

EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

AusCheck Act 2007, Crimes Act 1914

AusCheck Legislation Amendment (Major National Events) Regulations 2019

The *AusCheck Act 2007* (AusCheck Act) establishes a background checking function within the Department of Home Affairs. The purpose of the AusCheck Act is to provide a regulatory framework for coordinating and conducting centralised criminal, security and other background and identity checking and for related purposes. This includes background and identity checks relating to aviation and maritime security. The AusCheck Act was recently amended to provide for the provision of background checking services by AusCheck to the organising bodies of major national events.

An event is a major national event for the purposes of the AusCheck Act when the Minister makes a declaration under section 5A that a specified event is a major national event. The Minister cannot make a declaration under section 5A unless he or she is satisfied that it is in the national interest that the Commonwealth be involved in the conduct and coordination of background checks in connection with the accreditation of individuals in relation to the event. It is anticipated that major national events will be declared by the Minister for a range of different activities, including sporting events (such as the upcoming Women's and Men's Cricket T20 World Cups) and diplomatic visits (such as the G20 Summit).

Legislative authority

Section 8 of the AusCheck Act states that the regulations may provide for the establishment of the AusCheck scheme as prescribed in regulations. Subsection 10AA(1) of the AusCheck Act provides that the AusCheck scheme may, in relation to major national events, make provision for: giving information to the Secretary that is directly necessary for the purpose of conducting a background check; the criteria against which a background check is to be assessed; the decision or decisions that may be made as a result of an application for a background check; the form of advice to be given to an individual in respect of whom a background check is conducted; and, the form of advice to be given to other persons about the outcome of a background check.

The *AusCheck Regulations 2017* establish the AusCheck scheme, which relates to the conduct and coordination of background checks by AusCheck, a background checking function of the Department of Home Affairs, for the purposes of the *Aviation Transport Security Act 2004*, the *Maritime Transport and Offshore Security Act 2003*, the *National Health Security Act 2007*, and any other Act that expressly requires or permits a background check to be conducted under the AusCheck scheme. The AusCheck Regulations prescribe a range of matters for the operation of the AusCheck scheme.

Purpose

The purpose of the *AusCheck Legislation Amendment (Major National Events) Regulations 2019* (Amendment Regulations) is to:

- amend the AusCheck Regulations to provide for the establishment and operation of the AusCheck scheme for major national events purposes (Part 1 of Schedule 1 to the Amendment Regulations), and
- amend Schedule 2 to the *Crimes Regulations 2019* (Crimes Regulations) to provide additional exclusions from the spent convictions scheme established under Division 3 of Part VIIC of the *Crimes Act 1914* (Crimes Act).

Each of these Parts is described under separate headings below. Further specific detail of the amendments made by the Amendment Regulations is at [Attachment A](#).

Part 1 of Schedule 1—AusCheck scheme for major national events

The measures inserted into the AusCheck Regulations by Part 1 of Schedule 1 include:

- a power for the Minister to declare the organising body for a major national event, and the types of background checks to be conducted in relation to that event;
- authority for AusCheck to undertake background checks upon application of an organising body for a major national event, and to conduct a further background check in limited circumstances;
- requirements that must be met to conduct electronic identity verification and in-person identity verification, if required as part of a background check, and for the withdrawal of the accreditation of an individual in certain prescribed circumstances; and
- relevant definitions to support the operation of these measures.

Other minor technical amendments would also be made by Part 1 of Schedule 1.

Part 2 of Schedule 1—Exclusions from the spent convictions scheme

Division 3 of Part VIIC of the Crimes Act establishes the spent convictions scheme, which provides that persons who have been convicted of a Commonwealth or a Territory offence are not required to disclose information about a conviction once it becomes a spent conviction. This typically occurs if a person is pardoned, or 10 years after the date on which the person was convicted (if they were not sentenced to imprisonment, or to a period of not more than 30 months, see section 85ZM of the Crimes Act). Relevantly, if a conviction is spent, a person who knows that the conviction is spent cannot disclose that an individual was charged with, or convicted of, the offence, or take account of that conviction, unless an exclusion applies. One of those exclusions is where the disclosure by a prescribed person or body is for a prescribed purpose, in relation to a prescribed offence (see paragraph 85ZZH(k) of the Crimes Act).

Section 21 of, and Schedule 2 to, the Crimes Regulations relevantly prescribe that, for the aviation and maritime security, and national health security, functions operating under the AusCheck scheme, the spent convictions scheme does not apply to the disclosure by the Secretary of the Department administering the AusCheck Act of information to the relevant issuing bodies, for the purpose of assessing whether or not to issue a security identity card, in relation to convictions for specified offences (see item 20 of the table in Schedule 2).

Part 2 of Schedule 1 to the Amendment Regulations amends item 20 of Schedule 2 to extend the Secretary's exclusion for major national events purposes and insert a new item 23A into the table in Schedule 2 to the Crimes Regulations providing that the spent convictions scheme does not apply to the collection, use and disclosure of information about MNE Level 1 disqualifying offences to an organising body for the purpose of assessing whether or not to issue an MNE accreditation to that person, similar to the regime in place in respect of other functions under the AusCheck scheme (see items 13, 19 and 23 in particular).

Impact and effect

The impact of the Amendment Regulations is to provide for the extension of the AusCheck scheme to background checking of individuals in connection with the accreditation of the individual in relation to a major national event. This is intended to have a positive impact on the management of security risks for major national events.

It is not anticipated that there will be any adverse impact or effect from the making of the Amendment Regulations.

Consultation

The Attorney-General's Department has been consulted on the proposed Regulations. The Office of the Australian Information Commissioner was specifically consulted on the amendment to the spent convictions scheme. All agencies were supportive of the proposed Regulations being made.

AusCheck developed the policy rationale implemented by the Amendment Regulations in consultation with Emergency Management Australia, the lead authority on the security of major events in Australia, and with the first intended organising body for a major national event.

Regulatory impact statement

The Office of Best Practice Regulation (OBPR) was consulted prior to making the Amendment Regulations. The OBPR had previously advised that a regulatory impact statement was not required prior to the introduction of the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016 (Crime Cooperation Bill), and legislative instruments made under the provisions of the AusCheck Act (and other Acts) being amended by the Crime Cooperation Bill once passed, as there was no regulatory impact. As the Amendment Regulations are made pursuant to provisions of the AusCheck Act amended by the *Crimes Legislation Amendment (International Crime Cooperation and*

Other Measures) Act 2016, that OBPR advice extends to the Amendment Regulations (OBPR ID: 21087).

Status and commencement

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Regulations are compatible with human rights and freedoms for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The statement of compatibility with human rights is included at Attachment B.

The Amendment Regulations commence on the day after registration.

Details on provisions

AusCheck Legislation Amendment (Major National Events) Regulations 2019

Section 1 – Name

Section 1 outlines that the name of the Amendment Regulations is the *AusCheck Legislation Amendment (Major National Events) Regulations 2019* (Amendment Regulations).

Section 2 – Commencement

Section 2 provides for the commencement of the Amendment Regulations, occurring the day after registration on the Federal Register of Legislation.

The commencement of the Amendment Regulations at the first available opportunity after they are made provides for background checking for major national events accreditation to be in place for background checks to be conducted prior to the first proposed major national event, the International Cricket Council Twenty20 Cricket World Cup, scheduled to commence in February 2020.

Section 3 – Authority

Section 3 prescribes that the Amendment Regulations are made under the *AusCheck Act 2007* (AusCheck Act) (paragraph (a)) and the *Crimes Act 1914* (Crimes Act) (paragraph (b)).

AusCheck Act

Subsection 18(1) of the AusCheck Act provides that the Governor-General may make regulations prescribing matters required or permitted by the AusCheck Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the AusCheck Act. Relevantly, the AusCheck Act also provides that:

- the regulations may provide for the establishment of the AusCheck scheme relating to the conduct and coordination of background checks of individuals if the check is of an individual in connection with the accreditation of the individual in relation to a major national event (paragraph 8(1)(d))
- the AusCheck scheme may make provision for and in relation to the giving to the Secretary of information that is directly necessary for the purpose of conducting a background check, the criteria against which a background check is to be assessed, the decision or decisions that may be made as a result of a background check, the form of advice to be given to an individual in respect of whom a background check is

conducted, and the form of advice to be given to other persons about the outcome of a background check (subsection 10AA(1))

- the AusCheck scheme may empower the Secretary to give directions to an applicant for a background check, or to a person who is required to take action relating to matters connected with a background check (subsection 11(1)), and
- the regulations may provide for the imposition of penalties, not exceeding 100 penalty units, for a contravention of the regulations (paragraph 18(2)(c)).

The AusCheck Act, in particular paragraph 8(1)(d), provides a broad discretion for the making of regulations with respect to the conduct of background checks in relation to accreditations for major national events.

The amendments being made by the Amendment Regulations to the AusCheck Regulations by Part 1 of Schedule 1 are supported by the abovementioned provisions of the AusCheck Act.

Crimes Act

Section 91 of the Crimes Act relevantly provides that the Governor-General may make regulations, not inconsistent with that Act, prescribing all matters required or permitted by the Crimes Act to be prescribed, for carrying out or giving effect to that Act. Paragraph 85ZZH(k) of the Crimes Act, relevantly, provides that Division 3 of Part VIIC of the Act concerning spent convictions does not apply in prescribed circumstances. Section 21 of, and Schedule 2 to, the *Crimes Regulations 2019* (Crimes Regulations) prescribe such circumstances.

The amendments being made by the Amendment Regulations to Schedule 2 to the Crimes Regulations are supported by section 91 and paragraph 85ZZH(k) of the Crimes Act.

Section 4 – Schedules

Section 4 provides that each instrument specified in a schedule to this instrument would be amended or repealed as set out in this instrument and any other item in a schedule to this instrument has effect according to its terms. There is one Schedule to the Amendment Regulations, which makes amendments to the AusCheck Regulations (Part 1 of Schedule 1) and the Crimes Regulations (Part 2 of Schedule 1).

Schedule 1—Amendments

Part 1—Major national events

AusCheck Regulations 2017

Part 1 of Schedule 1 to the Amendment Regulations amends the AusCheck Regulations to extend the AusCheck scheme to apply to major national events.

Clause 1 – Section 4 (after paragraph (c) of the note)

Clause 1 would insert paragraph (ca) into the note at the start of section 4 of the AusCheck Regulations, which makes reference to terms defined section 4 of the AusCheck Act that are used in the AusCheck Regulations.

Paragraph (ca) would make reference to the definition of ‘major national event’ that was recently inserted into the AusCheck Act by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018*. That Act provided for the extension of the AusCheck scheme to major national events and inserted the regulation-making powers into the Act upon which the proposed Regulations rely.

Clause 2 – Section 4

Clause 2 inserts a definition of *AusCheck* into section 4 of the AusCheck Regulations. This definition provides that AusCheck is that part of the Department, currently the Department of Home Affairs, which administers the AusCheck scheme. This definition has been inserted to clarify that AusCheck exercises powers and perform functions under the AusCheck Regulations.

Clause 3 – Section 4 (at the end of the definition of *Category A identification document*)

Clause 3 inserts an additional paragraph (c) into the definition of *Category A identification document*, relevant only for the purposes of major national events. Paragraph (c) does not apply in relation to applications relating to aviation and maritime security cards or access to security sensitive biological agents.

A document is a Category A identification document under paragraph (c) for the purposes of major national events when it is a valid document that:

- for an individual who was born in Australia and is an Australian citizen—either the individual’s birth certificate or a notice given to the individual under section 37 of the *Australian Citizenship Act 2007* (subparagraph (i)); or
- for any other individual—a valid document that provides evidence of the start of the person’s identity in Australia (subparagraph (ii)).

It is specified that a Category A identification document under subparagraph (c)(ii) must be ‘valid’ because it is possible for a document to be invalidated after it is produced, for example by cancellation or subsequent replacement.

This definition adopts a standard of proof consistent with the *National Identity Proofing Guidelines* published by the Commonwealth of Australia in 2016 (National Identity Proofing Guidelines).

Clause 4 – Section 4 (at the end of the definition of *Category B identification document*)

Clause 4 inserts an additional paragraph (c) into the definition of *Category B identification document* relevant only for the purposes of major national events. Paragraph (c) does not apply in relation to applications relating to aviation and maritime security cards or access to security sensitive biological agents.

A document is a Category B identification document under paragraph (c) for the purposes of major national events when it is a current and valid document that:

- the document is issued to the individual by a Commonwealth, State or Territory Department or agency, or by a government of a foreign country or an agency of a government of a foreign country (subparagraph (i))
- the document provides photographic proof of the individual’s identity (subparagraph (ii)), and
- the document includes the individual’s signature (subparagraph (iii)).

It is specified that a Category B identification document under paragraph (c) must be ‘current’ because a Category B document is typically issued for a period of time and has an expiry date after which the document will not be current. For example, an unrestricted driver licence issued by a State or Territory may be issued for a period of 10 years.

It is specified that a Category B identification document under paragraph (c) must be ‘valid’ because it is possible for a document to be invalidated after it is produced, for example by cancellation or subsequent replacement.

It is noted at the definition that an example of a Category B identification document for the purposes of paragraph (c) of the definition is a current and valid Australian or foreign passport or a driver licence.

This definition adopts a standard of proof consistent with the National Identity Proofing Guidelines.

Clause 5 – Section 4 (and the end of the definition of *Category C identification document*)

Clause 5 inserts an additional paragraph (c) into the definition of *Category C identification document* relevant only for the purposes of major national events. Paragraph (c) does not

apply in relation to applications relating to aviation and maritime security cards or access to security sensitive biological agents.

A document is a Category C identification document under paragraph (c) for the purposes of major national events when it is a current and valid document that provides evidence of the individual's use of identity while operating in the community (including a community outside of Australia).

It is specified that a Category C identification document under paragraph (c) must be 'current' because the document is typically issued for a period of time and has an expiry date after which the document will not be current

It is specified that a document is 'valid' because it is possible for a document to be invalidated after it is produced, for example by cancellation or subsequent replacement. For example, a person may have lost their Medicare card and requested a new one. The Department of Human Services would cancel that card and issue a new one. If the individual relocated their lost Medicare card, it would appear to be 'current' as the expiry date had not passed but it would not be 'valid' as it is cancelled.

It is noted at the definition that an example of a Category C identification document for the purposes of paragraph (c) of the definition is a current and valid Medicare card, or a bank or credit card issued by a bank.

This definition adopts a standard of proof consistent with the National Identity Proofing Guidelines.

Clause 6 – Section 4

Clause 6 inserts two additional definitions into section 4 of the AusCheck Regulations for the purposes of the major national events provisions being inserted by the proposed Regulations.

Category D identification document

This definition adds an additional category of documents that are an identification document for the purposes the AusCheck Regulations. This definition applies in relation to an applicant for, or holder of, an MNE accreditation. It does not apply in relation to applications relating to aviation and maritime security cards or access to security sensitive biological agents.

A document is a Category D identification document under paragraph (c) for the purposes of a major national event when it is a valid document that:

- provides evidence of the individual's current residential address (which may be a residential address outside of Australia) (subparagraph (i)), and
- is less than 6 months old (subparagraph (ii)).

It is specified that a Category D identification document must be ‘valid’ because it is possible for a document to be invalidated after it is produced, for example by the contents of the document becoming outdated for example by an individual moving address or cancelling a utilities account.

It is noted at the definition that an example of a Category D identification document is a current utilities notice. Other examples of a Category D identification document include a bank statement, electoral roll registration or motor vehicle registration.

This definition adopts a standard of proof consistent with the National Identity Proofing Guidelines.

conviction

This definition provides that conviction, for an applicant for, or holder of, an MNE accreditation has the same meaning as in Part VIIC of the Crimes Act, subject to the following exclusions:

- a spent conviction (within the meaning of subsection 85ZM(2) of the Crimes Act) if Division 3 of Part VIIC of the Crimes Act applies to the individual in relation to the conviction (paragraph (a) of the definition). This exclusion would only apply in relation to convictions for Commonwealth offences. As clauses 27 and 28 of Schedule 1 to the proposed Regulations would make amendments to the exclusions from spent convictions under Division 3 of Part VIIC of the Crimes Act, this would need to be taken into account in the interpretation of this paragraph of the definition, and
- a conviction for an offence which, under a law relating to pardons or quashed convictions, the individual is taken never to have been convicted (paragraph (b) of the definition). This exclusion would apply in relation to convictions for Commonwealth, State and Territory offences.

Five notes are included with this definition, outlining:

- the application of subsection 85ZM(1) of the Crimes Act, as to when a person is taken to have been convicted of an offence under that subsection (Note 1)
- the effect of Part VIIC of the Crimes Act, in particular section 85ZR, as to when a person receives a free and absolute pardon for an offence against a law of the Commonwealth or a Territory (Note 2)
- that a conviction may cease to be a spent conviction under Division 3 of Part VIIC of the Crimes Act if a person is convicted of a further offence by application of Division 4 of that Part (Note 3)
- that, under the Crimes Act, a person does not need to disclose convictions that have been quashed or are spent (Note 4), and

- that convictions for MNE level 1 disqualifying offences do not become spent for the purposes of assessing whether to issue the convicted person with an MNE accreditation (by application of the amendments to the Crimes Regulations proposed in clauses 27 and 28 of Schedule 1 to the proposed Regulations) (Note 5).

The definition is modelled after the definition of ‘conviction’ in subregulation 6.01(1) of the *Aviation Transport Security Regulations 2004* (ATSR) and subregulation 6.07B(1) of the *Maritime Transport and Offshore Facilities Security Regulations 2003* (MTOFSR).

Clause 7 – Section 4 (at the end of the definition of *identification document*)

Clause 7 inserts an additional paragraph (d) into the definition of *identification document* in the AusCheck Regulations to include the new definition of Category D identification document (see further at clause 6 above).

Clause 8 – Section 4

Clause 8 inserts further additional definitions into section 4 of the AusCheck Regulations.

imprisonment

This definition provides that imprisonment includes periodic detention, home-based detention and detention until the rising of a court, but does not include an obligation to perform community services. This definition is being included to assist with the interpretation of ‘MNE level 2 offence’ and ‘MNE level 3 offence’. See further at those definitions below.

For a sentence of periodic detention, when considering the length of the sentence of imprisonment, the length of the sentence would be determined by reference to the amount of time the individual is actually imprisoned, and not the length of time over which the sentence is served. For example, if a person was sentenced to weekend detention over 2 years, the length of the sentence of imprisonment would be considered to be 208 days and not 2 years.

MNE

This definition provides that MNE is short for major national event, which is defined in section 5A of the AusCheck Act.

MNE accreditation

This definition provides that MNE accreditation means accreditation of an individual in relation to a major national event. An MNE accreditation would be issued by the organising body for the major national event after AusCheck advises the organising body about the outcomes of a background check (under new section 21A of the AusCheck Regulations, at clause 22 below).

MNE criminal record

This definition provides that an individual has an MNE criminal record if the individual has been:

- convicted of an MNE level 1 disqualifying offence (paragraph (a))
- convicted of an MNE level 2 offence and sentenced to any term of imprisonment for the offence (paragraph (b)), or
- convicted of an MNE level 3 offence and sentenced to a term of imprisonment of 12 months or more (paragraph (c)).

The definition of imprisonment, outlined above, applies in this definition.

The purpose of including this definition in the proposed Regulations is to provide a short-hand reference by which the defined concept is captured:

- within the meaning of ‘unfavourable criminal history’ for the purposes of section 6 of the AusCheck Regulations (as would be amended by clause 17, see further at that clause), and
- in the ability of AusCheck to conduct a background check in relation to an individual for, or holder of, an MNE accreditation (under section 11AB(1)(a), as would be inserted by clause 18).

MNE level 1 disqualifying offence

This definition provides that an MNE level 1 disqualifying offence is an MNE-security-relevant offence mentioned in an item in the table in clause 1 of Schedule 1 to the AusCheck Regulations (as would be inserted by clause 26). See further explanation at that clause.

MNE level 2 offence

This definition provides that an MNE level 2 offence is an MNE-security-relevant offence mentioned in an item in the table in clause 2 of Schedule 1 to the AusCheck Regulations (as would be inserted by clause 26). See further explanation at that clause.

MNE level 3 offence

This definition provides that an MNE level 3 offence is an MNE-security-relevant offence mentioned in an item in the table in clause 3 of Schedule 1 to the AusCheck Regulations (as would be inserted by clause 26). See further explanation at that clause.

MNE-security-related offence

This definition provides that an MNE-security-relevant offence is an offence mentioned in an item in the table in Schedule 1 against a law of the Commonwealth, a State or Territory. Schedule 1 would be inserted by clause 26. See further explanation at that clause.

organising body

This definition defines organising body by reference to the body that the Minister declares under new section 21E of the AusCheck Regulations to be the organising body. See further detail at clause 23, which inserts that new section.

verifying person

This definition provides that, for an identity verification check in relation to a major national event under proposed Subdivision B of Division 5A of Part 2 of the AusCheck Regulations (see clause 23), the verifying person means:

- AusCheck (paragraph (a))
- the organising body for the relevant major national event (paragraph (b)), or
- a person acting on behalf of AusCheck or the organising body (paragraph (c)).

Paragraph (c) of the definition is required to allow either AusCheck or an organising body to authorise another person to complete an identity check on their behalf. This is particularly important in relation to the conduct of in person identity verification under new section 21J (see clause 23). This would provide, for example, for an applicant for an MNE accreditation to present to a post office to complete an in person identity verification on behalf of an organising body.

Clause 9 – Paragraph 5(1)(d)

Section 5 of the AusCheck Regulations prescribes the different types of information required to be provided for an individual to whom an application for a background check relates (defined as the ***required information***).

Clauses 9 to 13 of Schedule 1 to the Amendment Regulations amend section 5 of the AusCheck Regulations to add further specific types of information that are required information for the purpose of a background check relating to a major national event accreditation. This information must be provided by an organising body to AusCheck when making an application for a background check to be conducted under section 21G (see paragraph 11AA(2)(b), at clause 18 below).

Clause 9 amends paragraph 5(1)(d) of the AusCheck Regulations with the effect that, in an application for a background check for the purposes of an MNE accreditation under proposed

section 11AA of the AusCheck Regulations, the required information to be provided in that application does not include a 10 year address history for the applicant.

This information is not required for AusCheck to conduct background checks in relation to MNE accreditation because this aligns with the collection capabilities of organising bodies and the major events industry.

Clause 10 – After paragraph 5(1)(i)

Clause 10 inserts paragraphs 5(1)(ia) and (ib) into the AusCheck Regulations, prescribing additional required information to be provided for an application for a background check for a major national event under section 21G. This information does not need to be provided for applications relating to aviation and maritime security cards or access to security sensitive biological agents.

Under paragraph 5(1)(ia), an applicant for a background check who is, or is to be, employed for the purposes of a major national event and requires a background check for the purposes of that employment, would be required to provide as required information details about:

- the name and business address of their employer (sub-paragraph (i)), and
- the details of the capacity in which the individual is, or is to be, employed (sub-paragraph (ii)).

This information is required for AusCheck to conduct background checks in relation to MNE accreditation because this information provides background checking partners (being bodies who assist AusCheck to complete different components of a background check) with the capacity to complete a thorough check of an individual.

Under paragraph 5(1)(ib), an applicant for a background check who is, or is to be, a volunteer worker for an organisation (defined as the ***volunteer organisation***) for the purposes of a major national event and requires a background check for the purposes of that employment, must provide as required information details about:

- the name and business address of the volunteer organisation (sub-paragraph (i)), and
- the details of the work that the individual is performing, or will perform, with the volunteer organisation (sub-paragraph (ii)).

This information is required for AusCheck to conduct background checks in relation to MNE accreditation because this information provides background checking partners (being bodies who assist AusCheck to complete different components of a background check) with the capacity to complete a thorough check of an individual.

Clause 11 – After paragraph 5(1)(k)

Clause 11 inserts paragraph 5(1)(ka) into the AusCheck Regulations, prescribing additional required information to be provided for an application for a background check for a major national event under section 21G. This information does not need to be provided for applications relating to aviation and maritime security cards or access to security sensitive biological agents.

Under paragraph 5(1)(ka), an applicant for a background check who is a student who needs to provide the following required information:

- the business name and address of the institution at which the individual is studying (sub-paragraph (i)), and
- details of the work that individual is undertaking, or will undertake, with the organisation (sub-paragraph (ii)).

This information is required for AusCheck to conduct background checks in relation to MNE accreditation because this information provides background checking partners (being bodies who assist AusCheck to complete different components of a background check) with the capacity to complete a thorough check of an individual.

Clause 12 – Paragraph 5(1)(m)

Clause 12 makes technical amendments to paragraph 5(1)(m) of the AusCheck Regulations to correct the chapeau of the paragraph to refer to the proper operation of paragraph 8(1)(a) in relation to background checks for aviation and maritime security identification cards.

Clause 13 – At the end of subsection 5(1)

Clause 13 inserts new paragraph 5(1)(n) into the AusCheck Regulations, prescribing additional required information to be provided for an application for a background check for a major national event under section 21G. This information does not need to be provided for applications relating to aviation and maritime security cards or access to security sensitive biological agents.

Under paragraph 5(1)(n), an applicant for a background check who is an individual under 16 years of age at the time the application is made must provide the following required information:

- express consent from a parent or guardian of the individual for the background check to be conducted (sub-paragraph (i)); and
- if, under proposed paragraph 21F(b), the background check must include an identity verification check, express consent from a parent or guardian of the individual for the identity verification check to be conducted (sub-paragraph (ii)).

The information is required as it is an appropriate privacy safeguard for a parent or guardian of a child to provide express consent for background checks, and identity verification checks, to be conducted.

Clause 14 – At the end of subsection 5A(1)

Clause 14 inserts paragraph (c) into subsection 5A(1) of the AusCheck Regulations, which deals with identity verification checks relating to aviation and maritime security cards or access to security sensitive biological agents. Paragraph 5A(1)(c) provides that section 5A does not apply in relation to background checks of an individual in connection with MNE accreditation.

Identity verification for background checks in relation to MNE accreditation are separately dealt with under proposed Subdivision B of Division 5A of Part 2 of the AusCheck Regulations, as inserted by the Amendment Regulations under clause 23 of Schedule 1. See further explanation at that clause.

Clause 15 – Section 5B

Clause 15 would amend section 5B of the AusCheck Regulations to be subsection 5B(1), without substantial change to that provision, consequential to the insertion of subsection 5B(2) by clause 16.

Clause 16 – At the end of section 5B

Clause 16 inserts new subsection 5B(2) into the AusCheck Regulations, providing that section 5B does not apply in relation to a background check of an individual in connection with MNE accreditation.

This amendment is required because new section 21L of the AusCheck Regulations separately provides that AusCheck is not required to continue background checking of an individual for the purposes of a major national event if that individual's identity is required to be electronically verified and cannot be verified under section 21H (see further at clause 23).

Clause 17 – At the end of section 6

Clause 17 inserts new paragraph 6(d) into the AusCheck Regulations, providing that a person has an 'unfavourable criminal history' when the person has an 'MNE criminal record' (as defined in section 4 of the AusCheck Regulations, see clause 8).

The effect of paragraph 6(d) is to define a period in which AusCheck is obliged to afford procedural fairness to an individual prior to providing advice that may affect a person's eligibility to hold an MNE accreditation (under section 12 of the AusCheck Regulations, see further at clause 21) and to trigger external Administrative Appeals Tribunal review (under section 26) available to an individual who is provided notice by AusCheck that they have an

unfavourable criminal history or are refused an exemption from specified identity verification requirements under subsection 21K(7).

The triggering of review mechanisms is an important because a conviction for an MNE level 1 disqualifying offence means that a person cannot be issued an MNE accreditation (see new subsection 21M(2)) and a conviction and relevant sentence of imprisonment for an MNE level 2 or level 3 offence gives an organising body a discretion to not issue an MNE accreditation (see new subsection 21M(3)).

Clause 18 – After Division 3 of Part 2

Clause 18 inserts Division 3AA into Part 2 of the AusCheck Regulations (containing sections 11AA, 11AB and 11AC) to provide for the conduct of background checks, by AusCheck, of individuals for which a background check is applied for before an MNE accreditation can be issued to the individual by the organising body.

Section 11AA – Background check of applicants for, or holders of, MNE accreditation—application by organising body etc.

Section 11AA of the AusCheck Regulations prescribes that AusCheck may undertake a background check of an individual in relation to accreditation for a major national event where an organising body has made an application under section 21G (see subsection (1)) and certain requirements that need to be met in those circumstances (subsections (2) to (4)).

Applications made by an organising body under section 21G will be the primary mechanism by which AusCheck will conduct background checks of individuals in relation to accreditation for major national events. Subsection 11AA(1) would provide AusCheck with legislative authority to undertake these checks.

Subsection 11AA(2) prescribes the requirements of an application for a background check of an individual that an organising body must meet when making an application under proposed section 21G of the AusCheck Regulations (see clause 23). Those requirements are that the application must:

- be made electronically (paragraph (a))
- include all of the ‘required information’ (as defined by section 5 of the AusCheck Regulation as amended by clauses 9-13 of Schedule 1 to the AusCheck Regulations, as outlined above) (paragraph (b))
- be made in the form (if any) approved for the purposes of proposed subsection 11AA(3) (paragraph (d)), and
- meet any other requirements specified by the Secretary for the purposes of proposed subsection 11AA(4) (paragraph (e)).

In addition, in circumstances where a background check must include an electronic identity verification check (by declaration of the Minister under proposed paragraph 21F(b)), paragraph 11AA(2)(c) prescribes that the application must also include:

- the details required under proposed section 21H or a copy of an exemption (or application for an exemption) under proposed section 21K from the requirement to provide those details (sub-paragraph (i)), and
- the record (if any) required under proposed section 21H.

Subsection 11AA(3) authorises the Secretary to approve the form in which an application under proposed section 21G must be made, for the purposes of proposed paragraph 11AA(2)(d).

Subsection 11AA(4) would provide the Secretary with authority to specify, by notifiable instrument, additional requirements for an application under proposed section 21G, for the purposes of proposed paragraph 11AA(2)(e).

Section 11AB – Background checks of applicants for, or holders of, MNE accreditation—deemed application

Subsection 11AB(1) provides AusCheck with authority to conduct a background check where the Secretary, currently the Secretary of the Department of Home Affairs, forms a reasonable view that the individual has an MNE criminal record or constitutes a threat to the security of the major national event.

It is important for this separate authority to conduct a background check to be prescribed, to allow for AusCheck to conduct further background checks in circumstances where the Secretary (or delegate) becomes aware of further information concerning a relevant individual. For example, the Secretary may receive advice from a law enforcement or national security agency that informs the Secretary's reasonable view for the purpose of subsection 11AB(1).

Subsection 11AB(2) prescribes matters that must be taken into account by the Secretary when considering the matter mentioned in subsection (1). Those matters are:

- any information given to the Secretary by the individual or the organising body for the event (paragraph (a))
- any information given to the Secretary by a law enforcement, or national security, agency (however described) about the individual (paragraph (b)), and
- anything else relevant that the Secretary knows about (paragraph (c)).

The purpose of this subsection is to require the Secretary to consider all relevant information that the Department of Home Affairs holds in relation to an individual before providing

authority for AusCheck to conduct a further background check of an individual under subsection 11AB(1).

Subsection 11AB(3) would provide that, if AusCheck undertakes a background check of an individual under subsection 11AB(1):

- the organising body is taken to have applied for the background check of the individual (paragraph (a)), and
- the application for that background check is taken to be the same as the application for the original background check (paragraph (b)).

This subsection is required to be prescribed so that the powers of the Secretary to request further information (etc.) in relation to the application are enlivened (see section 11A of the AusCheck Regulations), as well as AusCheck's capacity to provide advice to an organising body about the outcome of the background check (new section 21A, see clause 22).

Section 11AC – AusCheck not to conduct or continue a background check in relation to a major national event after event has concluded

Section 11AC of the AusCheck Regulations would provide that AusCheck is not to conduct, or continue to conduct, a background check of an individual in connection with the accreditation of the individual in relation to a major national event after the event is concluded.

This section would avoid any doubt that AusCheck, or any other person or body that assists AusCheck, needs to continue to complete a background check of an individual after a major national event has finished.

Clause 19 – Paragraph 11A(2)(b)

Subsection 11A(2) of the AusCheck Regulations relevantly provides the Secretary with authority to request an individual for whom an application for a background check is made, the body or entity that applied for the background check, or the body that issued an aviation or maritime security card after the background check, to do a specified thing (including the giving of information) upon reasonable suspicion of prescribed circumstances (see paragraphs 11A(2)(d)-(g)).

Clause 19 amends subsection 11A(2) to extend the application of the Secretary's authority to an organising body for a major national event. This means that the Secretary would have capacity to request an organising body to do a thing, specified in the request, if the Secretary reasonably suspect the thing is necessary for the purposes of any of the matters listed in paragraphs 11A(2)(d)-(g). This is in addition to the capacity to request the individual who is the subject of the background request.

Clause 20 – Paragraph 11A(2)(f)

Subsection 11A(2) of the AusCheck Regulations, as outlined at clause 19 above, relevantly provides the Secretary with authority to request an individual who is the subject of a background check or an organising body to do a specified thing upon reasonable suspicion of the circumstances prescribed in paragraphs 11A(2)(d)-(g). Relevantly, paragraph 11A(2)(f) of the AusCheck Regulations prescribes that, for an application for a background check made under specified sections of the AusCheck Regulations relating to aviation and maritime transport, national health security, and subsequent background checks relating to such applications, where there are requirements specified by notifiable instrument made under subsection 11A(3).

Clause 20 amends paragraph 11A(2)(f) so that the paragraph also applies to applications made under new subsection 21C(3), being a background check where the Secretary reasonably suspects that the original background was conducted on incomplete or inaccurate information (see clause 22).

As a result of the amendments made by clauses 19 and 20, the Secretary has capacity to request an individual or an organising body for a major national event to do a specified thing to meet any of the requirements specified for the purposes of paragraph 11A(2)(f) of the AusCheck Regulations, where the Secretary reasonably suspects that doing the thing is necessary for that purpose.

Clause 21 – Paragraph 12(3)(a)

Under subsection 12(2) of the AusCheck Regulations, the Secretary is required to give an individual written notice about a preliminary assessment that a person has an unfavourable criminal history during the course of conducting a background check (which would relevantly include where an assessment that a person has an ‘MNE criminal record’, see clause 17 above).

The notice must inform the individual that the individual may, on or before the day specified in the notice, make representations to the Secretary about the preliminary assessment (paragraph 12(2)(b)). The day specified in the notice given under subsection 12(2) must meet the requirements of subsection 12(3). The requirements are relevantly specified by reference to date that the notice was given (under paragraph (3)(a)).

Clause 21 amends paragraph 12(3)(a) of the AusCheck Regulations to also include applications for background checks by an organising body for a major national event under proposed section 21G within the section 12 notification requirements. The effect of this amendment is that, if written notice is to be issued by the Secretary under subsection 12(2) to an individual for whom an application for a background check is made under proposed section 21G, the relevant individual will have a minimum of 28 days in which to make representations to the Secretary about the matters included in the notice.

Clause 22 – At the end of Division 5 of Part 2

Division 5 of Part 2 of the AusCheck Regulations prescribes when and to whom the Secretary must provide advice about the outcomes from background checks for aviation and maritime security purposes (Subdivision A) and for national health security purposes (Subdivision B).

Clause 22 inserts new Subdivision C into Division 5 of Part 2 of the AusCheck Regulations, incorporating sections 21A, 21B, 21C and 21D, prescribing when and to whom the Secretary must provide advice about the outcomes from background checks for major national events purposes.

Subdivision C—Advice about background checks for major national event purposes

Section 21A – Advice about background check of an individual—application made by organising body etc.

Section 21A of the AusCheck Regulations prescribes requirements for the Secretary to provide advice to an organising body for a major national event about the outcome of a background check for an individual who is an applicant for, or holder of, an MNE accreditation.

Subsection 21A(1) provides that section 21A applies if AusCheck undertakes a background check of an individual in connection with the accreditation of the individual in relation to a major national event.

The effect of subsection 21A(2) is to prescribe what the Secretary must advise the organising body, conditional upon what types of assessments for the background check are required to be conducted (as will be declared by the Minister under new section 21F, see clause 23 below).

Under paragraph 21A(2)(a), if a background check includes an assessment of the individual's criminal history (via the Ministerial declaration under new section 21E), the Secretary would be required to advise the organising body whether or not the individual has an unfavourable criminal history. Further detail about the outcome of a criminal history check may also be required to be provided by the Secretary under subsection 21A(3) (see below). If advice is provided that an individual has been convicted of an MNE level 1 disqualifying offence, then the organising body is required to decide to not issue that individual with an MNE accreditation (see paragraph 21M(2)(c) of the AusCheck Regulations).

Under paragraph 21A(2)(b), if the background check included a security assessment of the individual, the Secretary is required to advise the organising body whether or not the individual has an adverse security assessment or a qualified security assessment (defined in section 4 of the AusCheck Regulations by reference to the meaning of those terms in Part IV of the *Australian Security Intelligence Organisation Act 1979*). If advice is provided that an individual has an adverse security assessment or a qualified security assessment, then the

organising body is also required to decide to not issue that individual with an MNE accreditation (see paragraph 21M(2)(c) of the AusCheck Regulations).

Under paragraph 21A(2)(c), if the background check included an assessment of information relating to whether the individual is an unlawful non-citizen or holds a visa entitling the individual to work in Australia, the Secretary is required to advise the organising body of the results of the assessment.

Subsection 21A(3) prescribes additional information to be provided by the Secretary if, under paragraph 21A(2)(a), the Secretary is required to advise the organising body about whether or not an individual has an unfavourable criminal history. In these circumstances, the Secretary would also be required to:

- include in the advice whether the individual has been convicted of an MNE level 1 disqualifying offence, an MNE level 2 offence or an MNE level 3 offence (paragraph (a))
- not include in the advice details of the type of offence of which the individual has been convicted (paragraph (b)), as this is subject to the further consent requirements outlined in subsection 21A(4), and
- also inform the relevant individual of the advice provided by the Secretary to the organising body (under paragraphs 21A(2)(a), (3)(a) and (b)) and the reasons for that advice (paragraph (c)).

Subsection 21A(4) provides that the Secretary must provide to the organising body a document setting out the details of the MNE level 2 offence or MNE level 3 offence an individual has been convicted of, as well as any sentence imposed for the offence, if:

- the Secretary has advised the organising body that an individual has been convicted of an MNE level 2 offence or an MNE level 3 offence pursuant to paragraph 21A(3)(a) (paragraph (a))
- the organising body makes a written request to the Secretary to provide the organising body with the details with the offence of which the individual has been convicted (paragraph (b)), and
- the individual provides the Secretary with express consent to provide details of the offence to the organising body (paragraph (c)). This is an important measure by which the individual will be aware of, and provide consent for, the disclosure of their personal and sensitive information (within the meaning of the *Privacy Act 1988*).

The intention of subsection 21A(4) is to enable an organising body to fully consider an individual's conviction in its risk assessment processes prior to issuing an MNE accreditation to an individual under this subsection.

Section 21B – Advice about a background check that is cancelled

Section 21B of the AusCheck Regulations prescribes the circumstances in which the Secretary must advise an individual or an organising body (as the case requires) that the background check for the individual is cancelled. This section is intended to be conjunctive, meaning that advice may be provided to an individual, to an organising body, or to both the individual and the organising body.

Advice under section 21B may be required to be provided where:

- a background check of an individual in connection with the accreditation of the individual in relation to a major national event is cancelled under proposed subsection 11A(7) (paragraph (a)), and
- had AusCheck completed the check, the Secretary would have been required or authorised (whether or not depending upon the results of the check) to give the individual or the relevant organising body advice or a document (paragraph (b)).

This would occur when the Secretary makes a request under subsection 11A(2) of the AusCheck Regulations for the individual or organising body to do a specified thing, and the thing is not done by the specified date (as may be extended under subsection 11A(5)) for complying with the thing.

Section 21B is intended to be analogous to section 15A of the AusCheck Regulations, which currently makes similar provision requiring the Secretary to provide similar advice in respect of applications for background checks for aviation and maritime security purposes.

Section 21C – AusCheck may undertake new background checks

Section 21C of the AusCheck Regulations prescribes the circumstances in which AusCheck may undertake a new background check after giving advice about the outcome of a background check under proposed Subdivision C of Division 5 of Part 2 (in particular, under proposed subsection 21A(2) or section 21B).

The intended purpose of section 21C is to ensure that accurate background checks are conducted, accurate advice is given on the basis of background checks and to improve security outcomes. This purpose would be achieved by giving AusCheck the power to undertake a new background check where it becomes apparent that any of the requirements for the application for the original check were not satisfied, or the required information for the initial background check was inaccurate or incomplete.

Subsection 21C(1) provides that section 21C applies if the Secretary gives advice about a background check (referred to as the ***original check***) of an individual under new Subdivision C in connection with the accreditation of the individual in relation to a major national event (i.e. under sections 21A, 21B or 21D, paragraph (a)) and the Secretary later reasonably

suspects that any of the four circumstances prescribed in subparagraphs 21C(b)(i)-(iv) apply, namely that:

- any of the original requirements for the application under proposed section 21G for the background check (specified in proposed subsection 11AA(2), outlined at clause 18 above) were not satisfied (subparagraph (1)(b)(i))
- the Secretary did not have all the required information (as defined by section 5 of the AusCheck Regulations) for the individual when AusCheck undertook the original check (subparagraph (1)(b)(ii))
- any of the requirements specified under subsection 11A(3) for the purposes of paragraph 11A(2)(f) in relation to the application for the original check were not satisfied (subparagraph (1)(b)(iii)), or
- the advice provided by the Secretary under new Subdivision C is inaccurate or incomplete (subparagraph (1)(b)(iv)).

Subsection 21C(2) provides AusCheck with statutory authority to conduct a new background check of an individual to which subsection 21C(1) applies.

Subsection 21C(3) provides that, if AusCheck undertakes a new background check under subsection 21C(2) for the purposes of the AusCheck scheme:

- the organising body for the major national event is taken to have applied for the new background check (paragraph (a)), and
- the application for the new background check is taken to be the same as the application for the original check, including any information given to the Secretary in response to a request to do a specified thing under subsection 11A(2) (i.e. as affected by subsection 11A(6)) (paragraph (b)).

Subsection 21C(3) is included so that:

- the Secretary can exercise his or her powers under section 11A of the AusCheck Regulations (noting that this section applies if an application is made for a background check for an individual under subsection 11A(1)), and
- further advice can be given by the Secretary to an organising body about the outcome, or cancellation, of the new background check under proposed sections 21A and 21B respectively.

It is noted at subsection 21C(3) that paragraph 21C(3)(b) may be relevant to whether the Secretary may make a request under subsection 11A(2) of the AusCheck Regulations for an individual or organising body to do a specified thing in relation to the application.

Section 21C is intended to be analogous to sections 16A and 20B of the AusCheck Regulations, relating to aviation and maritime security background checks and national health security background checks respectively.

Section 21D – Secretary must give further advice if initial advice is inaccurate or incomplete

Section 21D prescribes that, if the Secretary becomes aware that advice about a background check of an individual that has been given under Subdivision C is inaccurate or incomplete, the Secretary must give further advice in accordance with Subdivision C that is accurate and complete. Such initial advice may have been given when the criminal history of an individual did not disclose all their convictions for MNE-security-related offences, meaning that subsequent advice about the criminal history (in particular whether an individual has been convicted of an MNE level 1 disqualifying offence) needs to be given by the Secretary to the organising body.

This section is analogous to sections 17 and 21 of the AusCheck Regulations, relating to aviation and maritime security background checks and national health security background checks respectively.

Clause 23 – After Division 5 of Part 2

Clause 23 inserts new Division 5A into Part 2 of the AusCheck Regulations, which contains Subdivisions A, B and C relating to major national events.

Division 5A—Matters relating to major national events

Subdivision A—Organising bodies and types of assessments and identity checks

Subdivision A would provide the Minister with authority to declare an organising body (proposed section 21E) and what types of assessments for a background check are required, including the types of identity verification checks, (proposed section 21F) for a major national event.

Section 21E – Organising bodies for major national events

Section 21E gives the Minister, currently the Minister for Home Affairs, authority to declare an organising body for a major national event by notifiable instrument. This declaration will ordinarily be made at the same time as the Minister makes:

- a declaration under section 5A of the AusCheck Act that a specified event is a major national event, and
- a declaration under section 21F of the AusCheck Regulations about the types of assessment and identity verification checks that are required for background checks for the purposes of that major national event, and the types of identity verification

checks that may be conducted in the course of a background check (as outlined in further detail below).

Once declared to be an organising body, that body will be authorised to make applications to AusCheck for background checks to be conducted under proposed section 21G as well as have other powers and obligations under the AusCheck Regulations.

Whilst there is no specific power in the AusCheck Act permitting subdelegation in the AusCheck Regulations, it is intended that the Minister's power to make a declaration under section 21E is a permissible subdelegation of the regulation making powers in the AusCheck Act. This is because the power to declare an organising body for a major national event concerns the application of the law to a particular person in a particular instance, and on the basis of the Minister having the prior agreement from that body. Such a declaration will also provide clarity and certainty as to the interpretation of the AusCheck scheme relating to major national events.

As a section 21E declaration by the Minister is a notifiable instrument, it will be made publically available on the Federal Register of Legislation (<https://www.legislation.gov.au>) free of charge.

Section 21F – Minister may determine types of assessments and identity verification checks for background checks [note heading title will be updated in final version]

Paragraph 21F(a) gives the Minister authority to declare by notifiable instrument that background checks of an individual in connection with MNE accreditation must include an assessment of one or more of the matters mentioned in paragraphs 5(a), (b), (c) and (d) of the AusCheck Act, as specified in the instrument.

This would provide the Minister with an ability to declare whether a background check includes an assessment of:

- the individual's criminal history (paragraph 5(a) of the AusCheck Act), which includes whether or not the individual has an MNE criminal record and in particular whether the individual has a conviction for an MNE level 1 disqualifying offence
- matters relevant to a security assessment (paragraph 5(b) of the AusCheck Act)
- the individual's citizenship status, residency status or the individual's entitlement to work in Australia (paragraph 5(c) of the AusCheck Act), and
- the identity of the individual (paragraph 5(d) of the AusCheck Act).

Paragraph 21F(b) would, in addition, provide that where the declaration under paragraph 21F(a) includes an assessment of the identity of the individual (as mentioned in paragraph 5(d) of the AusCheck Act) then the Minister can, also by notifiable instrument, declare how the identity assessment (defined to be the ***identity verification check***) is to be conducted.

Under paragraph 21F(b), the declaration would state that the identity verification check is to be conducted electronically (meaning that proposed section 21H applies), in person (meaning that proposed section 21J applies), or both electronically and in person (meaning that both proposed sections 21H and 21J apply).

Whilst there is no specific power in the AusCheck Act permitting subdelegation in the AusCheck Regulations, it is intended that the Minister's power to make a declaration under section 21F is a permissible subdelegation of the regulation making powers in the AusCheck Act. This is because the power to declare the particular elements of a background check that are required for a particular major national event concerns the application of the law in a particular instance, to a discrete number of persons. Such a declaration will also provide clarity and certainty as to the interpretation of the AusCheck scheme relating to major national events.

Each person subject to the requirements triggered by the declaration would also have, at minimum, to provide consent for identity verification checks to occur (if 16 years or over, see new paragraph 21H(b)). In the case of persons under 16 years, the parent or guardian would need to provide consent for the background check to occur (see new paragraph 5(1)(n)).

As a section 21F declaration by the Minister is a notifiable instrument, it will be made publically available on the Federal Register of Legislation (<https://www.legislation.gov.au>) free of charge.

Subdivision B—Applying for background checks and requirements for identity verification checks

Subdivision B provides for the provision of an application (section 21G) and other information (sections 21H and 21J) by an organising body or an individual to AusCheck so that AusCheck can conduct background checks. This subdivision also deals with the situation where required information cannot be provided (sections 21K and 21L).

Section 21G – Arranging for a background check

Section 21G provides that an organising body for a major national event may apply to AusCheck for a background check of an individual in connection with the accreditation of the individual in relation to the major national event. An application under section 21G will need to meet the requirements of proposed subsection 11AA(2) of the AusCheck Regulations (see further at clause 18 above).

Section 21H – Electronic identity verification checks

Section 21H prescribes that, if the Minister makes a declaration under new paragraph 21F(b) that an identity verification check of individuals is to be conducted electronically, then the following documents must be provided to AusCheck:

- details of a Category A identification document or a Category B identification document which AusCheck can use to electronically verify the individual's identity (paragraph (a)), and
- if the individual is at least 16 years old at the time of the check—a record of the individual having given express consent to their identity document being verified (paragraph (b)).

If an individual is under the age of 16, a record of the parent or guardian having given express consent to the identity document being verified has already been provided as part of the 'required information' to apply for a background check and in particular an identity verification check under section 21G (see new paragraph 5(1)(n), further detail at clause 13 above). No further consent would need to be specifically obtained for an individual under the age of 16 for the purpose of section 21H.

Given that Category A identification documents and Category B identification documents may contain personal information that is 'sensitive information' for the purposes of the Privacy Act (see subsection 6(1)) of that Act), obtaining consent of an individual to use that information to verify their identity is a requirement of the service that AusCheck uses to electronically verify identity documents and an important safeguard against the improper collection and use of that information

Section 21J – Identity verification checks—in person identity verification

Section 21J prescribes the requirements for conducting an in person identity verification check, which is required to be conducted if the Minister's declaration under new paragraph 21F(b) states that such a verification check needs to be completed (under subsection (1)).

Subsection 21J(2) provides that an individual who is 18 years or older must attend the identity verification check in person and give to the verifying person (being AusCheck, the organising body, or a person authorised by AusCheck or the organising body to conduct an in person identity verification, as defined in section 4) the information prescribed in paragraphs (2)(a) and (2)(b).

Under paragraph 21J(2)(a), the information required to be provided to the verifying person at an in person identity verification check includes a Category A identification document (subparagraph (i)), a Category B identification document (subparagraph (ii)), a Category C identification document (subparagraph (iii)) and, if evidence of the individual's current residential address is not set out in a document already given, a Category D identification document that provides that address (subparagraph (iv)).

The requirements that imposed under paragraph 21J(2)(a) adopt a standard of proof of identity consistent with the National Identity Proofing Guidelines. Only original documents can be provided under this subsection, there being no provision allowing for copies or certified copies to be provided.

Further, under paragraph 21J(2)(b), if an individual had completed an electronic identity verification check under new section 21H before attending the in person identity verification check, the individual must provide the identity documents that were electronically verified.

Any documents provided for the purposes of paragraph 21J(2)(b), being a Category A identification document and a Category B identification document (as outlined in new subsection 21H(2)), can also be the documents provided under subparagraphs 21J(2)(a)(i) and (ii). Separate documents would not need to be provided.

Section 21K – Exemptions

Section 21K provides for exemptions for individuals who cannot:

- provide details of a Category A identification document or a Category B identification document that are electronically verifiable by AusCheck (for the purpose of proposed subsection 21H(2)) (paragraph (1)(a))
- provide a Category A identification document at an in person identity verification check under proposed section 21J (subparagraph (1)(b)(i)), or
- attend an in person identity verification check (subparagraph (1)(b)(ii)).

It is expected that these exemptions will be required in circumstances where:

- an individual's Category A identification document or a Category B identification document has not been digitised by the document issuer and cannot be electronically verified
- an individual does not hold a Category A identification document and cannot feasibly obtain it in time for a background check to be completed – for example a long term permanent resident, or
- an individual physically cannot attend the location where an in person identity verification check is being held – for example if an individual lives in a remote area or has a disability.

If an individual requires an exemption, subsection 21K(2) enables the individual or organising body to apply to the Secretary, currently the Secretary of the Department of Home Affairs, for the exemption. In making such an application the individual must meet the requirements prescribed in subsection 21K(3), namely that the application :

- be made electronically (paragraph (a))
- state what exemption is required (as outlined in subsection 21K(1)) (paragraph (b))
- set out the reasons why the exemption is required (paragraph (c)), and
- any other information that may assist the Secretary in making a decision to grant an exemption (paragraph (e)).

In addition, if the exemption is required to exempt a person from attending an in person identity verification check, the application for the exemption must include the information that would be prescribed in paragraph 21K(3)(d), namely:

- a photograph of the individual showing the individual's full face, head and shoulders (taken no more than one month before the application for exemption is made) (subparagraph (i)), and
- certified copies of the documents required under proposed subsections 21J(2) or (3) that would otherwise be required to be presented in person at the identity check (subparagraph (ii)).

Subsection 21K(4) would provide that, for the purposes of subparagraph 21K(3)(d)(ii), a copy of an identification document must be certified, in writing, by a person prescribed by section 7 of the *Statutory Declarations Regulations 2018*. Such persons include a Commonwealth public servant with 5 or more years of continuous service, legal practitioner, justice of the peace and a police officer.

Subsection 21K(5) specifies matters that the Secretary must consider in making a decision to grant an exemption to an individual under section 21K. Those matters include the reasons set out in the application under paragraph 21K(3)(c) (paragraph (a)), and any other information provided by the individual under paragraph 21K(3)(e) (paragraph (b)).

If the Secretary requires further information to consider his or her decision, he or she can request further information be given within 30 days of that request under subsection 21K(6).

Subsection 21K(7) prescribes the time limit in which a decision by the Secretary to grant or to refuse to grant an exemption under section 21K must be made. Under this subsection, the Secretary is required to provide written notice of the matters specified in paragraphs (a) to (c) within 30 days of receiving the application under subsection 21K(2), unless the Secretary had made a request under subsection 21K(6) for further information. If such a request is made,

written notice of the decision needs to be provided by the Secretary within 30 days of receiving the further information.

A decision of the Secretary to refuse to grant an exemption under section 21K is subject to review by the Administrative Appeals Tribunal (see section 26 of the AusCheck Regulations, as amended by clause 24 of Schedule 1 to the Amendment Regulations outlined below).

Section 21K is analogous to section 5A of the AusCheck Regulations, which currently makes similar provision allowing the Secretary to provide an exemption in respect of providing certain information for identity checks to be conducted in relation applications for background checks for aviation and maritime security, as well as national health security, purposes.

Section 21L – AusCheck not required to continue background check if identity not verified

Section 21L provides that AusCheck is not required to continue a background check for an individual for the purposes of a major national event in circumstances where:

- the Minister’s declaration under proposed paragraph 21F(b) specifies that an identity verification check must be conducted in relation to an individual, and
- the individual’s identity cannot be verified in accordance with proposed section 21H (or an exemption not granted under new section 21K).

This would include circumstances where an individual has had an application for an exemption under section 21K refused, or where the individual cannot meet the any requirements of such an exemption, or where an individual has not made an application for an exemption.

Subdivision C—Decisions in relation to MNE accreditation

Subdivision C provides for the making of decisions about an individual in relation to an MNE accreditation, including when an organising body must decide not to issue an accreditation, (section 21M), as well as obligations for an organising body to notify the Secretary about decisions to issue an MNE accreditation (section 21N) or to cancel or suspend an MNE accreditation (section 21P).

Section 21M – Decisions in relation to MNE accreditation

Subsection 21M(1) provides that section 21M of the AusCheck Regulations applies if AusCheck undertakes a background check for an individual in relation to a major national event (whether as a result of an application by an organising body under proposed section 21G, or pursuant to a decision of the Secretary under proposed sections 11AB or 21C) (paragraph (a)) and, under proposed sections 21A or 21D, the Secretary advises the organising body of the result of the background check (paragraph (b)).

Subsection 21M(2) prescribes the circumstances in which an organising body must decide not to issue an MNE accreditation to an individual or, if an MNE accreditation has already been issued, cancel the individual's accreditation. These circumstances are where AusCheck advises the organising body that an individual:

- has been convicted of an MNE level 1 disqualifying offence (where a criminal history check is required in a Ministerial declaration made under proposed paragraph 21F(a)) (paragraph (a)), or
- has an adverse security assessment or a qualified security assessment (where a security assessment is required in a Ministerial declaration made under proposed paragraph 21F(a)) (paragraph (b)).

Subsection 21M(3) provides that, except as limited by the operation of subsection 21M(2), nothing in section 21M limits the discretion of an organising body to issue an MNE accreditation to an individual for a major national event.

Subsection 21M(4) would prescribe an offence that would apply to organising bodies, which applies when:

- the Secretary advises the organising body that an individual either has a conviction for an MNE level 1 disqualifying offence, or an adverse security assessment or a qualified security assessment (paragraph (a)), and
- the organising body either issues an MNE accreditation to the individual after receiving the advice (subparagraph (b)(i)) or, if the organising body has already issued the accreditation, fails to cancel the accreditation within 48 hours (subparagraph (b)(ii)).

The imposition of penalties for breach of offence provisions prescribed in the AusCheck Regulations is expressly authorised by paragraph 18(2)(c) of the AusCheck Act. The maximum penalty that could be imposed for a contravention of the offences in subsections 21M(4) is 5 penalty units, which is within the 50 penalty unit threshold for offences prescribed in regulations, as outlined at paragraph 3.3 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide to Framing Commonwealth Offences). If an organising body is a corporation, the corporate multiplier in subsection 4B(3) of the Crimes Act would apply, meaning that the maximum penalty that could be imposed would be increased to 25 penalty units.

The penalty for a single offence is lower than penalties for certain comparable offences relating to aviation and maritime security functions (being 10 penalty units, see regulations 6.29A and 6.08CA of the ATSR and MTOFSR respectively). Given, however, that organising bodies for a major national event seek AusCheck's background checking services on a voluntary basis and it is in the interests of national security to encourage participation in the AusCheck scheme, this lower penalty is being imposed.

The intention of imposing the offence in subsection 21M(4) is to ensure that an organising generally body complies with the obligation. The offence applies for each instance that the organising body either fails to refuse to issue an MNE accreditation, or fails to cancel an MNE accreditation that has already been issued within 48 hours. This means that, despite the low prescribed penalty for an individual offence and in combination with the corporate multiplier, the maximum payable offence may be much greater than 5 penalty units.

Section 21N – Organising body must advise Secretary of certain decisions

Section 21N prescribes an offence that applies to an organising body when:

- the Secretary advises the organising body about a background check of the individual under Section 21A (paragraph (a))
- the organising body decides to issue, or not to issue, an MNE accreditation to an individual in relation to a major national event (paragraph (b)), and
- the organising body does not inform the Secretary of the decision within seven days (paragraph (c)).

The imposition of penalties for breach of offence provisions prescribed in the AusCheck Regulations is expressly authorised by paragraph 18(2)(c) of the AusCheck Act. The maximum penalty that could be imposed for a contravention of the section 21N offence is 5 penalty units which is within the 50 penalty unit threshold for offences prescribed in regulations, as outlined at paragraph 3.3 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide to Framing Commonwealth Offences). If an organising body is a corporation, the corporate multiplier in subsection 4B(3) of the Crimes Act would apply, meaning that the maximum penalty that could be imposed would be increased to 25 penalty units.

The penalty for a single offence is lower than penalties for certain comparable offences relating to aviation and maritime security functions (being 10 penalty units, see regulations 6.29A and 6.08CA of the ATSR and MTOFSR respectively). Given, however, that organising bodies for a major national event seek AusCheck's background checking services on a voluntary basis and it is in the interests of national security to encourage participation in the AusCheck scheme, this lower penalty is being imposed.

The intention of imposing the offence in subsection 21N(4) is to ensure that an organising generally body complies with the obligation. The offence applies for each instance that the organising body fails to notify the Secretary of a decision to issue, or not to issue, an MNE accreditation within 7 days of making such a decision. This means that, despite the low prescribed penalty for an individual offence and in combination with the corporate multiplier, the maximum payable offence may be much greater than 5 penalty units.

Section 21P – Organising body must inform Secretary of cancellation or suspension of MNE accreditation

Section 21P prescribes an offence that applies to an organising body when:

- the Secretary advises the organising body about the outcome of a background check of an individual under proposed sections 21A or 21D (paragraph (a))
- after receiving advice under proposed sections 21A or 21D, the organising body issues an MNE accreditation to the individual for a particular period (paragraph (b))
- the organising body cancels or suspends the MNE accreditation person before the end of the period (paragraph (c)), and
- the organising body does not inform the Secretary of the cancellation or suspension within 48 hours (paragraph (d)).

Advice from the organising body in the abovementioned circumstances is required to be provided to the Secretary so that AusCheck can maintain an up to date database which is national used for law enforcement and national security purposes, and assists the Secretary to determine whether a further check is required under section 11AB.

The imposition of penalties for breach of offence provisions prescribed in the AusCheck Regulations is expressly authorised by paragraph 18(2)(c) of the AusCheck Act. The maximum penalty that could be imposed for a contravention of the section 21P offence would be 5 penalty units, which is within the 50 penalty unit threshold for offences prescribed in regulations, as outlined at paragraph 3.3 of the Guide to Framing Commonwealth Offences. If an organising body was a corporation, the corporate multiplier in subsection 4B(3) of the Crimes Act would apply, meaning that the maximum penalty that could be imposed would be increased to 25 penalty units.

The penalty for a single offence is lower than penalties for certain comparable offences relating to aviation and maritime security functions (being 10 penalty units, see regulations 6.29A and 6.08CA of the ATSR and MTOFSR respectively). Given, however, that organising bodies for a major national event seek AusCheck's background checking services on a voluntary basis and it is in the interests of national security to encourage participation in the AusCheck scheme, this lower penalty is being imposed.

The intention of imposing the offence in section 21P is to ensure that an organising generally body complies with the obligation. The offence applies for each instance that the organising body fails to notify the Secretary of a decision to cancel or suspend an MNE accreditation, before the end of a major national event, within 48 hours. This means that, despite the low prescribed penalty for an individual offence and in combination with the corporate multiplier, the maximum payable offence may be much greater than 5 penalty units.

Clause 24 – At the end of paragraph 26(a)

Section 26 of the AusCheck Regulations provides that individuals can apply to the Administrative Appeals Tribunal for review of decisions of the Secretary under provisions of specified in section 26.

Prior to the commencement of the Amendment Regulations, paragraph 26(a) provides that a decision of the Secretary to refuse to grant to an exemption in relation to an individual under subsection 5A(6) is reviewable by the Administrative Appeals Tribunal. Further, as outlined at clause 23 above, section 5A of the AusCheck Regulations is analogous to new section 21K.

Clause 24 would amend paragraph 26(a) of the AusCheck Regulations, therefore, to provide that Administrative Appeals Tribunal Review also applies to decisions of the Secretary to refuse to grant an exemption under proposed paragraph 21K(7).

Clause 25 – Paragraphs 30(3)(a) and (b)

Clause 25 amends paragraphs 30(3)(a) and (b) of the AusCheck Regulations to replace ‘or NHS entity’ with ‘, NHS entity or organising body’. This amendment will permit fees to be charged by AusCheck to an organising body for the conduct of background checks under the AusCheck scheme.

Clause 26 – At the end of this instrument

Clause 26 inserts new Schedule 1 into the AusCheck Regulations, which would describe the offences that are defined to be an ‘MNE level 1 disqualifying offence’, an ‘MNE level 2 offence’ and an ‘MNE level 3 offence’ in clauses 1, 2 and 3 respectively.

Clause 1 of proposed Schedule 1 to the AusCheck Regulations prescribes the offences that are an ‘MNE level 1 disqualifying offence’ for the purpose of the definition of that term in subsection 4 of the AusCheck Regulations. The offences prescribed by the table in clause 1 include offences involving or relating to:

- a weapon of mass destruction (item 1.1) or terrorism (item 1.2)
- treason, sedition, espionage or the disclosure of national secrets (item 1.3)
- engagement in hostile activities in a foreign country or involvement with foreign armed forces (item 1.4)

- the hijacking or destruction of an aircraft, vessel or offshore facility (item 1.5)
- the endangerment of an aircraft, airport, vessel, port or offshore facility that is used in commerce or owned by the Commonwealth or a State or Territory (item 1.6)
- an act of piracy at sea (item 1.7) or a crime against humanity (item 1.9), and
- slavery or smuggling or trafficking of people (item 1.8).

The intention of using ‘national secrets’ as an undefined term in item 1.3 provides for flexibility in the interpretation of this item to include, but not be limited to, the offences concerning the disclosure of information that would cause harm to Australia’s interests under Part 5.6 of the Criminal Code.

As outlined above, if a person is convicted of any of the offences in clause 1 then they would not be eligible to be issued or to maintain an MNE accreditation (see paragraph 21M(2)(c) of the AusCheck Regulations, as amended by clause 23 of Schedule 1 to the proposed Regulations). Information about an ‘MNE level 1 disqualifying offence’ would also be subject to an exclusion from the spent convictions scheme established by the Crimes Act (see further detail outlined in clauses 27 and 28 below).

Clause 2 of proposed Schedule 1 to the AusCheck Regulations prescribes the offences that are an ‘MNE level 2 offence’ for the purpose of the definition of that term. The offences prescribed by clause 2 include offences involving or relating to:

- murder, manslaughter or a threat to kill (item 2.1)
- assault, including indecent assault, sexual assault and sexual abuse (item 2.2)
- firearms, ammunition, weapons including the use of an item as a weapon, explosives or explosive devices or microbial or other biological agents or toxins (item 2.3)
- destruction of, or damage to, property, arson and affray, riot or public violence (items 2.4 and 2.5)
- false imprisonment, deprivation of liberty, kidnapping or taking a hostage (item 2.6)
- participation in, or association with, serious and organised crime or gangs (item 2.7), and
- the exploitation of a child (item 2.8) and robbery (item 2.9).

Clause 3 of Schedule 1 to the AusCheck Regulations prescribes the offences that are an ‘MNE level 3 offence’ for the purpose of the definition of that term in subsection 4(1) of the AusCheck Regulations. The offences prescribed by clause 3 include offences involving or relating to:

- fraud, forgery, false identity or false identity documents (item 3.1)
- perjury, perverting the course of justice and intimidation (item 3.2)
- the production, possession, supply, importation or export of an illegal drug or a controlled substance (item 3.3)
- racial hatred or vilification (item 3.4), bribery, corruption, extortion, racketeering or blackmail (item 3.6) and theft or burglary (item 3.9)
- money laundering, currency violations or dealing with proceeds of crime (item 3.5)
- obstructing, hindering, resisting or impersonating a government official or a law-enforcement officer (item 3.7)
- use, access, modification or destruction of data or electronic communications (item 3.8) and the intentional endangerment of persons (item 3.10), and
- illegal importation or export of goods, fauna or flora or interference with goods under customs control (item 3.11).

Clause 4 of proposed Schedule 1 to the AusCheck Regulations clarifies that a reference to an offence in clauses 1, 2 or 3 includes a reference to an offence against a law of the Commonwealth, a State or a Territory.

Part 2—Spent convictions

Crimes Regulations 2019

Part 2 of Schedule 1 to the proposed Regulations makes amendments to the Crimes Regulations. Relevantly, under section 85ZV of the Crimes Act, it is lawful for a person not to disclose the fact that he or she was charged with, or convicted of, an offence where the conviction for that offence is spent. As a result of this, under section 85ZW of the Crimes Act, anyone else who knows that section 85ZV applies to the person in relation to the offence shall not:

- disclose the fact that the person was charged with, or convicted of, the offence to any other person, or to a Commonwealth authority (subparagraph (b)(i)); or
- take account of the fact that the person was charged with, or convicted of, the offence (subparagraph (b)(ii)).

A person is excluded from the operation of section 85ZW of the Crimes Act where they are prescribed for the purpose of paragraph 85ZZH(k) of the Crimes Act. Section 21 of, and clause 1 of Schedule 2 to, the Crimes Regulations prescribe exclusions from the spent convictions scheme for this purpose.

If a person or body is mentioned in an item in column 1 of the table in clause 1 of Schedule 2 to the Crimes Regulations, it is excluded from the spent convictions scheme (including the application of section 85ZW of the Act) for the purpose mentioned in column 2 of the table in relation to the offence, or offences, mentioned in column 3.

Clause 27 – Clause 1 of Schedule 2 (at the end of the cell at table item 20, column 3)

The Secretary administering the AusCheck Act is currently prescribed at item 20 of the table in clause 1 of Schedule 2 to the Crimes Regulations, meaning that the Secretary is excluded from the spent convictions scheme for the purposes of the AusCheck scheme (as prescribed in the AusCheck Regulations) in relation to the various offences prescribed in column 3 (which concern aviation, maritime and national health security-related offences).

Clause 27 amends this exclusion to extend its application to offences which are defined as an ‘MNE level 1 disqualifying offence’ as listed in clause 1 of Schedule 1 to the AusCheck Regulations. As a result, the Secretary can disclose the fact that an individual who is an applicant for, or holder of, an MNE accreditation has been convicted of an ‘MNE level 1 disqualifying offence’ to an organising body. There is no intention for the Secretary to provide further information about the conviction (i.e. the type of offence, details of the offending conduct, the sentence imposed etc.) under this exclusion.

Without having the authority to make such a disclosure, the Secretary would not be permitted to provide an organising body with advice (under proposed Subdivision C of Division 5 of Part 2 of the AusCheck Regulations) that an individual had been convicted of an MNE level 1 disqualifying offence where the conviction for that offence was spent for the purposes of the Crimes Act.

Given that the offences which would be defined as an MNE level 1 disqualifying offence in proposed Schedule 1 to the AusCheck Regulations are of a serious and egregious nature, and that certain individuals at major national events are in security sensitive roles (including, for example, security screening staff), it is important for the Secretary to have the capacity to review relevant conviction information and to disclose that information to an organising body. Such disclosures are required to enhance and protect the integrity of background checks to be conducted for major national events under the AusCheck scheme.

Clause 28 – Clause 1 of Schedule 2 (after table item 23)

Clause 28 inserts new item 23A into the table in Schedule 2 of the Crimes Regulations. Item 23A provides that an organising body for a major national event is excluded from the spent convictions scheme for the purpose of assessing whether or not to issue an MNE

accreditation to an individual under Part 2 of the AusCheck Regulations, where the information relates to a conviction of an individual for an MNE level 1 disqualifying offence.

This would mean that an organising body would be captured by clause 23A of the Crimes Regulations, and be excluded from the spent convictions scheme (in particular the prohibition in subparagraph 85ZW(b)(ii) of the Crimes Act). As a result of being captured within the exclusion, the organising body can take account of an assessment made on the basis of any conviction for an MNE level 1 disqualifying offence in deciding not to issue an individual with an MNE accreditation as required under paragraph 21M(2)(c) of the AusCheck Regulations.

The insertion of item 23A is consistent with the exclusions from spent convictions prescribed for issuing bodies issuing identification cards for aviation and maritime security processes (items 13 and 19 of Schedule 1 to the Crimes Regulations) and bodies authorising persons to have access to security-sensitive biological agents (item 23).

Statement of Compatibility with Human Rights

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

AusCheck Legislation Amendment (Major National Events) Regulations 2019

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *AusCheck Act 2007* (the Act) was amended in 2018 to enable AusCheck to conduct and coordinate background checks on individuals seeking accreditation in relation to a major national event (MNE), through a declaration by the Minister and enactment of associated regulations. The Minister will declare an event an MNE if satisfied that it is in the national interest that the Commonwealth be involved in the conduct and coordination of background checks in connection with the accreditation of individuals in relation to the event. The associated regulations will provide a framework for MNE background checking and specify the criteria against which an MNE background check will be conducted. This Disallowable Legislative Instrument amends the *AusCheck Regulations 2017* (AusCheck Regulations) and the *Crimes Regulations 2019* (Crimes Regulations) to:

- specify the information required to be included in an application for an MNE background check and other MNE application requirements;
- establish the components of an MNE background check, namely an identity verification check, an Australian criminal history check, a security assessment check and a migration status check;
- authorise the Minister to, by notifiable instrument, enliven specific components of a background check for different events;
- define for the purposes of an MNE background check: Category A identification document, Category B identification document, Category C identification document, Category D identification document, conviction, imprisonment, MNE, MNE accreditation, MNE criminal record, MNE level 1 disqualifying offence, MNE level 2 offence, MNE level 3 offence, MNE-security-relevant offence, organising body, verifying person and unfavourable criminal history;
- authorise the Secretary to undertake an MNE background check of an individual in connection with the accreditation of the individual in relation to an MNE;
- specify the requirements for verifying identity electronically or in-person for an MNE background check;

- authorise the Secretary to grant an exemption from specified requirements of an MNE electronic or in-person identity verification check if the individual is unable to meet those requirements;
- require the Secretary to, if the preliminary assessment of an individual's Australian criminal history by the Secretary for an MNE background check is that the individual has an unfavourable criminal history, give the individual written notice of, and reasons for, the preliminary assessment and enable the individual to make representations to the Secretary about the preliminary assessment;
- require the Secretary to advise the organising body of the outcome of a background check of an individual in connection with MNE accreditation;
- authorise the Secretary to request an individual or applicant for an MNE background check do a specified thing (including giving specified information) to ensure such information is provided and application requirements are met;
- authorise the Secretary to initiate a new MNE background check if there is a reasonable suspicion that the information provided for an initial background check was incomplete or the application requirements were not met;
- authorise the Secretary to cancel an MNE background check where a request to do a specified thing is not complied with;
- require the Secretary to give further advice about an MNE background check if the Secretary becomes aware that the initial advice is inaccurate or incomplete;
- require an organising body not accredit, or cancel the accreditation of, an individual in relation to a major national event if the background check involved an Australian criminal history check and the individual has been convicted of an MNE level 1 disqualifying offence or if the background check involved a security assessment of the individual and that security assessment is an adverse or qualified security assessment;
- create an offence if an organising body does not, within 7 days after making a decision in relation to an application by an individual for accreditation for which a background check has been undertaken in relation to an MNE, inform the Secretary of the decision;
- create an offence if an organising body, after receiving advice from the Secretary to not issue MNE accreditation to an individual or to cancel an individual's MNE accreditation, issues MNE accreditation to an individual or fails to cancel an individual's MNE accreditation;
- create an offence if an organising body fails to inform the Secretary of the cancellation or suspension of an MNE accreditation that has been issued following an MNE background check before the end of the period the accreditation was issued for;
- authorise applications to be made to the Administrative Appeals Tribunal for review of decisions of the Secretary to refuse to grant an exemption in relation to identity verification requirements or to advise that an individual has an unfavourable criminal history;
- authorise the Secretary to charge a fee for an application for an MNE background check;

- specify the kinds of offences that are meant by MNE level 1 disqualifying offence, MNE level 2 offence, MNE level 3 offence; and
- prescribe the category of MNE level 1 disqualifying offences as excluded from the Commonwealth spent convictions scheme for the purposes of an AusCheck MNE background check.

These amendments will enable AusCheck to further contribute to the national security and safety of Australia by addressing specific risks, such as terrorism, arising out of certain large scale events. Background checking may be conducted on individuals who need accreditation to access secure areas, systems, processes or people (including large crowds and VIPs). In addition to increased police and private security resources and enhanced physical security measures, the background checking of accredited people will contribute to the treatment of terrorism risks.

The MNE background check components largely mirror those of the existing AusCheck background checking framework. Different components of an MNE background check may be enlivened by the Secretary for different events depending on the security profile of that event. The possible components to be enlivened for an MNE background check are an identity verification check (involving electronic and/or in-person identity verification), an Australian criminal history check, a security assessment check and an optional migration status check.

The retention and subsequent use and disclosure of AusCheck scheme personal information authorised under the AusCheck Act aims to assist law enforcement and national security agencies to respond to security incidents and perform their functions.

The AusCheck Regulations were made in July 2017 and their compatibility with human rights were considered by the Parliamentary Joint Committee on Human Rights within report 11 of 2017.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- Right to equality and non-discrimination – Article 2(1) and Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR), Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- Right to an effective remedy – Article 2(3) of the ICCPR
- Right to privacy– Article 17(1) of the ICCPR
- Right to work– Article 6(1) of the ICESCR

Rights to equality and non- discrimination

Article 2(1) of the ICCPR and Article 2(2) of the ICESCR provide that the rights in both covenants are to be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Similarly, Article 26 of the ICCPR provides that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The differential treatment by AusCheck of individuals on the basis of criminal history engages the rights of equality and non- discrimination. This instrument inserts Subdivision C into Division 5 of the AusCheck Regulations to allow AusCheck to give advice about MNE background checks of individuals including an assessment of an individual's criminal history information. AusCheck will assess the individual's criminal history information against MNE-security-relevant offences.

The objective of this assessment is to identify individuals who have been convicted of MNE security-relevant offences, which indicate that the individual is a threat or risk to national security, or has the propensity to commit a serious offence which increases the likelihood or risk that the individual will cause harm at the MNE. This assessment informs the eligibility of an individual to be accredited to work or volunteer at MNEs.

An AusCheck coordinated criminal history check would ensure consistency in criminal history assessments (including the application of spent convictions schemes) across jurisdictions and create efficiencies through the use of trusted and automatic data channels.

The new Subdivision C of Division 5 of the AusCheck Regulations is a reasonable, necessary and proportionate limitation on the rights to equality and non-discrimination as it does not capture all individuals with a criminal history. Distinctions made on the basis of criminal history are only necessary for individuals who have MNE-security- relevant offences that appear in their criminal history. This is the least restrictive means, in the context of background checks, of identifying individuals who may threaten national security. The criterion for MNE-security- relevant offences is explicitly stated in legislation and therefore is lawful and non-arbitrary.

Right to an effective remedy

Article 2(3) of the ICCPR provides that an individual should have an effective remedy for any violation of rights or freedoms recognised in the ICCPR. The article also provides that the remedy shall be determined and enforced by a competent judicial, administrative or legislative authority.

Section 26 of the AusCheck Regulations provides a right of review by the Administrative Appeals Tribunal (AAT) for an applicant who is refused an exemption in relation to identity verification requirements or receives an unfavourable criminal history decision. The AAT is a

competent administrative authority which has the power to review a decision made by AusCheck, and to set aside, remit or affirm that decision.

This instrument amends the existing definition of ‘unfavourable criminal history’ in section 6 of the AusCheck Regulations to include an ‘MNE criminal record’. ‘MNE criminal record’ is defined in this instrument to be where there is a conviction of an MNE level 1 disqualifying offence, or conviction and imprisonment for an MNE level 2 or 3 offence.

The effect of this instrument is that an applicant who is refused an exemption in relation to identity verification requirements or receives an unfavourable criminal history decision can apply to the AAT for a review of that decision.

To the extent that an individual’s rights under the ICCPR may be violated pursuant to the scheme being put in place by this instrument, section 26 of the AusCheck Regulations promotes the right to an effective remedy.

Right to privacy

Article 17(1) of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Parts 1, 2 and 3 of the instrument engage the right to privacy by providing for the collection, use, storage and disclosure of personal information including criminal history information.

The limitation on the right to privacy is legitimately authorised by section 13 of the AusCheck Act . The purpose of the authorisation in relation to the MNE framework within the AusCheck scheme is to:

- determine whether a background check is required or permitted
- conduct or advise on the outcome of a background check
- update information on an individual who has undertaken a background check, and
- verify the identity of an individual.

Personal information collected for a MNE background check may be used or disclosed under section 14 of the AusCheck Act for the following purposes:

- carrying out a subsequent background check in relation to the individual under the AusCheck scheme
- responding to an incident that poses a threat to national security
- performance of functions relating to law enforcement or national security.

The instrument also engages the right to privacy through the prescription of AusCheck as excluded from restrictions under Division 3 of Part VIIC of the *Crimes Act 1914*, which

provides a person a right of non-disclosure for offences that have been spent and limits the use and disclosure of information about those offences in certain circumstances.

This instrument amends the Crimes Regulations to prescribe an exclusion at Schedule 2 from Division 3 of Part VIIC in relation to MNE level 1 disqualifying offences for the purpose of an MNE background check. This limitation to the right of privacy is necessary to ensure that a conviction for an MNE level 1 disqualifying offence can be taken into account when assessing an individual's criminal history, even where it would otherwise be considered spent. These offences are directly related to national security and considered to be so serious in nature that disclosure is in the national interest. This enhances and protects the integrity of background checks conducted for MNE purposes under the AusCheck scheme. Without such an exclusion, AusCheck would not have capacity to direct that an MNE accreditation not be issued or be revoked in circumstances where a person has been convicted of such an offence and it would have otherwise have been spent.

The purpose of collecting, using, storing and disclosing information is reasonable and necessary to pursue the objective of national security and public order. This is achieved by using an individual's personal information, such as their criminal record, to identify and disclose whether they would constitute a threat to secure areas, systems, processes or people. The collection and storage of personal information also assists law enforcement agencies respond to security incidents by providing an up-to-date database of individuals who hold an MNE accreditation check as a result of an MNE background check.

Appropriate safeguards exist to ensure that use of an individual's personal information is reasonable and proportionate. Personal information is provided voluntarily by an individual with their consent to it being used for a background check. An individual will be provided with a privacy notice by AusCheck detailing how their information will be utilised to ensure informed consent. AusCheck will update the privacy notice to capture the amendments in this instrument. Section 29 of the AusCheck Regulations allows the Secretary of the Department to issue guidelines about the use and disclosure of information in the AusCheck database. The guidelines are currently publically available on the Department's website. All AusCheck staff members are required to comply with the guidelines. Section 15 of the AusCheck Act also provides an offence provision for AusCheck staff members who unlawfully disclose AusCheck scheme personal information.

Right to work

Article 6(1) of the ICESCR provides for the right to work, including the right of everyone to the opportunity to gain a living by work which the persons freely chooses or accepts. The assessment by AusCheck of an individual's criminal history or a national security assessment may lead to an obligation on an organising body not to issue an MNE accreditation, or to cancel an MNE accreditation, if the person has been convicted of an MNE level 1 disqualifying offence. Holding an MNE accreditation may be an essential requirement for people who work or volunteer at MNE, for example, people who work in secure areas of an MNE. Therefore AusCheck's assessment could limit the right to work of some individuals,

particularly if an individual has been convicted of an MNE level 1 disqualifying offence or has an adverse or qualified security assessment.

In these circumstances, the new section 21M provides that if the Secretary advises the organising body that a person has been convicted of an MNE level 1 disqualifying offence, or has an adverse or qualified security assessment, then the organising body must not issue an MNE accreditation for that person. It further provides that if the person has already been accredited, the MNE accreditation must be cancelled. It is an offence for the organising body to issue an MNE accreditation or to fail to cancel an MNE accreditation after receiving the Secretary's advice. For persons convicted and sentenced for MNE level 2 and 3 offences, the organising body has a discretion as to whether to issue or cancel an MNE accreditation. The organising body may, with the express consent of the person, request that AusCheck provide details of the relevant MNE level 2 or 3 offence to help the organising body exercise this discretion.

To the extent that these provisions may limit the right to work, the limitation is proportionate, as the failure to be issued an MNE accreditation (or the cancellation of an MNE accreditation) only affects the person's ability to work or volunteer at a declared MNE and does not impact any other employment. MNE offences are serious offences that present a threat to national security and public order. Given the risks associated with large scale events, it is reasonable to conduct background checks on individuals who may work or volunteer at an MNE. The limitations are also the least rights restrictive option. An organising body will only be required to not issue an MNE accreditation if the Secretary advises the organising body that a person has been convicted of an MNE level 1 disqualifying offence, or has an adverse or qualified security assessment. This reflects the serious nature of those offences and of national security risks. MNE level 2 and 3 offences will not be automatically disqualifying. The amendments in this instrument are aimed at ensuring that persons who work or volunteer at an MNE do not pose a risk to national security or public order.

Article 4 of the ICESCR provides that countries may limit economic, social and cultural rights if those limits are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. The outcome of advice from the Secretary that a person has an unfavourable criminal history or a security assessment and should not be issued an MNE accreditation is an appealable decision. The outcome of an unfavourable criminal history or adverse or qualified security assessment is based on the threat of the individual to national security and public order and therefore the limitation is considered to be reasonable and necessary to promote national security and public order.

Conclusion

The Disallowable Legislation Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.