 6 Power to enter into contracts**

Paragraph 37(a) of the Act provides that the Museum shall not, without the approval of the Minister, enter into a contract under which the Museum is to pay or receive for the acquisition of any historical material—an amount exceeding \$250,000 or, if a higher amount is for the time being prescribed for the purposes of that paragraph, that higher amount.

Paragraph 37(b) of the Act provides that the Museum shall not, without the approval of the Minister, enter into a contract in any other case under which the Museum is to pay or receive an amount exceeding \$250,000 or, if a higher amount is for the time being prescribed for the purposes of that paragraph, that higher amount.

Section 6 of the Regulations prescribes a higher amount of \$2,000,000 for each of paragraphs 37(a) and (b) of the Act. This is an increase from the amounts prescribed by subregulations 26(1) and (2) in the *National Museum of Australia Regulations 2000*, which is \$1,000,000 for each of those paragraphs. The higher amount provides commercial flexibility and reduced administrative burden on the Museum, while maintaining appropriate Ministerial oversight of Museum expenditure. The increase is appropriate given the increase in costs since the previous limit was set in 2000, and this limit aligns the Museum with the contract limits placed on other national collecting institutions, such as the Australian National Maritime Museum and the National Gallery of Australia.

## **Part 3—Supply of liquor**

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

Section 7 provides that Part 3 is made for the purposes of subsection 41(1) of the Act. Subsection 41(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 Museum.

This Part and the framework it provides is required because events are held on Museum premises where alcohol may be served.

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

Subsection 8(1) provides that the Director may, in writing, authorise a person, or a class of persons, to sell or supply liquor on or in liquor controlled premises. This authorisation is not a legislative instrument for the purposes of section 8 of the *Legislation Act 2003*.

Subsection 8(2) provides that the Director must specify in the authorisation the parts of liquor controlled premises where liquor may be sold or supplied, and the hours during which liquor may be sold or supplied. Subsection 8(3) provides that the Director may specify in the authorisation conditions to which it is subject.

The Regulations do not provide for merits review of a decision made under section 8, on the basis that the granting of a liquor authorisation relates to commercial decisions made by the Museum, and it is not clear that an appropriate remedy would be available in circumstances where the Director decided not to authorise a particular person or class of persons to sell or supply liquor on or in liquor controlled premises. This is consistent with the *National Museum of Australia Regulations 2000* and under similar regulations governing the supply of liquor in certain other national collecting institutions (such as the National Portrait Gallery of Australia and the National Gallery of Australia).

### **Section 9 Supply of liquor**

#### *Authorisations*

Section 9 creates several offences regarding the sale or supply of liquor by a person in or on liquor controlled premises. These offences apply to the sale and supply of liquor on Museum premises, as subsection 41(2) of the Act excludes the law of the Australian Capital Territory relating to the sale, supply and disposal of liquor on premises in respect of which regulations are in force under subsection 41(1).

Subsection 9(1) provides that it is an offence if a person sells or supplies liquor and the person is on liquor controlled premises. The penalty for this offence is 5 penalty units.

Subsection 9(2) provides that the offence provision in subsection 9(1) not apply to a person who is authorised to do so under subsection 8(1), or who is supplying liquor (other than by selling it) if the liquor is sold or supplied to that person on or in liquor controlled premises by an authorised liquor supplier.

The note under subsection 9(2) provides that in any prosecution for an offence under this subsection, the defendant would bear an evidential burden in relation to matters in subsection 9(2). Placing the evidential burden on the defendant in this case is appropriate,

having regard to the principles in the Attorney-General's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide).

In regard to paragraph 9(2)(a), it would be disproportionately more difficult and costly, taking into account the relatively low penalty, for the prosecution to prove that an accused person sold or supplied liquor without being authorised to do so than it would be for a person to raise evidence of the defence, that they held the appropriate authorisation. An accused could cheaply and readily raise evidence of the authorisation.

In regard to paragraph 9(2)(b), it is within the peculiar knowledge of a person supplying liquor (other than by selling) that they obtained the liquor on or in liquor controlled premises from an authorised liquor supplier. There may well be no way for staff members to know with certainty the origin of liquor supplied by a person, including the circumstances in which it was first supplied to that person by another party. It would be significantly and disproportionately (given the low penalty) more difficult for the prosecution to prove, for example, that relevant liquor was not supplied to a person on liquor controlled premises, than it would be for the person to raise evidence that his or her conduct fell within the defence. Once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt.

In addition to the above matters, in accordance with the Guide, creating the defence is more readily justified as the offence carries a relatively low penalty of 5 penalty units and the conduct proscribed by the offence aims to achieve the important public health and safety objective of preventing unauthorised supply of liquor, including to minors.

Subsection 9(3) provides that if a person is an authorised liquor supplier, and sells or supplies liquor on liquor controlled premises, they must comply with the conditions to which their authorisation as an authorised liquor supplier is subject to under subsection 8(2) or 8(3). This is required so that an authorised liquor supplier only supplies liquor in compliance with their authorisation.

Subsection 9(4) provides that it is an offence if a person is subject to a requirement under subsection 9(3), and the person engages in conduct in relation to the meaning given by the *Criminal Code*, and that person's conduct contravenes the requirement. The penalty for this offence is 5 penalty units.

#### *Adulterated liquor*

Subsection 9(5) provides that it is an offence if a person is on or in liquor controlled premises and sells or supplies liquor that is adulterated. This is to require that the liquor being sold or supplied is genuinely the product described. The penalty for this offence is 5 penalty units.

#### *Intoxicated persons and minors*

Subsection 9(6) provides that it is an offence if a person on or in liquor controlled premises, 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(7) provides that a person may refuse to sell or supply liquor to another person on or in liquor controlled premises 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 18 years of age or older.



The Regulations do not provide for merits review of a decision made under section 9, on the basis that the grant of a liquor authorisation relates to commercial decisions made by the Museum. This is consistent with the position under similar regulations governing the supply of liquor in certain other national collecting institutions (such as the National Portrait Gallery of Australia and the National Gallery of Australia).

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

Subsection 10(1) provides that it is an offence for a person who is under 18 years of age to buy or obtain liquor on or in liquor controlled premises. The penalty for this offence is 5 penalty units.

Subsection 10(2) provides that it is an offence for a person to send another person, who is under 18 years of age, to buy or obtain liquor on or in liquor controlled premises. The penalty for this offence is 5 penalty units.

## **Part 4—Conduct of persons on Museum premises**

### **Division 1—Purposes of this Part**

Section 11 provides that this Part is made for the purposes of Subsections 44(a), 44(c) and 44(d) of the Act.

Part 4 regulates the conduct of persons on Museum premises.

Subsection 44(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 Museum. Section 44(c) provides that the Governor-General may make regulations restricting or prohibiting the making, using, printing, publishing, exhibiting, selling or offering for sale of replicas, photographs, representations or copies of historical material forming part of the national historical collection. Section 44(d) provides that the Governor-General may make regulations for prescribing penalties not exceeding a fine of 5 penalty units for offences against the Regulations.

### **Division 2—Authorised officers**

The powers under Division 2 provide authorised officers the ability to respond to the conduct of persons who are, or who will likely be endangering public safety or the safety of staff; persons whose conduct will cause or is likely to cause offence to members of the public or staff; or persons who are likely to commit an offence against the Regulations.

#### **Section 12 Authorised officers**

##### *Appointment of authorised officers*

Section 12 relates to the appointment and identification of *authorised officers*.

Subsection 12(1) provides that the Director may appoint in writing, if the Director is reasonably satisfied that the person has received appropriate training, a staff member, or an individual contractor of the Museum to be an authorised officer. This would include a staff member mentioned in subsections 30(1) and 30(2) of the Act, a person whose services are made available to the Museum under subsections 31(1) and 30(2) of the Act, and a Museum contractor who is an individual. A volunteer is not authorised to be appointed as an authorised officer under the Regulations.

##### *Identity cards*

Subsection 12(2) provides that the Director must issue an identity card to an authorised officer appointed under subsection 12(1). The reason being is authorised officers have special powers under the Regulations that other members of staff do not, for example, the power to direct people to leave the premises and apprehend a person in certain circumstances. It is important that authorised officers are appropriately identified because actions by an authorised officer under the Regulations can have serious consequences for individuals.

Subsection 12(3) provides that the identity card issued by the Director to an appointed authorised officer under subsection 12(2), must contain a recent photograph of the person to whom the card is issued. Subsection 12(4) requires that an authorised officer must carry the

identity card issued to them by the Director under subsection 12(2) at all times when performing functions or exercising powers as an authorised officer. Subsection 12(5) provides that a person who ceases to be an authorised officer must return the identity card issued to them by the Director under subsection 12(2) within 14 days of so ceasing.

Subsection 12(6) provides that a person commits an offence of strict liability if they cease to be an authorised officer and, do not return their identity card to the Director within 14 days of so ceasing and, the person engages in conduct (‘engages in conduct’ having the meaning in the *Criminal Code*) and, the person’s conduct contravenes that requirement. 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 Museum. This could have impacts on public safety, the safety of staff members, and the safety of the national historical collection. The penalty for this offence is 1 penalty unit.

Subsection 12(7) provides that an offence is not committed under subsections 12(5) and 12(6) if the identity card was lost or destroyed.

The note under subsection 12(7) provides that in any prosecution for an offence under subsections 12(5) and (6), a defendant intending to rely on the exception in subsection 12(7) 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 would 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 within the knowledge of the defendant.

### **Section 13 Powers of authorised officers—prohibiting entry**

Section 13 provides that in certain circumstances an authorised officer may prohibit a person or group of persons from entering Museum premises. These powers are required to provide authorised officers the ability to prevent the conduct of a person or a group of persons from risking the safety of staff, the public and Museum material.

Subsection 13(1) provides conditions under which an authorised officer may prohibit entry to Museum premises. The conditions are:

- the person or group has been directed to leave Museum premises under section 14 on one or more occasions; or
- the person has been removed from Museum premises under section 15 on one or more occasions; or
- public safety or the safety of staff members will be, or is likely to be, endangered by the presence of a person or the group on or in Museum premises; or
- the conduct of the person or group on or in Museum premises will cause, or is likely to cause, offence to members of the public or staff members; or
- the person or group is likely to commit an offence against these Regulations.

Subsection 13(2) provides that an authorised officer may prohibit entry to Museum premises by the public or staff members if the authorised officer has reasonable grounds for believing that the safety of members of the public or staff members will be, or is likely to be, endangered for any reason.

The note under subsection 13(2) provides reference to section 32 which provides for applications to be made to the Administrative Appeals Tribunal for review of an authorised officer's decision under section 13.

#### **Section 14 Powers of authorised officers—directions to leave**

Section 14 provides that in certain circumstances an authorised officer may direct a person or a group of persons to leave Museum premises, or any part of the Museum premises.

Subsection 14(1) provides the conditions under which an authorised officer may direct a person or a group of persons to leave Museum premises. The conditions are where the authorised 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 or in Museum premises; or
- the conduct of the person or group on or in Museum premises is likely to cause offence to the public or staff members; or
- the person or group intends to commit, is committing, or has committed, an offence against the Regulations.

Subsection 14(2) provides that if an authorised officer issues a direction in accordance with subsection 14(1)(c), they may take a photograph of the person and/or direct the person to provide the person's name and residential address to the authorised officer.

Collection of name and residential address information provides secondary verification of a person's identity should there be any doubt. The combination of a photograph and name and address information ensures that subsequent authorised officers are able to accurately identify a person or group of persons that have been directed to leave the Museum premises under section 14, for the purposes of paragraph 13(1)(a) which provides for an authorised officer to prohibit entry. Being able to collect personal information in such circumstances facilitates a safe and secure environment for Museum staff and visitors, and helps protect the Museum's collections and exhibits from potential damage, theft or loss.

The Museum is subject to the *Privacy Act 1988* (Cth) (Privacy Act) and all personal information collected by the Museum must be dealt with according to the Australian Privacy Principles (APPs), which are set out in Schedule 1 to the Privacy Act (<https://www.oaic.gov.au/privacy/australian-privacy-principles/>). Personal information collected in accordance with subsection 14(2) of the Regulations would be used and managed in accordance with the APPs. This includes any image or personal information collected by an authorised officer in exercising their powers under the Regulations.

Subsection 14(3) provides that an authorised officer may direct members of the public or staff members to leave Museum premises or any part of Museum premises if the authorised officer has reasonable grounds for believing that the safety of members of the public or staff members is endangered for any reason.

#### **Section 15 Powers of authorised officers—apprehension**

Section 15 provides that in certain circumstances an authorised officer may apprehend a person, using such force as is reasonably necessary and, remove the person from Museum premises or, hold the person in their custody until the person can be taken into the custody of a member of a police force.

Subsection 15(1) provides the conditions under which an authorised officer may exercise their powers under section 15. These conditions are if an authorised officer has reasonable grounds for believing that a person on or in Museum premises:

- intends to interfere, is interfering with, or has interfered with, Museum material;
- intends to damage, is damaging, or has damaged Museum premises or Museum material; or
- is refusing, or has refused, to comply with a direction given by an authorised officer in the performance of the officer's duties.

Subsection 15(2) provides an authorised officer the power to apprehend the person, using such force as is reasonably necessary. Subsection 15(3) provides that if the authorised officer apprehends the person, the person may be removed from Museums premises or held in the custody of the authorised officer until the person can be taken into the custody of a member of a police force. Subsection 15(4) requires that if a person is held in the custody of an authorised officer under subsection 15(3), the person must be delivered into the custody of a member of a police force as soon as practicable.

## **Section 16 Powers of authorised officers—vehicles**

### *Vehicles*

Section 16 provides that an authorised officer may direct a person who is on or in Museum premises and apparently in charge of a vehicle to park, or not park, the vehicle on or in Museum premises or in a specified place on or in Museum premises.

## **Section 17 Powers of authorised officers—possible prohibited articles**

Section 17 provides an authorised officer the power to direct a person who is carrying an article that appears to be a prohibited article on or in Museum premises 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 any further on or in Museum premises, and allows for the person to collect it upon exiting the Museum.

## **Section 18 Powers of authorised officers—taking photographs**

Section 18 provides an authorised officer the power to direct a person who is in or on Museum premises not to take any photographs of specified Museum material or photographs while on or in any part of the Museum premises. This power is required as part of the Museum's obligations to provide a safe environment for members of the public and staff, in particular vulnerable members of the community; as well as to prevent unauthorised copying or commercial distribution of images of Museum material, including material on loan to the Museum which is subject to contractual conditions prohibiting photography.

## **Section 19 Powers of authorised officers—deletion and destruction of photographs**

Section 19 provides an authorised officer the power to direct a person to delete or destroy a photograph taken on or in any part of the Museum premises, where they have reasonable grounds to believe that the photograph was taken on the premises in contravention of any

direction given by an authorised officer under this Division, or in contravention of a prohibition, condition or restriction in a Director’s notice.

Subsection 19(1) provides the conditions under which an authorised officer can exercise the powers of this section. Subsection 19(2) provides the authorised officer with the discretion to direct the person to delete or destroy the photograph.

### **Section 20 Powers of authorised officers—offence**

Section 20 provides that a person commits an offence if the person is on or in Museum premises and they do not comply with a direction from an authorised officer under this Division. The purpose of these offence provisions is to enhance the effectiveness of the directions given by security officers. Encouraging compliance with directions helps to ensure that Museum premises are safe and secure for members of the public and staff members. The penalty for this offence would be 5 penalty units.

## **Division 3—Director’s notices**

### **Section 21 Director’s notices**

Section 21 provides the power for the Director to issue a Director’s notice, sets out various requirements relating to the notice, and provides for an offence for contravention of a notice in certain circumstances.

Subsection 21(1) provides that the Director may, by legislative instrument, issue a notice (a Director’s notice) in accordance with subsection 21(2). In accordance with other similar national collecting institutions and international standards of museum management, the control of persons at the Museum will be necessary on such issues as the use of cameras and equipment, the safety of the national historical collection, the conduct of the public and the control of food, liquid and animals on Museum premises. This section enables the Museum flexible control over premises, collection and exhibitions to accommodate changing standards of 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 Museum equally.

Subsection 21(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 Director and must specify a prohibition, condition or restriction relating to Museum premises or Museum material.

Subsection 21(3) provides that if a person is on or in Museum premises, and a copy of a Director’s notice is displayed in accordance with subsection (4), and a prohibition, condition or restriction specified in a Director’s notice applies to the person, the person must comply with the prohibition, condition or restriction.

Subsection 21(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 of the prohibition, condition or restriction and must be displayed at either or both of the entrance to the area of Museum premises to which it relates, and the location to which it relates.

Subsection 21(5) provides that a person commits an offence if the person is subject to a requirement under subsection 21(3), and the person engages in conduct ('engage in conduct' having the meaning it has in the *Criminal Code*) and that conduct contravenes the requirement. The penalty for this offence is 5 penalty units.

#### **Division 4—Other provisions**

##### **Section 22 Damaging Museum material and property**

Subsection 22(1) provides that a person commits an offence if the person touches or interferes with Museum material that is of the kind mentioned in subsections 22(1)(a) and 22(1)(b) of the definition of Museum material in section 5 while on or in Museum premises. The purpose of this offence is to act as a deterrent to touching or interfering with Museum material. The penalty for this offence is 5 penalty units.

Subsection 22(2) provides that a person commits an offence if the person is on or in Museum premises, and engages in conduct ('engage in conduct' being given the meaning that it has in the *Criminal Code*) and the conduct damages Museum material. The purpose of this offence is to act as a deterrent to conduct which may damage Museum material. The penalty for this offence is 5 penalty units.

Subsection 22(3) provides that recklessness or negligence is the fault element for a person's conduct that damages Museum material mentioned in paragraph 22(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 section 5.4 of the *Criminal Code*.

Subsection 22(4) provides that a person commits an offence if they attach an article or write on a building, structure, fixture, fitting, wall or fence; and either the building or structure is Museum premises; or the wall, fence, fixture or fitting is on land that is Museum premises. The purpose of the offence is to act as a deterrent for attaching articles to or writing on a building, fixture, fitting, wall or fence. The penalty for committing such an offence is 5 penalty units.

Subsection 22(5) provides that a person commits an offence if they engage in conduct which damages a building, structure, fixture, fitting, wall, fence, plant or garden; and either the building or structure is Museum premises; or the fixture, fitting, wall, fence, plant or garden is on land that is Museum premises. 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 22(6) provides that recklessness or negligence is the fault element for a person's conduct that damages Museum material mentioned in paragraph 22(5)(b).

Subsection 22(7) provides that section 22 does not limit section 132.8A of the *Criminal Code*, which relates to damaging or destroying Commonwealth property.

##### **Section 23 Selling articles**

Section 23 provides that a person commits an offence if the person is on or in Museum premises, and engages 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 this offence is 5 penalty units.

### **Section 24 Photographing, copying etc. material in national historical collection**

Subsection 24(1) provides that a person commits an offence if the person makes, uses, prints, publishes, exhibits, sells or offers for sale a replica, photograph, representation or copy of any material, knowing that the material forms part of the national historical collection. The national historical collection is a rich and diverse collection of Australian historical material which is held in trust for the nation. The national historical collection contains one of the world's largest collections of bark paintings, the holdings of the former Australian Institute of Anatomy, historical vehicles and material related to Australian politics. For this reason, measures must be put in place to protect the national historical collection. The penalty for this offence is 5 penalty units.

Subsection 24(2) provides that subsection 24(1) does not apply if the person is making, using, printing, publishing or exhibiting a replica, photograph, representation or copy for non-commercial purposes.

The note under subsection 24(2) 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 to show that the photographing, copying etc. is for non-commercial purposes. It is appropriate that the defendant would bear the evidential burden as such matters are likely to be within their knowledge.

It would be significantly and disproportionately more difficult for the prosecution to prove that a person is photographing, copying etc. for commercial purposes. Once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt. In accordance with the Guide, the penalty for contravention of subsection 24(1) is the relatively low amount of 5 penalty units, which tends to support a defence provision in these circumstances.

### **Section 25 Animals**

Subsection 25(1) provides that a person commits an offence if the person allows an animal belonging to the person, or in the person's care or charge, to enter or remain in a Museum building. This is to ensure that the Museum building is both hygienic and safe for members of the public and staff members as well as reducing the potential for damage to Museum material, while still providing access to the Museum to people who require an assistance animal, or police force members performing their duties, and allowing the Museum to bring animals to the Museum for special events or particular purposes. The penalty for this offence is 5 penalty units.

Subsection 25(2) provides that subsection 25(1) does not apply if the person is a person with a disability (within the meaning of the *Disability Discrimination Act 1992*) and the animal is an assistance animal, or the person is a member of a police force acting in accordance with their duties, or the animal is under the control of the Museum.



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 to show that the animal is an assistance animal. It is appropriate that the defendant would bear the evidential burden as the matters required to be established, for instance that the person has a disability and has in their charge an assistance animal, or that a person is a police officer and the animal in their charge is required as part of their duties, are matters likely to be within the knowledge of the person involved.

It would be significantly and disproportionately more difficult for the prosecution to prove that a person is not a person with a disability and that their animal is not an assistance animal, than it would be for any accused to raise the relevant defence by providing evidence of their own status (and that of their assistance animal). This is similarly the case in relation to proving that a person is not a police officer acting in accordance with their duties. Once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt.

In accordance with the Guide, the penalty for contravention of subsection 25(1) is the relatively low amount of 5 penalty units, which tends to support a defence provision in these circumstances.

Subsection 25(3) provides that a person commits an offence if the person allows an assistance animal belonging to them or in their charge, to enter or remain in any Museum building, and the animal is not restrained on a lead or by other reasonable means. The penalty for this offence is 5 penalty units.

## **Section 26 Foods and liquids**

Subsection 26(1) provides that a person commits an offence if they bring food or liquid into a Museum building, or consume food or liquid in a Museum building. The penalty for this offence is 5 penalty units.

Subsection 26(2) provides that subsection 26(1) does not apply: if the food or liquid is for medical purposes; or to bringing water into or drinking water in a Museum building if the water is in a sealed container; or to bringing food or liquid into a Museum building for the purpose of feeding an infant if the food or liquid is in a sealed container; or to breastfeed an infant; or to bringing food or liquid into, or consuming food or liquid in, an area in a Museum building designated for consuming food or liquid.

The note under subsection 26(2) provides that in any prosecution for an offence under subsection 26(1), a defendant intending to rely on the exception in subsection 26(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 27 Smoking**

Subsection 27(1) provides that a person commits an offence if the person is on or in Museum premises and smokes. This offence is required for the health of members of the public and

staff members, and to prevent damage to Museum material. The penalty for this offence is 5 penalty units.

Subsection 27(2) defines “smokes” for the purposes of these Regulations. It provides that a person smokes if the person uses, consumes, holds or otherwise has control over a tobacco product, non-tobacco smoking product or e-cigarette that is generating (whether or not by burning) smoke or an aerosol or vapour.

Subsection 27(3) defines specific words used in the definition of “smokes” to determine what cannot be smoked for the purposes of these Regulations. The definitions specifically reference new developments and technologies in smoking products, including e-cigarettes, personal vaping products and herbal cigarettes. These are included to put in place similar arrangements to those in place for tobacco products, to prevent damage to Museum material caused by the gas or vapour being emitted by e-cigarettes, and to provide a healthy environment for members of the public and staff members who may (or may not) suffer from a respiratory medical condition.

## **Section 28 Prohibited articles**

Subsection 28(1) provides that it is an offence if a person brings a prohibited article onto or into any Museum premises or uses a prohibited article on or in any Museum premises. The purpose of this offence is to prevent any unnecessary damage to Museum material, as well as safety hazards caused by large or sharp personal items that could cause injury to a person.

Subsection 28(2) provides that subsection 28(1) does not apply to bringing a prohibited article onto or into any Museum premises if the person deposits the item, as soon as practicable, at the place in or on the Museum premises designated for that purpose. Subsection 28(2) also provides that subsection 28(1) does not apply when bringing a camera or camera bag onto or into Museum premises, or using a camera for non-commercial purposes.

The note under subsection 28(2) provides that in any prosecution for an offence under subsection 28(1), a defendant intending to rely on the exception in subsection 28(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 on or in Museum premises 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.

## **Division 5—Defences**

### **Section 29 Defences**

Section 29 provides for certain defences to prosecutions under Part 3 or Part 4 of the Regulations, being that the Director had consented in writing to the relevant 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 the Director's written consent, they are not prosecuted for an action that would otherwise constitute an offence under the instrument.

Subsection 29(1) provides that it is a defence to a prosecution under Part 3 or Part 4 if when the relevant conduct was engaged in by the person, the Director had consented, in writing, to the conduct.

Subsection 29(2) provides that it is a defence to a prosecution under Part 3 or Part 4 if the person accused of the offence is a member of the Council, the Director or a staff member acting in accordance with their duties.

The note under subsection 29(2) provides that in any prosecution for an offence under Part 3 or Part 4, a defendant intending to rely on the defences in subsections 29(1) and (2) has the evidential burden of showing that the defence applies. This could be discharged, for example, by providing evidence in writing of the Director's consent, or evidence that they were acting in accordance with their duties. These are matters within the knowledge of the defendant.

It is appropriate that the defendant bears the evidential burden as it would be disproportionately difficult and costly, taking into account the low penalty, for the prosecution to prove that the Director had not consented in writing to a person engaging in conduct that contravenes Part 3 or Part 4 of the Regulations, than for the person to raise evidence of the written consent.

It would be similarly disproportionately difficult and costly for the prosecution to prove that a person is not one of the categories of persons listed in subsection 29(2) and was not acting in accordance with their duties, than for the person to raise evidence of their appointment or employment and associated duties.

Any accused could cheaply and readily raise evidence of their written consent, or of their appointment or employment and associated duties. Once the evidential burden is discharged, the prosecution would then be required to disprove the matter beyond reasonable doubt.

In accordance with the Guide, creating the defence is more readily justified as the offences carry a relatively low penalty of 5 penalty units.

## Part 5—Entry charges

### Section 30 Entry charges

Section 30 relates to the charging of entry charges and generally provides that the Director may fix charges for entry onto or into Museum premises, and may waive these entry charges in certain circumstances.

Subsection 30(1) provides that this section is made for the purposes of Subparagraph 44(b) of the Act. Subparagraph 44(b) of the Act provides that the Governor-General may make regulations for fixing charges for entry onto any land, or into any building, owned by or under the control of the Museum.

Subsection 30(2) provides that the Director may, in writing, fix charges for entry onto or into Museum premises.

Section 30(3) provides that without limiting subsection 33(3A) of the *Acts Interpretation Act 1901*, the Director may, under subsection (2) of this section, fix:

- different charges for different types of persons (including groups of persons); or
- charges for entry to an exhibition, program or other event held on or in Museum premises; or
- a single charge for entry onto or into Museum premises; and to an exhibition, program or other event.

Section 30(4) provides that the Director may waive all or part of a charge that is payable under this section by a person or group of persons for the purpose of encouraging people to visit the Museum, or promoting access to the Museum for educational or disadvantaged groups.

This is consistent with the *National Museum of Australia Regulations 2000*.

A determination of entry charges made under this section is not a legislative instrument for the purposes of section 8 of the *Legislation Act 2003*.

## **Part 6—Delegations**

### **Section 31 Delegation by Director**

Section 31 relates to the delegation of the Director's power and functions under the Regulations. This power is required to ensure that functions and decision-making for the Museum continues in the Director's absence, for example when taking leave or travelling overseas.

Subsection 31(1) provides that the Director may, in writing, delegate any or all of the Director's powers and functions under this instrument to an Australian Public Service employee who is either a member of staff of the Museum mentioned in section 30 of the Act, or a person whose services are available to the Museum under subsection 31(1) of the Act, and who is an SES employee, an acting SES employee, classified as an Executive Level 2 or acting in a position usually occupied by an APS employee who is classified as Executive Level 2.

Subsection 31(2) provides that a person exercising powers or performing functions under a delegation under subsection 31(1) must comply with any directions of the Director.

**Part 7—Review of decisions****Section 32 Review by Administrative Appeals Tribunal**

Section 32 provides that an application may be made to the Administrative Appeals Tribunal for review of a decision of an authorised officer under section 13 of the Regulations to prohibit entry onto or into Museum premises.

The purpose of this is to provide the opportunity for independent merits review of decisions made under section 13 of the Regulations, given that they have the capacity to result in a person being prohibited from the Museum on an ongoing basis.

## **Part 8—Transitional provisions**

### **Division 1—Provisions of this instrument as originally made**

#### **Section 33 Definitions**

This section provides that in Part 8 *old regulations* is defined to mean the *National Museum of Australia Regulations 2000*, as in force immediately before the commencement of this section.

#### **Section 34 Authorisation to supply liquor**

This section provides that an authority given under subregulation 8(1) of the old regulations, and in force immediately before the commencement of this section, has effect from the 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 35 Authorised officers**

Subsections 35(1) and 35(2) are intended to ensure that an appointment made under subregulation 10(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 if paragraph 12(1)(a),(b) or (c) of the instrument applies to the person at commencement.

Subsection 35(3) provides that a certificate issued to the person under subregulation 10(2) of the old regulations; and in force immediately before the commencement of this section has effect, from that commencement, as if it were an identity card issued under subsection 12(2) of this instrument.

#### **Section 36 Directions to leave**

Subsection 36(1) provides that for the purposes of subsection 13(1)(a) a person or groups of persons who has been directed to leave Museum premises under regulation 11 of the old regulations, is taken to have, under section 14 of this instrument, been directed to leave Museum premises.

Subsection 36(2) provides that a person or groups of persons who has been removed from Museum premises under subregulation 12(3)(a) of the old regulations, is taken to have, under section 15 of this instrument, been removed from Museum premises.

Subsection 36(3) provides that a direction given under regulation 13 of the old regulations and which was in force immediately before the commencement of this section, has effect from that commencement as if it had been given under section 16 of this instrument.



**Section 37 Director's notices**

This section provides that a notice that was on display immediately before the commencement of this section on Museum land or in a Museum building under the old regulations, which specifies a prohibition, condition or restriction relating to Museum premises or Museum material, and is displayed in accordance with subsection 21(4), is taken to be a Director's notice.

**Section 38 Consent of Director**

This section provides that for the purposes of subsection 29(1) (Defences) of this instrument, it does not matter whether consent was given before, on or after the commencement of this section.

**Section 39 Entry charges**

This section provides that a determination of a charge made under regulation 7 of the old regulations, and was in force immediately before the commencement of this section, has effect from that commencement as if it had been made under subsection 30(2) of this instrument.

**Section 40 Delegations**

Subsection 40(1) provides that it applies to a delegation to a person of a power of the Director under the old regulations if the delegation was made under regulation 27 of the old regulations, and was in force immediately before the commencement of this section, and at that commencement subsections 31(1)(a) and 31(1)(b) (Delegations) of this instrument apply to the person.

Subsection 40(2) provides that such a delegation has effect from that commencement as if it were a delegation of the equivalent power under this instrument, and made under section 31 of this instrument.

**Schedule 1—Repeals**

Schedule 1 repeals the *National Museum of Australia Regulations 2000*, which is due to sunset on 1 October 2019, 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 Museum of Australia Regulations 2019

#### ***Overview of the Regulations***

The *National Museum of Australia Act 1980* (the Act) established the National Museum of Australia (the National Museum) as Australia's principal agency for the collection, research, dissemination of information and exhibition of material that relates to Australia's past, present and future. The National Museum's primary function is to develop and maintain a national collection of historical material, and to exhibit or make available for exhibition by others, historical material from the national historical collection that is otherwise in the possession of the Museum. The Act states the National Museum shall use every endeavour to make the most advantageous use of the national collection in the national interest.

The purpose of the proposed *National Museum of Australia Regulations 2019* (the Regulations) is to repeal and remake the *National Museum of Australia Regulations 2000*, with some changes to reflect current drafting practice and ensure that the Regulations continue to be fit-for-purpose. Specifically, the proposed Regulations will:

- increase the financial threshold above which the National Museum requires the approval of the Minister to enter into a contract;
- provide for the Director of the Museum to fix entry charges;
- provide for the Director of the Museum to authorise and place conditions on the sale, supply, disposal, possession and control of liquor on the Museum's premises;
- provide for the Director of the Museum to appoint authorised officers;
- provide for persons or groups of persons who are prohibited from entering Museum premises to apply to the Administrative Appeals Tribunal for review of that decision; and
- create certain offences relating to the protection of the national historical collection, control of land and buildings, and the sale and supply of liquor on Museum 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 freedom of expression in Article 19 of the *International Covenant on Civil and Political Rights* (the ICCPR);
- 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); and
- 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 15 of the Regulations provides that in certain circumstances, an authorised officer may apprehend a person, using such force as is reasonably necessary. The circumstances in which an authorised officer may exercise the power is limited to when the officer has reasonable grounds for believing that the person on or in Museum premises:

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

If an authorised officer apprehends a person for the reasons discussed above, under subsection 15(3) the authorised officer may remove the person from Museum premises, or hold the person in the authorised officer's custody until the person can be taken into the custody of a member of the police force.

The Regulations provide that an authorised officer is to be appointed, in writing, by the Director and is to be provided with an identity card. An authorised 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).

An authorised officer has several powers to direct persons on or in Museum premises to do certain things, in particular an authorised officer can direct a person:

- to leave Museum premises, 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 14);
- who is apparently in charge of a vehicle that is on or in Museum premises, to park the vehicle on or in Museum premises, or not to park the vehicle on or in Museum premises or in a specified place on or in Museum premises (section 16); or
- to submit for inspection possible prohibited articles, or leave such articles in designated places (section 17);
- Not to take photographs of any part of the Museum premises or of specified Museum material while on or in Museum premises (section 18);
- To delete or destroy a photograph if the officer has reasonable grounds to believe that a person has taken a photograph in contravention any direction by an officer or prohibition, condition or restriction in a Director's notice in relation photography (section 19).

It is noted that the power in section 15 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 16 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 15 it is clearly defined when an authorised officer can exercise the power to apprehend a person. The power can only be exercised if the officer has reasonable grounds for believing that a person is, has or will, interfere or damage Museum material, or is refusing to comply with a direction of an authorised 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 officer can exercise the power.

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

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

In addition to the requirement of the reasonableness threshold being met for the power to be exercised by an authorised officer, subsection 15(2) makes it clear that when apprehending the person, the authorised 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 an authorised officer, once they have apprehended the person, is to remove the person from Museum premises, or hold them in the custody of an authorised 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 an authorised 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 Museum premises where they can no longer endanger the public, the staff, or the national

historical 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 historical 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 Museum 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 freedom of expression***

Article 19 of the ICCPR protects the right of all persons to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds. In accordance with the Act's determination in section 6 that the functions of the National Museum are to make available historical material, support research into, and disseminate information relating to Australian history, the Regulations do not specifically regulate public access to material in the Museum's collection which engages the right to freedom of expression.

The United Nations Human Rights Committee (HRC) has defined the freedom of expression as including the expression and receipt of communications of every form of idea and opinion capable of transmission to others. It includes political discourse, commentary on one's own and on public affairs, canvassing and discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. It embraces even expression that may be regarded as deeply offensive, although such expression may be restricted.

The exercise of the right to freedom of expression carries with it special duties and responsibilities. Some areas of restriction are permitted: lawful restrictions relating either to the rights or reputations of others; the protection of national security; public order; and public health or morals. These restrictions must be strictly necessary and proportionate, and may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. The HRC observed that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected... The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law".

The collection of the National Museum is extraordinarily broad, relating to Australia's past, present and future. The Museum's collection comprises material that forms the national historical collection, and developing and maintaining a national collection is a function under

paragraph 6(1)(a) of the Act. The Gallery of Aboriginal Australia is also established and forms part of the Museum under section 5 of the Act.

Section 18 of the Regulations provides that an authorised officer may direct a person who is on or in Museum premises to not take any photographs while on or in Museum premises or any part of Museum premises or to not take photographs of specified Museum material. This restriction is necessary to protect Museum material, including material that may be on loan to the Museum from another institution and where that institution has requested such restrictions during the display of its material, from unauthorised commercial exploitation.

Subsection 24(1) makes it an offence if a person makes, uses, prints, publishes, exhibits, sells or offers for sale a replica, photograph, representation or copy of any material and the person knows that the material is historical material forming part of the national historical collection. However, subsection 24(2) provides that subsection 24(1) does not apply to making, using, printing, publishing or exhibiting a replica, photograph, representation or copy for non-commercial purposes, which is considered appropriate given the large number of visitors to the Museum who take photographs simply to record their visit, and not for commercial gain.

### ***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 Regulations regulate access to the National Museum, and as such engages the right to take part in cultural life.

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) 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. CESCR has also 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 and theatres, cinemas and sports stadiums.

Section 13 of the Regulations relates to the power of an authorised officer employed by the National Museum to prohibit entry to a person or group of persons under certain circumstances. An authorised officer may decide to prohibit entry if that officer has reasonable grounds for believing that:

- the person or group has, under section 14, been directed to leave Museum premises on one or more occasions; or
- the person has, under section 15, been removed from Museum premises on one or more occasions; or
- public safety or the safety of staff members will be, or is likely to be, endangered by the presence of the person or the group on or in Museum premises; or
- the conduct of the person or group on or in Museum premises will cause, or is likely to cause, offence to members of the public or staff members; or
- the person or group is likely to commit an offence against the Regulations.

As an institution that is established to develop and maintain a national collection of historical material, the National Museum has promoted participation in cultural life since it was formally established under the Act in 1980. The Museum is a place where all persons can access a comprehensive collection of material relating to Australia and the people who live in Australia. To prohibit entry to a person or group of persons would limit their ability to participate in cultural life as represented by the collection of the National Museum.

This power balances the right of an individual to take part in cultural life with the rights of other Museum visitors to also enjoy this right in safety and without umbrage. It also provides a necessary and proportionate safeguard to protect the Museum's collection and premises, to ensure it remains a safe and community-orientated space for the current and future use for all. The Regulations also provide under section 32 that a decision made by an authorised officer under section 13 to prohibit entry may be subject to independent merits review by way of application to the Administrative Appeals Tribunal.

Subsection 30(2) of the Regulations provides that the Director of the Museum may fix charges for entry onto or into Museum premises. These charges are typically fixed so that the Museum can reasonably recoup some of the costs associated with receiving material from other national collecting institutions, or hosting a significant public event. While subsection 30(2) provides that the Director of the Museum may fix charges for general entry onto or into Museum premises, Subsection 30(4) provides that the Director may waive all or part of an entry charge fixed under subsection 30(2) for the purposes of encouraging people to visit the Museum or promoting access to the Museum for educational or disadvantaged groups.

### ***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(6) of the Regulations provide that a person commits an offence of strict liability if they cease to be an authorised officer, and do not return their identity card to the Director, within 14 days of ceasing. This offence is a strict liability offence, recognising that access to identity cards by individuals who are not appointed authorised officers weakens the security of the National Museum. The offence is intended to prevent the misuse of the special powers given to authorised officers once a person ceases their appointment as an authorised officer, and encourage the voluntary return of identity cards from persons who are no longer performing this role. It is also intended to provide for the safety and security of members of the public, staff members and objects in the Museum's collections.

This offence is not considered unreasonable as an authorised officer can only perform their duties and exercise powers under these Regulations using their identity card while on Museum premises, which is issued to the authorised officer specifically and they are required as a condition of their employment to carry it at all times while on duty. Therefore, it is completely within the person's control to return it. The Regulations make an exemption from this strict liability offence for circumstances where a person has lost or damaged their identity



card under subsection 12(7). 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. The penalty for conviction of this offence is 1 penalty unit.

While subsection 12(6) 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 authorised officers do not have access to identity cards and hold themselves out as such, particularly given the significant powers authorised 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 specified 14 day period of ceasing.

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), 24(2), 25(2), 26(2), 28(2), 28(4) and 29(2) of the Regulations provide for exceptions to various offences. For the exceptions to apply, the defendant has the evidential burden of proof to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist. However, these exceptions do not relate to offences of strict liability which limit the presumption of innocence. That is, whilst the defendant has an evidential burden, the prosecution is still required to disprove the matter beyond reasonable doubt. As such, the offences to which these exceptions relate, do not limit the presumption of innocence.

For the reasons discussed above, to the extent that the strict liability offence in subsection 12(6) 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.