

EXPLANATORY STATEMENT

AusCheck Act 2007, Aviation Transport Security Act 2004, Maritime Transport and Offshore Facilities Security Act 2003.

Transport Security Legislation Amendment (Serious Crime) Regulations 2022

The *Aviation Transport Security Act 2004* (the Aviation Act) and the *Aviation Transport Security Regulations 2005* (the Aviation Regulations), and the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (the Maritime Regulations) operate, respectively, to safeguard against unlawful interference with aviation or maritime transport, and offshore facilities and to prevent the use of aviation or maritime transport, or offshore facilities in connection with serious crime.

To give effect to those dual purposes, the Aviation Act and Maritime Act establish regulatory frameworks and set minimum-security requirements for the Australian aviation and maritime industries by imposing obligations and requirements on persons engaged in certain aviation and maritime-related activities, respectively.

The *AusCheck Act 2007* (AusCheck Act) and the *AusCheck Regulations 2017* (AusCheck Regulations) establish the AusCheck scheme which operates to provide a regulatory framework for coordinating and conducting, within the Department of Home Affairs, centralised criminal, security, and other background checks on individuals in relation to aviation and maritime security.

Legislative Authority

Subsection 18(1) of the AusCheck Act, subsection 133(1) of the Aviation Act, and subsection 209(1) of the Maritime Act each provide that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Aviation Act and the Maritime Act were recently amended by the *Transport Security Amendment (Serious Crime) Act 2021* (the Serious Crime Act) so that the Aviation Regulations and the Maritime Regulations may prescribe requirements for the purposes of preventing the use of aviation, maritime transport and offshore facilities in connection with serious crime.

Purpose

The purpose of the *Transport Security Legislation Amendment (Serious Crime) Regulations 2022* (the Amending Regulations) is to amend the Aviation Regulations and the Maritime Regulations to give effect to amendments introduced by Schedule 2 to the Serious Crime Act, for the purposes of preventing the use of aviation and maritime transport and offshore facilities in connection with serious crime. The Amending Regulations also amend the AusCheck Regulations to incorporate a criminal intelligence assessment in the background check process for the ASIC and MSIC schemes, and to make consequential amendments that support the amendments made to the Aviation Regulations and the Maritime Regulations.

In particular, the Amending Regulations amend the Aviation Regulations and the Maritime Regulations to:

- introduce measures to permit criminal intelligence assessment as an additional fifth element of a background check;
- ensure consistency of the language used to describe the ASIC and MSIC schemes; and
- make other consequential and technical amendments to the Aviation and Maritime Regulations and to the AusCheck Regulations.

The Amending Regulations also amend the AusCheck Regulations to:

- introduce measures to permit criminal intelligence assessment as an additional fifth element of a background check; and
- make other consequential and technical amendments to the AusCheck Regulations.

Stakeholder consultation across the aviation, maritime and offshore oil and gas sectors, and with relevant government agencies, was undertaken on the development and introduction of the Serious Crime Act and the criminal intelligence measures in this proposed instrument.

Consultation

Consultation included a range of discussion papers, presentations and agenda items at various industry forums including: the Aviation Security Advisory Forum; the Aviation Security Employee Consultative Forum; the Maritime Industry Security Consultative Forum; the Maritime Security Strategic Forum; the Offshore Oil and Gas Security Forum; Regional Industry Consultative Meetings; Issuing Body Forums; and various ASIC and MSIC stakeholder consultative forums. Industry is generally supportive of the proposed changes to the ASIC and MSIC schemes to strengthen their ability to prevent serious criminal influence at airports, seaports and offshore facilities.

The AusCheck Act, Aviation Act, and Maritime Act specify no conditions that need to be satisfied before the power to make the proposed Serious Crime Regulations may be exercised.

The Office of Best Practice Regulation (OBPR) has been consulted in relation to the making of the Instrument. OBPR has advised that a Regulation Impact Statement is not required (OBPR Reference Number: 21-01043).

The Instrument is a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

The Instrument commences on the day after registration.

Details of the Instrument are set out in Attachment A.

A Statement of Compatibility with Human Rights is completed for the Instrument and is at Attachment B.

Authority: Subsection 18(1) of the
AusCheck Act 2007
Subsection 133(1) of the
Aviation Transport Security Act 2004
Subsection 209(1) of the
Maritime Transport and Offshore Facilities Security Act 2003

Details of the proposed *Aviation Transport Security Legislation Amendment (Serious Crime) Regulations 2022*

Section 1 – Name

This section provides that the title of the Regulations is the Transport Security Legislation Amendment (Serious Crime) Regulations 2022 (the proposed Regulations).

Section 2 – Commencement

This section provides for the commencement of the proposed Regulations, as set out in the table in subsection 2(1).

Table Item 1 of subsection 2(1) provides for Sections 1 to 4 and anything in this instrument not elsewhere covered by this table to commence on the day after the instrument is registered.

Table Item 2 of subsection 2(1) provides for Schedule 1 to commence on the day after the instrument is registered.

Table Item 3 of subsection 2(1) provides for Schedule 2 to commence at the same time as Schedule 2 to the *Transport Security Amendment (Serious Crime) Act 2021* commences.

The guiding note following the table in subsection 2(1) makes clear to the reader that the table relates only to the provisions of this instrument as originally made, and that it will not be amended to deal with any later amendments of this instrument.

Subsection 2(2) clarifies that information in column 3 of the table in subsection (1) is not part of the instrument, and that information may be inserted there, or edited, in any published version of the instrument.

Section 3 – Authority

This section provides that the instrument is made under the *AusCheck Act 2007*, the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*.

Section 4 – Schedules

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

Schedule 1—Information requirements and review process

AusCheck Regulations 2017

The amendments to the *AusCheck Regulations 2017* (the AusCheck Regulations) proposed by this instrument make consequential amendments to align the defined terms and language used in the AusCheck Regulations with that used in both the *Aviation Transport Security Regulations 2005* (Aviation Regulations) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Maritime Regulations), with respect to conducting background checks on applicants for, or holders of, an aviation security identification card (ASIC) or maritime security identification card (MSIC). The amendments to the AusCheck Regulations also make other technical and consequential amendments, for example to provide meaning for terms related to criminal intelligence assessments conducted as part of a background check under the AusCheck Regulations.

Item 1 – Section 4 (paragraphs (d) and (e) of the note to the heading)

This item repeals paragraphs (d) and (e) of the note to the heading of section 4 of Part 1 of the AusCheck Regulations and substitute a new paragraph (d) “Secretary”.

The guiding note following the heading of section 4 provides for terms defined in section 4 of the *AusCheck Act 2007*. Paragraphs (d) and (e) of the note previously refer to the Secretary and the Transport Secretary, respectively.

The purpose and effect of this amendment is to repeal a reference which is not considered helpful to the reader. Under previous administrative arrangements, the Secretary and the Transport Secretary are the same person, who has different responsibilities under the AusCheck Regulations to those in the Aviation Regulations and Maritime Regulations.

Item 2 – Section 4

This item inserts a definition of the term “Transport Secretary” to provide that the term means the Secretary of the Department administered by the Minister who administers the *Aviation Transport Security Act 2004*.

The previous definition of Transport Secretary was repealed by item 27 of Part 1 of Schedule 2 to the *Home Affairs and Integrity Agencies Legislation Amendment Act 2018* as a consequence of the Administrative Arrangement Orders that transferred administrative responsibility for *Aviation Transport Security Act 2004* from the Minister for Infrastructure, Transport and Regional Development to the Minister for Home Affairs.

At the time this instrument comes into effect, the Minister for Home Affairs also administers the *AusCheck Act 2007* (AusCheck Act). The Secretary referred to in the new definition, therefore, is the Secretary of the Department of Home Affairs.

The purpose and effect of this amendment is to enable the reader to distinguish between decisions or applications made, or notifications or advice given, by the

Secretary, or their delegate, under the *Aviation Transport Security Act 2004* and its regulations (the Transport Secretary), from those made or given by the Secretary, or their delegate, under the AusCheck Regulations.

Item 3 – Subsection 13(6)

This item repeals subsection 13(6), which previously provides that if the Secretary advises the issuing body under subsection 13(5) that the security assessment of the individual is a qualified security assessment, the Secretary must give the Transport Secretary a copy of the security assessment.

As noted above, previously providing a copy of an assessment was necessary as responsibilities under the AusCheck Regulations and the Aviation Regulations were effected by different Department heads. The responsibilities for both Regulations previously rest with the Secretary of the Department of Home Affairs. As a consequence, there is no longer any need for a copy to be provided, as a requirement that the Secretary of the Department of Home Affairs must give him or herself a copy of the security assessment results in an administrative absurdity.

The purpose and effect of this amendment is to repeal a provision which is no longer necessary.

Item 4 – Subsections 14(2) and (4)

This item repeals subsections 14(2) and (4), and substitute a new subsection 14(2) to provide, under the heading “Advice relating to criminal history”, that if the individual has an unfavourable criminal history, the Secretary must advise the issuing body for the ASIC or MSIC.

Currently, subsections 14(2) and (4), provide that the Secretary must advise the Transport Secretary whether or not the individual has an unfavourable criminal history (subsection (2)); and if the Secretary advises the Transport Secretary under subsection (2) that the individual has an unfavourable criminal history, the Secretary must inform the issuing body for the ASIC or MSIC of that advice (subsection (4)).

New subsection 14(2) substantially replicates the intended outcome of previous subsection 14(4), that the Secretary must inform the relevant issuing body of an individual’s unfavourable criminal history.

Protection of privacy

Personal information collected by the Secretary (and more generally by the discrete area within the Department of Home Affairs (the Department) that performs the AusCheck function (AusCheck)), including the outcome of a background check for the aviation and maritime security schemes, is protected under the AusCheck Act and AusCheck Regulations. Sections 13 and 14 of the AusCheck Act are relevant to how information is collected, retained and shared, with section 15 of the AusCheck Act covering the protection of information. These sections of the AusCheck Act have been designed and developed to ensure that the acts and practices of the Secretary, AusCheck and delegates in relation to the disclosure of personal information, are

consistent with the Australian Privacy Principles (APP), which are the cornerstone of the *Australian Privacy Act 1988* (Privacy Act).

Privacy Act and AusCheck Act

The Privacy Act applies in relation to this item, and to the amendments made to sections 14, 15A, 16 and 18 of the AusCheck Regulations by items 5, 6, 7, 8, 9, 11 and 12. However, the effect of these amendments is that disclosure of personal information by the Secretary (or AusCheck) to an issuing body in those particular circumstances will be required by law.

APP 6 of Part 3 of Schedule 1 to the Privacy Act generally governs the use and disclosure of personal information by an APP entity, such as the Department (and by extension, AusCheck by virtue of being a discrete area within the Department). In particular, subclause 6.1 provides that an APP entity must not use or disclose personal information about an individual that was collected for a particular purpose for another purpose, unless the individual has consented or an exception applies. Paragraph (b) of subclause 6.2 provides an exception to the prohibition on use or disclosure where a disclosure is required or authorised by or under Australian law. In effect, this means the amendments made to sections 14, 15A, 16 and 18 by this item and items 5, 6, 7, 8, 9, 11 and 12 have the consequence that the required disclosures will be an exception to APP 6.

However, the personal information the Secretary must disclose to issuing bodies under the amendments made to sections 14, 15A, 16 and 18 by this item and by items 5, 6, 7, 8, 9, 11 and 12 will also be *AusCheck scheme personal information* (as defined in subsection 4(1) of the AusCheck Act). The use and disclosure of *AusCheck scheme personal information* is subject to even more stringent safeguards under sections 13, 14 and 15 of the AusCheck Act.

In particular, subsection 15(1A) of the AusCheck Act provides that it is a criminal offence punishable by two years' imprisonment if a person obtains information that is *AusCheck scheme personal information* and the person discloses that information to someone else, unless an exception under subsection 15(2) applies. Importantly, the offence in subsection 15(1A) continues to apply to the on-disclosure of *AusCheck scheme personal information*. The effect of this is that, where *AusCheck scheme personal information* is disclosed to an issuing body in accordance with the amendments made to sections 14, 15A, 16 and 18 by items 5, 6, 7, 8, 9, 11 and 12, it will be an offence for the issuing body to disclose the *AusCheck scheme personal information* unless an exception in subsection 15(2) applies. The exceptions in subsection 15(2) include:

- with consent;
- where disclosure is to the individual to whom the *AusCheck scheme personal information* relates;
- disclosure that is taken to be authorised by section 13, authorised under section 14 or required or authorised by another law; or
- a disclosure to Australian Federal Police for the purposes of the AusCheck scheme.

Disclosures (and use) authorised by section 14 are generally for the purposes of, or in connection with, the AusCheck scheme, or for specific purposes, such as for the

purposes of responding to an incident that poses a threat to national security or the performance of functions relating to law enforcement or national security by the Commonwealth, a State or Territory (or an authority of Commonwealth, a State or Territory).

Therefore whilst the amendments made to sections 14, 15A, 16 and 18 by this item and by items 5, 6, 7, 8, 9, 11 and 12 will have the effect that the disclosure of information by the Secretary to the issuing body in the circumstances is an exception to APP 6, given the more limited purposes for which AusCheck scheme personal information can be used and disclosed under the AusCheck Act and the offence provision in subsection 15(1A) of the AusCheck Act, the information disclosed is subject to more rigorous safeguards.

Other safeguards

Section 13 of the AusCheck Regulations specifies what information must be shared and with whom, when the Secretary or AusCheck provides advice about a background check for an individual for aviation and maritime security purposes. Subsections 13(2), 13(3) and 13(4) specifically set out what advice relating to criminal history must be given; for example, only the advice that the individual has an *unfavourable criminal history*, or that an *adverse security assessment* has been given in relation to the person must be given to an issuing body, thereby providing the relevant safeguards.

In effect, all that the Secretary is required to provide is advice that there is or is not an *unfavourable criminal history*, or an *adverse security assessment* in relation to the applicant. For example, there is no requirement that the Secretary must set out the offences described in the criminal history. Therefore, subsection 13(4) operates as an effective safeguard to protect an individual's privacy in relation to their criminal history, security assessment and criminal intelligence assessment by providing that if the Secretary advises the issuing body under subsection 13(2) that the individual has an *unfavourable criminal history*, or an *adverse security assessment* the Secretary must inform the individual of that advice and the reasons for that advice. For example, the individual would receive a list of criminal offences that are the 'reasons' for the *unfavourable criminal history* advice given to the issuing body, but the issuing body would not receive the list of offences. There are no provisions within the AusCheck Act or Regulations for this information to be provided to an issuing body, which is an additional safeguard of an individual's privacy.

Relevantly, the Department has commissioned a Privacy Impact Assessment to support the implementation of these amendments, and to ensure that privacy considerations are addressed appropriately. The 12 recommendations of this assessment have been considered, and actioned where appropriate, in the context of implementation.

The purpose and effect of this amendment is to repeal a reference which is no longer necessary due to the altered administrative arrangements that are in place, while still permitting the disclosure of an unfavourable criminal history to an issuing body.

Item 5 – Subsection 14(5)

This item omits the words “Transport Secretary”, and substitutes the words “issuing body for the ASIC or MSIC” in subsection 14(5).

Currently, subsection 14(5) provides that if the Secretary advises the Transport Secretary under subsection (2) that the individual has an unfavourable criminal history, the Secretary must inform the individual of that advice and the reasons for that advice.

The amendment made by this item is consequential to the amendment proposed by item 7 above, and also reflects previous administrative arrangements.

The purpose and effect of the amendment is to make provision for the Secretary to give advice to the issuing body for an ASIC or MSIC that a background check made in relation to an individual has revealed that the individual has an unfavourable criminal history.

Item 6 – Paragraph 15A(b)

This item omits the words “individual, an issuing body, or the Transport Secretary”, and substitutes the words “individual or an issuing body”.

The purpose of the amendment is to remove a reference to the Transport Secretary which is no longer necessary due to the altered administrative arrangements that are in place, and which previously perpetuate an administrative absurdity.

Item 7 –Section 16 (heading)

This item repeals the heading for section 16, and substitute a new heading “Advice about background check etc. in certain circumstances”.

This amendment has the effect of removing the previous reference to the Transport Secretary in the heading of section 16, which is no longer necessary due to the altered administrative arrangements that are in place, and which previously perpetuate an administrative absurdity.

The purpose and effect of this item is to make clear that section 16 deals with giving advice about background checks undertaken by AusCheck in relation to individuals in circumstances where advice of an unfavourable criminal record was given because the individual has an adverse criminal record.

Item 8 – Paragraph 16(1)(c)

This item omits the words “the Transport Secretary informs the Secretary that” from paragraph 16(1)(c)”.

Currently, paragraph 16(1)(c) provides that section 16 applies if the Transport Secretary informs the Secretary that an application in relation to the individual has been made under either subregulation 6.29(1) or 6.43A(2) of the Aviation Regulations, or subregulation 6.08F(1) or 6.08MA(2) of the Maritime Regulations.

This amendment repeals a reference to the Transport Secretary which is no longer necessary due to the altered administrative arrangements that are in place, and which

previously perpetuate an administrative absurdity.

The purpose and effect of this item is to make clear that section 16 applies if an application in relation to the individual has been made under subregulation 6.29(1) or 6.43A(2) of the Aviation Regulations, or subregulation 6.08F(1) or 6.08MA(2) of the Maritime Regulations.

Item 9 – Subsection 16(2)

This item amends the chapeau of subsection 16(2) to omit the words “The Secretary must give the Transport Secretary”, and to substitute the words “AusCheck must give the Secretary”.

This amendment repeals a reference to the Transport Secretary which is no longer necessary due to the altered administrative arrangements that are in place, and which previously perpetuate an administrative absurdity. The amendment also correctly identifies the flow of information for this type of advice.

The purpose and effect of this item is to explicitly impose a requirement on the discrete area within the Department of Home Affairs that performs the AusCheck function to give the Secretary advice that the individual has an unfavourable criminal record because the individual has an adverse criminal record; and to give the Secretary a document setting out the individual’s criminal history, and any other information relevant to the background check of the individual.

Item 14A 13 – Paragraph 16A(1A)(a)

This item amends paragraph 16A(1A)(a), which deals with additional circumstances in which AusCheck may undertake a new background check of an individual, to omit the words “and gives advice of the cancellation under section 15A”.

This amendment is consequential to the amendment proposed by item 6 above, rendering the notification unnecessary.

The purpose and effect of this amendment is to make clear that, in addition to the circumstances set out in subsection 16A(1), AusCheck may only undertake a new background check of the individual if the Secretary cancels a background check (the original check) of an individual under subsection 11A(7), and the thing that the Secretary requested be done under subsection 11A(2) in relation to the original check is later done.

Item 11 – Paragraph 18(a)

This item amends the chapeau of paragraph 18(a) to omit the words “the Transport Secretary tells the Secretary”, and to substitute the words “the Secretary decides”.

This amendment replicates the substance and intention of the previous chapeau of paragraph 18(a), by stating that it is a decision made by the agency head.

The purpose and effect of this item is to repeal a reference to the Transport Secretary which is no longer necessary due to the altered administrative arrangements that are in place, and which previously perpetuate an administrative absurdity.

Item 12 – Section 18 (note)

This item repeals the guiding note following section 18 and substitutes a new note.

The purpose and effect of this item is to remind the reader that for decisions that an issuing body is to be an issuing body for transferred ASIC applications or transferred ASICs, the reader should refer to regulation 6.22 of the Aviation Regulations and, for decisions that an issuing body is to be an issuing body for transferred MSIC applications or transferred MSICs, the reader should refer to regulation 6.07ZA of the Maritime Regulations.

Item 13 – Section 28

This item amends the chapeau of section 28 to omit the words “the Transport Secretary tells the Secretary”, and to substitute the words “the Secretary decides”.

This amendment replicates the substance and intention of the previous chapeau of section 28, by making it clear that it is a decision made the agency head.

The purpose and effect of this item is to repeal a reference to the Transport Secretary which is no longer necessary due to the altered administrative arrangements that are in place, and which previously perpetuate an administrative absurdity.

Item 14 – Section 28 (note)

This item repeals the guiding note following section 28 and substitutes a new note.

The purpose and effect of this item is to remind the reader that for decisions that an issuing body is to be an issuing body for transferred ASIC applications or transferred ASICs, the reader should refer to regulation 6.22 of the Aviation Regulations and, for decisions that an issuing body is to be an issuing body for transferred MSIC applications or transferred MSICs, the reader should refer to regulation 6.07ZA of the Maritime Regulations.

Item 15 - Section 33

This item repeals section 33. Section 33 is an application provision that deals with the requirement to give advice to the Transport Secretary in certain circumstances.

The purpose and effect of this item is to repeal a redundant application provision. This application provision is no longer required due to the altered administrative arrangements that are in place, and which previously perpetuate an administrative absurdity.

Item 16 - In the appropriate position in Part 5

This item creates new Division 6 in Part 5 of the AusCheck Regulations to contain new section 40, which deals with the application provisions for amendments made by the proposed Regulations, as they relate to the AusCheck Regulations.

New section 40

New section 40 operates to provide that the amendments made by Schedule 1 of the Amending Regulations apply in relation to applications for background checks and that amendments made by Schedule 1 of the Amending Regulations apply relating to decisions about the transfer of materials from one issuing body to another made after the commencement of this instrument.

New subsection 40(1)

New subsection 40(1) has the operative effect that the amendments of sections 13, 14, 15A and 16A made by Schedule 1 to the Amending Regulations apply in relation to any background check for which an application is made after the commencement of Schedule 1 to the proposed Regulations.

The purpose and effect of this amendment is to make clear that applications for background checks that were made prior to the commencement of the Amending Regulations continue to be dealt with under the AusCheck Regulations that were in force at that time, and that the amendments made by the Amending Regulations apply to applications for background checks made after the instrument commences.

New subsection 40(2)

New subsection 40(2) has the operative effect that the amendments of section 16 made by Schedule 1 to the Amending Regulations apply in relation to any background check for which an application in relation to an individual is made under subregulation 6.29(1) or 6.43A(2) of the Aviation Regulations or subregulation 6.08F(1) or 6.08MA(2) of the Maritime Regulations after commencement of Schedule 1 to the proposed Regulations, whether the background check of the individual is undertaken before or after Schedule 1 to the Amending Regulations commences.

The purpose and effect of this amendment is to make clear that the amendments made by the Amending Regulations apply to applications for background checks regardless of whether the background check of the individual was undertaken before or after Schedule 1 to the Amending Regulations commences. This means that the amendments will apply to an application for a background check that was made before that date, if the background check has not been completed at the time the Amending Regulations come into effect.

New subsection 40(3)

New subsection 40(3) has the operative effect that the amendments of sections 18 and 28 made by Schedule 1 to the Amending Regulations apply in relation to any decision that an issuing body is to be the issuing body for transferred ASIC applications or transferred ASICs, or transferred MSIC applications or transferred MSICs, made after the commencement of Schedule 1 to the proposed Regulations.

The purpose and effect of this amendment is to make clear that the amendments made by the Amending Regulations only apply to decisions that an issuing body is to be the issuing body for transferred ASIC or MSIC applications or transferred ASICs or MSIC applications made after Schedule 1 to the Amending Regulations commences.

Aviation Transport Security Regulations 2005

The amendments to the *Aviation Transport Security Regulations 2005* (the Aviation Regulations) made by Schedule 1 to this instrument make consequential and technical amendments to remove references made redundant by the administrative arrangement orders that transferred responsibility from the Secretary of the Department of Infrastructure, Transport and Regional Development to the Secretary of the Department of Home Affairs and introduce powers for the Secretary of the Department of Home Affairs to reconsider decisions made by the Secretary to align with a similar concept used in the *Maritime Transport and Offshore Facility Security Regulations 2003* (the Maritime Regulations).

Item 17 – Subregulation 6.22(3)

This item repeals subregulation 6.22(3), which deals with responsibility for ASICs, applications and records if the entity that managed ASICs, applications and records ceases to be an issuing body.

Currently, subregulation 6.22(3) provides that the Secretary must tell the Secretary AGD who the new issuing body for the transferred ASICs and transferred ASIC applications will be.

The amendment made by this item is consequential to the administrative arrangements that transferred responsibility from the Secretary of the Department of Infrastructure, Transport and Regional Development to the Secretary of the Department of Home Affairs. A requirement that the Secretary of the Department of Home Affairs must tell him or herself who the new issuing body for the transferred ASICs and transferred ASIC applications results in an administrative absurdity. As a consequence, the requirement is no longer needed.

The purpose and effect of this amendment is to repeal a provision which is no longer necessary due to the altered administrative arrangements that are in place.

Item 18 – Subregulation 6.22A(3)

This item repeals subregulation 6.22A(3), which previously operates to provide that the Secretary AGD must be told if the Secretary declares an issuing body as a transitional issuing body.

As with the amendment above, a requirement that the Secretary of the Department of Home Affairs must tell him or herself that an entity has been declared, by themselves, as a transitional issuing body results in an administrative absurdity. As a consequence, the requirement is no longer needed.

The purpose and effect of this amendment is to repeal a provision which is no longer necessary due to the altered administrative arrangements that are in place.

Item 19 – Part 8 (heading)

This item omits the word “Review” from the heading of Part 8, and substitutes the words “Reconsideration and review”.

The purpose and effect of the technical and consequential amendment made by this item is to indicate that Part 8 deals with the former review mechanisms undertaken by the AAT as well as the new reconsideration mechanisms introduced by item 20 below.

Item 20 – After regulation 8.01

This item introduces a new regulation 8.01A to provide the Secretary with the powers to reconsider decisions in relation to ASICs and related matters, and a new regulation 8.01B to deal with matters if the Secretary makes no decision under new regulation 8.01A.

New subregulation 8.01A(1)

New subregulation 8.01A(1) permits applications to be made to the Secretary for reconsideration of decisions made by the Secretary in relation to issuing bodies, where the Secretary made a decision to:

- refuse to exempt an issuing body from giving effect to its ASIC program in a particular case or respect; or
- impose a condition on an exemption; or
- direct an issuing body to vary its ASIC program; or
- refuse to approve a variation of an issuing body's ASIC program; or
- revoke an issuing body's authorisation; or
- refuse to revoke an issuing body's authorisation.

The amendment proposed by new subregulation 8.01A(1) provides a means for the Secretary to reconsider a decision they made in the first instance, as an intervening step to resolve the matter. This amendment permits an issuing body to apply to the Secretary for reconsideration, and if not satisfied with the outcome of reconsideration, the issuing body then may make an application to the AAT for review.

New subregulation 8.01A(2)

New subregulation 8.01A(2) permits applications to be made to the Secretary for reconsideration of decisions made by the Secretary in relation to the issue, suspension and cancellation of ASICs where the Secretary made a decision to:

- grant, or to refuse to grant, an issuing body an exemption from needing the relevant airport operator's approval to issue an airport-specific ASIC to a person under regulation 6.27A; or
- refuse to approve the issuing of an ASIC; or
- approve the issuing of an ASIC subject to a condition; or
- give the issuing body for an ASIC a direction under subregulation 6.31(3); or

- direct the suspension of an ASIC; or
- refuse to set aside the cancellation of an ASIC under regulation 6.43B or 6.43C; or
- set aside the cancellation of an ASIC subject to a condition under regulation 6.43D.

The amendment proposed by new subregulation 8.01A(2) provides a means for the Secretary to reconsider a decision they made in the first instance, prior to a review being conducted by the AAT. This amendment permits a person to apply to the Secretary for reconsideration, and if not satisfied with the outcome of reconsideration, the person then may make an application to the AAT for review.

New subregulation 8.01A(3)

New subregulation 8.01A(3) permits applications to be made to the Secretary for reconsideration of decisions made by the Secretary in relation to the wearing and use of ASICs where the Secretary made a decision to:

- refuse to exempt somebody from displaying a valid ASIC in a secure area, or part of such an area; or
- impose a condition on such an exemption.

The amendment proposed by new subregulation 8.01A(3) provides a means for the Secretary to reconsider a decision they made in the first instance, prior to a review being conducted by the AAT. This amendment permits a person to apply to the Secretary for reconsideration of decisions made by the Secretary in relation to the wearing and use of ASICs, and if not satisfied with the outcome of reconsideration, the person then may make an application to the AAT for review.

The primary purpose of new regulation 8.01A is to introduce new reconsideration mechanisms in the Aviation Regulations that align with a similar former mechanism in regulation 6.08X of the Maritime Regulations.

The effect of the amendment made by this item is that issuing bodies and applicants for, and holders of, ASICs has an additional option to seek reconsideration of a decision, rather than only having the option of seeking an AAT review.

New regulation 8.01B

New regulation 8.01B describes what is taken to have occurred if a person who made an application for reconsideration or review of a decision under regulation 8.01A has not been notified of the decision 30 days after making the application. In those circumstances, the Secretary is taken to have refused to vary the original decision.

The purpose and effect of the amendment made by this item is that review and reconsideration applicants will have certainty around the timeframe for a review and reconsideration decision. This will permit the applicant, should they choose to do so,

to seek an AAT review if they are not notified of a review and reconsideration decision 30 days after making the application.

Item 21– Subregulation 8.02(1)

This item repeals subregulation 8.02(1) and replaces it with a new subregulation 8.02(1) to provide for applications to be made to the Tribunal for a review of a decision made by the Secretary under regulation 8.01A or 8.01B.

This amendment is consequential to the amendments made above that introduce new sections 8.01A and 8.01B that permit applications to be made to the Secretary to reconsider decisions in relation to ASICs and other matters. The purpose and effect of this amendment is to simplify, and clarify the types of reconsideration decisions that may be referred to the Tribunal for review.

Item 22 – Subregulation 8.02(3) and (4)

This item repeals subregulations 8.02(3) and (4) which previously provide for the types of decisions that may be referred to the AAT for review.

The amendment made by this item is consequential to the amendment made by the item above, which simplifies and clarifies the types of decisions that may be referred to the AAT for review. As a consequence, subregulations 8.02(3) and (4) are no longer needed.

The purpose and effect of this amendment is to repeal provisions which are no longer necessary.

Item 23 – In the appropriate position in Part 10

This item inserts new Division 22 into Part 10 of the Aviation Regulations to deal with amendments made by the proposed Regulations, and inserts new regulation 10.52.

New regulation 10.52

New regulation 10.52 deals with the continued application of Part 8 of the Aviation Regulations.

Regulation 10.52 is an application provision, which provides that, despite the amendments made to the Aviation Regulations by the proposed Regulations, Part 8 continues to apply in relation to any decision mentioned in regulation 8.02, as it was prior to the amendments coming into effect, made before the commencement of Schedule 1 to the proposed Regulations.

The purpose and effect of this amendment is to make clear that Part 8 continues to apply to a decision mentioned in regulation 8.02 as though the amendments in Schedule 1 to the Amending Regulations had not been made.

Maritime Transport and Offshore Facilities Security Regulations 2003

The amendments to the *Maritime Transport and Offshore Facilities Security Regulations 2003* (the Maritime Regulations) made by this instrument make

consequential and technical amendments to remove references made redundant by the administrative arrangement orders that transferred responsibility from the Secretary of the Attorney General's Department to the Secretary of the Department of Home Affairs and amend the Secretary of the Department of Home Affairs' powers to reconsider decisions made by the Secretary.

Item 24 – Subregulation 6.07ZA(3)

This item repeals subregulation 6.07ZA(3) which previously operates to provide that the Secretary must tell the Secretary AGD who the new issuing body is for transferred MSIC applications and transferred MSICs, if the body ceases to exist, or their authorisation is revoked by the Secretary or where the body no longer performs that function.

The amendment made by this item is consequential to the Administrative Arrangements that transferred responsibility from the Transport Secretary to the Secretary of the Department of Home Affairs. A requirement that the Secretary of the Department of Home Affairs must give themselves a copy of the security assessment results in an administrative absurdity.

The purpose and effect of this amendment is to repeal a provision which is no longer necessary due to the altered administrative arrangements that are in place.

Item 25 – Subregulation 6.07ZB(3)

This item repeals subregulation 6.07ZB(3) which previously provides that the Secretary must tell the Secretary AGD if the Secretary declares a body to be a transitional issuing body.

Similarly to the amendments proposed by item 40 above, the amendment made by this item is consequential to the Administrative Arrangements that transferred responsibility from the Secretary AGD to the Secretary of the Department of Home Affairs. A requirement that the Secretary of the Department of Home Affairs must tell themselves that they have declared a body to be a transitional issuing body creates an administrative absurdity.

The purpose and effect of this amendment is to repeal a provision which is no longer necessary due to the altered administrative arrangements that are in place.

Item 26 – Subregulations 6.08X(3A) and (6)

This item repeals subregulations 6.08X(3A) and (6) which deal with decisions in relation to alternative identification requirements and decisions in relation to the issue of a disqualifying notice.

This amendment is, in part, consequential to the amendment made by item 27 below, which introduces new subregulation 6.08Z(2) to deal with AAT review of decisions of the Secretary under paragraph 6.08BC(5)(a) to refuse to approve alternative identification requirements for a person. New subregulation 6.08Z(2) substantially replicates previous subregulation 6.08X(3A).

Subregulation 6.08X(6) previously provided for the AAT to review a decision made by the Secretary to give the person a disqualifying notice under regulation 6.08D.

The primary purpose for the review power being repealed, and not replaced or relocated, is to remove an unsuitable review provision. A person whose background check under regulation 6.08D finds that they have been convicted of a tier 1 offence, or who has an adverse security assessment or an adverse criminal intelligence assessment poses a significant risk to maritime transport and offshore facility security and may use maritime transport or offshore facilities in connection with serious crime. Equally, for a person who has been given an adverse security assessment or an adverse criminal intelligence assessment, their access to secure areas and zones in ports may be used by associates or malicious actors to commit an unlawful interference with maritime security or in connection with serious crime. Being convicted of a tier 1 offence, or having an adverse security or criminal intelligence assessment alone automatically disqualifies a person from being issued or holding an MSIC, and in each of these circumstances under regulation 6.08D there is no room for the Secretary to exercise discretion in disqualifying an applicant from being issued an MSIC, or a holder from holding an MSIC.

Chapter 3 of the Administrative Review Council's 1999 publication *What decisions should be subject to merit review?* states, at 3.1, that "decisions that automatically follow from the happening of a set of circumstances (which leaves no room for merits review to operate) do not involve a decision of such a quality that merits review can operate in respect of it". This principle is expanded on in 3.8 to 3.12, which state that there are some decisions that may be described as automatic and mandatory decisions that "arise where there is a statutory obligation to act in a certain way on the occurrence of a specified set of circumstances". In effect, this means that if a mandatory obligation to undertake an administrative action as a response to specific circumstances exists, there is nothing on which merits review can operate.

As noted above, if the outcome of a background check reveals the existence of certain convictions or adverse security or criminal intelligence assessments in relation to the MSIC applicant or holder, it is mandatory under regulation 6.08D that a disqualifying notice is given. Consistent with the Administrative Review Council's guidance, it follows that decisions under subregulation 6.08D(1) to issue disqualifying notices are unsuitable for merits review. As a consequence, giving a disqualifying notice in those circumstances should not be, and should not have been, a reviewable administrative action.

In many cases, review of the criminal history results or adverse assessments given in relation to a background check that were the catalyst for mandatory disqualification is still available to an MSIC applicant or MSIC holder.

The operative purpose of this amendment is to align the review powers in the Maritime Regulations with those in the Aviation Regulations, which do not previously permit AAT review of this type of administrative action.

The effect of this amendment is that references that are no longer required as a consequence of other amendments proposed by this instrument are removed, and that a provision that permitted review of a decision that is unsuitable for review has been removed.

Item 27 – Regulation 6.08Z

This item repeals regulation 6.08Z and substitute new regulation 6.08Z to deal with AAT review of the Secretary’s decisions.

New subregulation 6.08Z(1)

New subregulation 6.08Z(1) deals specifically with AAT review of the Secretary’s reconsideration decisions by providing that applications may be made to the Tribunal for review of decisions of the Secretary under regulation 6.08X or 6.08Y.

New subregulation 6.08Z(2)

New subregulation 6.08Z(2) deals specifically with AAT review of decisions relating to alternative identification requirements by providing that applications may be made to the Tribunal for review of decisions of the Secretary under paragraph 6.08BC(5)(a) to refuse to approve alternative identification requirements for a person. This subregulation substantially replicates former subregulation 6.08X(3A).

The purpose and effect of this amendment is to make provision for the decisions made by that Secretary for which applications may be made to the Tribunal for review.

Item 28 – In the appropriate position in Schedule 2

This item inserts new Part 13 in Schedule 2 to the Maritime Regulations and provides, in new section 120, for the application of amendments made by Schedule 1 to this instrument.

New section 120

New section 120 operates to provide that despite the amendments made by Schedule 1 to the Proposed Regulations, subdivision 6.1A.7 continues to apply, in relation to any decision mentioned in regulation 6.08X or 6.08Z (as in force immediately before the commencement of Schedule 1) made before that commencement, as if those amendments had not been made.

The purpose and effect of this amendment is to make clear that the amendments made by Schedule 1 do not apply to any decision mentioned in regulation 6.08X or 6.08Z made before the Amending Regulations come into effect. Subdivision 6.1A.7 continues to apply to those pre-amendment decisions mentioned in regulation 6.08X or 6.08Z in the same way as it did prior to the Amending Regulations coming into effect.

Schedule 2 Criminal intelligence assessments

AusCheck Regulations 2017

The amendments to the *AusCheck Regulations 2017* (the AusCheck Regulations) proposed by Schedule 2 to this instrument introduces a new definition in relation to criminal intelligence assessments, and imposes advice requirements about criminal intelligence assessments which may affect the eligibility of the person to hold, or be issued, an aviation or maritime security identification card (ASIC or MSIC).

Currently, a background check undertaken under the AusCheck Regulations for the purposes of the ASIC and MSIC schemes involves four elements: an identity check, a criminal history check, a security assessment (conducted by ASIO under Part IV of the *Australian Security Intelligence Act 1979* (ASIO Act)) and, if the person is not an Australian citizen or permanent resident, a migration status check. A criminal intelligence assessment conducted by the ACIC will be incorporated as a fifth element of a background check, in the same manner as ASIO security assessments.

Item 1 – Section 4

This item inserts a new definition, in section 4, of *adverse criminal intelligence assessment* which provides that the term has the same meaning as in section 36A of the *Australian Crime Commission Act 2002* (the ACC Act).

Modelled after the definition of ‘adverse security assessment’ in subsection 35(1) of the ASIO Act, section 36A of the ACC Act provides that *adverse criminal intelligence assessment* means a criminal intelligence assessment in respect of a person that contains:

- any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person (paragraph (a)); and
- a recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person (paragraph (b)).

In general terms, if the Australian Criminal Intelligence Commission (ACIC) provides an *adverse criminal intelligence assessment* in respect of an individual, the Secretary will be notified by the ACIC of the adverse assessment, who will then notify the issuing body and the individual.

The amendment made by this item is consequential to amendments to the Aviation Regulations and the Maritime Regulations proposed below.

The purpose and effect of the amendment made by this item is to provide a definition of the concept of an *adverse criminal intelligence assessment* in the definition provision of the AusCheck Regulations. This will give effect to the amendments made by Schedule 2 to the Serious Crime Act which introduced the concept of criminal intelligence assessments.

Item 2 – After subsection 13(4)

This item inserts a new subsection 13(4A) which deals with advice relating to criminal intelligence assessments, to provide that the Secretary must advise the issuing body whether or not an *adverse criminal intelligence assessment* of the individual has been given to the Secretary.

Protection of Privacy

As noted in item 4 of Schedule 1 to this instrument, personal information including the outcome of a background check for the aviation and maritime security schemes, is protected under the AusCheck Act and AusCheck Regulations. Sections 13 and 14 of the AusCheck Act are relevant to how information is collected, retained and shared, with section 15 of the AusCheck Act covering the protection of information. These sections of the AusCheck Act have been designed and developed to ensure that the acts and practices of the Secretary, AusCheck and delegates in relation to the disclosure of personal information, are consistent with the APPs, which are the cornerstone of the Privacy Act.

Privacy Act and AusCheck Act

The Privacy Act applies in relation to this item and item 3. However, the effect of these items is that disclosure of personal information by the Secretary to an issuing body in those particular circumstances will be required by law.

APP 6 of Part 3 of Schedule 1 to the Privacy Act generally governs the use and disclosure of personal information by an APP entity, such as the Department (and by extension, the Secretary of the Department). In particular, subclause 6.1 provides that an APP entity must not use or disclose personal information about an individual that was collected for a particular purpose for another purpose, unless the individual has consented or an exception applies. Paragraph (b) of subclause 6.2 provides an exception to the prohibition on use or disclosure where a disclosure is required or authorised by or under Australian law. In effect, this means the amendments made to sections 13 and 14 by this item and item 3 have the consequence that the required disclosures will be an exception to APP 6.

However, the personal information the Secretary must disclose to issuing bodies under the amendments made to sections 13 and 14 by this item and item 3 will also be *AusCheck scheme personal information* (as defined in subsection 4(1) of the AusCheck Act). The use and disclosure of *AusCheck scheme personal information* is subject to even more stringent safeguards under sections 13, 14 and 15 of the AusCheck Act.

In particular, subsection 15(1A) of the AusCheck Act provides that it is a criminal offence punishable by two years' imprisonment if a person obtains information that is AusCheck scheme personal information and the person discloses that information to someone else, unless an exception under subsection 15(2) applies. Importantly, the offence in subsection 15(1A) continues to apply to the on-disclosure of AusCheck scheme personal information. The effect of this is that, where AusCheck scheme personal information is disclosed to an issuing body in accordance with the amendments made to sections 13 and 14 by this item and item 3, it will be an offence

for the issuing body to disclose the AusCheck scheme personal information unless an exception in subsection 15(2) applies. The exceptions in subsection 15(2) include:

- with consent;
- where disclosure is to the individual to whom the AusCheck scheme personal information relates;
- disclosure that is taken to be authorised by section 13, authorised under section 14 or required or authorised by another law; or
- a disclosure to Australian Federal Police for the purposes of the AusCheck scheme.

Disclosures (and use) authorised by section 14 are generally for the purposes of, or in connection with, the AusCheck scheme, or for specific purposes, such as for the purposes of responding to an incident that poses a threat to national security or the performance of functions relating to law enforcement or national security by the Commonwealth, a State or Territory (or an authority of Commonwealth, a State or Territory).

Therefore whilst the amendments made to sections 13 and 14 by this item and item 3 will have the effect that the disclosure of information by the Secretary to the issuing body in the circumstances is an exception to APP 6, given the more limited purposes for which AusCheck scheme personal information can be used and disclosed under the AusCheck Act and the offence provision in subsection 15(1A) of the AusCheck Act, the information disclosed is subject to more rigorous safeguards.

Other safeguards

Section 13 of the AusCheck Regulations specifies what information must be shared and with whom, when AusCheck provides advice about a background check for an individual for aviation and maritime security purposes. Subsections 13(2), 13(3) and 13(4) specifically set out what advice relating to criminal history must be given; for example, only the advice that the individual has an *unfavourable criminal history*, or that an *adverse criminal intelligence assessment* has been given in relation to the person must be given to an issuing body, thereby providing the relevant safeguards.

In effect, all that the Secretary is required to provide is advice that there is or is not an *unfavourable criminal history*, an *adverse security assessment* or an *adverse criminal intelligence assessment* in relation to the applicant. For example, there is no requirement that the Secretary must set out the offences described in the criminal history. Therefore, subsection 13(4) operates as an effective safeguard to protect an individual's privacy in relation to their criminal history, security assessment and criminal intelligence assessment by providing that if the Secretary advises the issuing body under subsection 13(2) that the individual has an *unfavourable criminal history*, an *adverse security assessment* or an *adverse criminal intelligence assessment* the Secretary must inform the individual of that advice and the reasons for that advice. There are no provisions within the AusCheck Act or Regulations for this information to be provided to an issuing body, which is an additional safeguard of an individual's privacy.

Relevantly, the Department has commissioned a Privacy Impact Assessment to support the implementation of these amendments, and to ensure that privacy considerations are addressed appropriately. The 12 recommendations of this

assessment have been considered, and actioned where appropriate, in the context of implementation.

The purpose of the amendment made by this item is to mandate that advice must be given to the issuing body regarding whether or not an *adverse criminal intelligence assessment* has been issued in relation to a person. The effect of the amendment proposed by this item is that an issuing body would receive relevant advice that would indicate that an application for an ASIC or MSIC must be refused or an ASIC or MSIC must be cancelled because an adverse assessment has been issued in relation to the applicant or holder of an ASIC or MSIC.

Item 3 – At the end of section 14

This item inserts new subsection 14(6) which deals with advice relating to an *adverse criminal intelligence assessment*, to provide that the Secretary must advise the issuing body for the ASIC or MSIC whether or not an *adverse criminal intelligence assessment* of the individual had been given to the Secretary.

The purpose of the amendment made by this item is to mandate that advice must be given to the issuing body regarding whether or not an *adverse criminal intelligence assessment* has been issued in relation to a person in circumstances where a background check is initiated by the Secretary. The effect of the amendment proposed by this item is that an issuing body would receive relevant advice that would indicate that an application for an ASIC or MSIC must be refused or an ASIC or MSIC must be cancelled because an adverse assessment has been issued in relation to the applicant or holder of an ASIC or MSIC.

Item 4 – After subparagraph 23(b)(ii)

This item inserts new paragraph 23(b)(ia) to include the new circumstance where an *adverse criminal intelligence assessment* of the individual has not been given to the Secretary.

Section 23 deals with the circumstances in which an issuing body must inform the Secretary of a decision not to issue an ASIC or MSIC to certain individuals. Section 23 applies if AusCheck undertakes a background check of an individual and the Secretary advises an issuing body under section 13 that the individual has no adverse, or qualified, unfavourable assessments, and has no negative outcome for visa status or work entitlement.

The purpose and effect of the amendment is to provide a clear authority for the issuing body to inform the Secretary of a decision not to issue an ASIC or MSIC to certain individuals where an *adverse criminal intelligence assessment* of the individual has not been given to the Secretary.

Item 5 – At the end of Division 6 of Part 5

41 Application provision—amendments made by Schedule 2

New section 41 operates to provide that the amendments of sections 13 and 14 made by Schedule 2 to the *Transport Security Legislation Amendment (Serious Crime)*

Regulations 2022 apply in relation to any application for a background check made after the commencement of that Schedule.

The purpose and effect of this item is to make clear that the amended sections 13 and 14 apply only to an application for a background check made after the commencement of Schedule 2 to the *Transport Security Legislation Amendment (Serious Crime) Regulations 2022*, and not to background checks made before that date, but not conducted until after commencement.

For example, if a background check was applied for before commencement, but the check hadn't been done by the time of commencement, the amendments in sections 13 and 14 would not apply.

Aviation Transport Security Regulations 2005

The amendments to the *Aviation Transport Security Regulations 2005* (the Aviation Regulations) proposed by Schedule 2 to this instrument introduces new requirements in relation to criminal intelligence assessments which may affect the eligibility of the person to hold, or be issued, an aviation security identification card (ASIC).

Item 6 – Regulation 1.03

This item inserts a signpost, in the definitions provision in regulation 1.03, which refers the reader to the new definition of *adverse criminal intelligence assessment* to subregulation 6.01(1).

This signpost is followed by a guiding note that reminds the reader that, for a person's notification and review rights in relation to an adverse criminal intelligence assessment, the reader should see section 36D and Subdivision C of Division 2A of Part II of the *Australian Crime Commission Act 2002*.

The purpose and effect of the amendment made by this item is to provide a sign post for the definition of the concept in the definition provision of the Aviation Regulations to assist the reader locate the definition. Including the signpost in regulation 1.03 makes clear that the definition in subregulation 6.01(1) applies only to the relevant Part or Division rather than to the Aviation Regulations as a whole. This amendment will give effect to the amendments made by Schedule 2 to the Serious Crime Act which introduced the concept of *criminal intelligence assessments*.

Item 7 – Subregulation 6.01(1)

This item introduces a new definition of *adverse criminal intelligence assessment* in subregulation 6.01(1), to provide that *adverse criminal intelligence assessment* has the same meaning as in section 36A of the *Australian Crime Commission Act 2002* (the ACC Act).

Section 36A of the ACC Act provides that *adverse criminal intelligence assessment* means a criminal intelligence assessment in respect of a person that contains:

- any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person (paragraph (a)); and
- a recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person (paragraph (b)).

This definition is modelled after the definition of ‘adverse security assessment’ in subsection 35(1) of the ASIO Act.

In general terms, if the Australian Criminal Intelligence Commission (ACIC), provides an *adverse criminal intelligence assessment* in respect of an individual the Secretary will be notified by the ACIC of the adverse assessment, who will then notify the issuing body and the individual. The individual thereafter has the opportunity to seek merits review of the adverse assessment in the Security Division of the AAT as well as any judicial review that may be available. However, if the *adverse criminal intelligence assessment* remains in place after the conclusion of such reviews, or where the person does not seek any review of the decision, an ASIC cannot be issued to the individual.

In practice, an adverse criminal intelligence assessment will be issued by the ACIC where there is intelligence or information that suggests that the person may commit a ‘serious and organised crime’ (as defined by subsection 4(1) of the ACC Act), or may assist another person to commit such a crime. In these circumstances it is considered to be appropriate to issue a disqualification notice to an individual that would prevent them from holding an ASIC. As noted above, review in the Security Division of the AAT of an adverse criminal intelligence assessment remains available to the individual.

The amendment made by this item is consequential to amendments proposed below.

The purpose and effect of the amendment made by this item is to provide a definition for the concept in the Aviation Regulations. This will give effect to the amendments made by Schedule 2 to the Serious Crime Act which introduced the concept of criminal intelligence assessments. This will also support the operationalisation of the additional purpose of Part 6 of the Aviation Regulations, to prevent aviation being used in connection with serious crime.

Item 8 – Subregulation 6.27AA(3)

This item amends subregulation 6.27AA(3), to omit all of the words after “reasonable grounds”, and to substitute words that include the former circumstances and adds an additional circumstance in new paragraph 6.27AA(3)(c) to deal with circumstances where the Secretary considers on reasonable grounds that there is a risk that the person would use aviation in connection with serious crime.

Currently, subregulation 6.27AA(3), gives the Secretary a discretion to apply for a background check if the Secretary considers on reasonable grounds that the person has

been convicted of an aviation-security-relevant offence or that the person constitutes a threat to aviation security.

The purpose and effect of this amendment is that a background check may be conducted if the Secretary considers on reasonable grounds that the person has been convicted of an aviation-security-relevant offence, or that the person constitutes a threat to aviation security, or there is a risk that the person would use aviation in connection with serious crime.

A background check may be only be conducted where a person has consented in accordance with paragraphs 9(1)(a) and (b) of the AusCheck Regulations, or is deemed to have consented under subsection 9(4) of the AusCheck Regulations. This consent or deemed consent is given when the person applies for an ASIC, or applies for their ASIC to be renewed.

This will apply to a person who makes an application for an ASIC or applies for their ASIC to be renewed on or after the date this amendment comes into effect.

Item 9 – Subregulation 6.27AA(4)

This item amends subregulation 6.27AA(4) to omit “paragraph (3)(a) or (b)”, and to substitute “paragraph (3)(a), (b) or (c)”.

This amendment is consequential to the amendment made by the item above, which introduced a new paragraph 6.27AA(3)(c), and the purpose and effect of the amendment is to include a reference to new paragraph 6.27AA(3)(c).

Item 10 – After paragraph 6.28(1)(e)

This item inserts new paragraph 6.28(1)(ea) to provide for an additional circumstance in which an issuing body may issue an ASIC.

The purpose and effect of this amendment is to provide that, subject to subregulations 6.28(3), (4), (4A) and (4D) and regulations 6.29, 6.31 and 6.35 and the other circumstances described in paragraphs 6.28(1)(a) to (f), an issuing body may issue an ASIC to a person only if the issuing body has been notified in writing by the Secretary that an adverse criminal intelligence assessment in relation to the person has not been given to the Secretary.

Item 11 – Paragraph 6.28(3)(a)

This item amends paragraph 6.28(3)(a) to insert “, (ea)” after “(e)”.

This amendment is consequential to the amendment made by the item above, which introduced a new paragraph 6.28(1)(ea), and the purpose and effect of the amendment is to include a reference to new paragraph 6.28(1)(ea).

Item 12 – Subregulation 6.28(4)

This item amends paragraph 6.28(4)(a) to insert “, (ea)” after “(e)”.

This amendment is consequential to the amendment made by the item above, which introduced a new paragraph 6.28(1)(ea), and the purpose and effect of the amendment is to include a reference to new paragraph 6.28(1)(ea).

Item 13 – Paragraph 6.38(6)(c)

This item amends paragraph 6.38(6)(c) to insert “, (bb)” after “(ba)”.

This amendment is consequential to the amendment made by the item below, which introduces a new paragraph 6.43(2)(bb), and the purpose and effect of the amendment is to include a reference to new paragraph 6.43(2)(bb).

Item 14 – After paragraph 6.43(2)(ba)

This item amends subregulation 6.43(2), which deals with the circumstances in which an issuing body must immediately cancel an ASIC, to insert new paragraph 6.43(2)(bb).

The new paragraph operates to provide that an issuing body must immediately cancel an ASIC issued by the body if the Secretary has notified the issuing body in writing that an *adverse criminal intelligence assessment* of the holder has been given to the Secretary.

The purpose and effect of this amendment is to make clear that, in addition to the other circumstances set out in subregulation 6.43(2), an issuing body must immediately cancel an ASIC in circumstances where the Secretary has notified the issuing body in writing that an *adverse criminal intelligence assessment* of the holder has been given.

Item 15 – Paragraph 6.43F(1)(c)

This item amends paragraph 6.43F(1)(c) to insert “, (bb)” after “(b)”.

Subregulation 6.43F(1) deals with circumstances in which an issuer is required to immediately cancel a Visitor Identification Card or Temporary Aircrew Card issued by the issuer (or its agent) if the issuer finds out certain information.

An *agent* is defined in regulation 6.01 to mean an agent, of an airport operator or a Secretary-approved VIC issuer, authorised to issue VICs on behalf of the airport operator or Secretary-approved VIC issuer under regulation 6.37G. A *Secretary-approved VIC issuer* is defined in regulation 6.01 to mean an aircraft operator that the Secretary has approved to issue VICs under regulation 6.37F.

This amendment would require a VIC issuer or their agent to immediately cancel a VIC issued by them, in circumstances where the VIC or TAC holder has, at any time, had an ASIC cancelled under paragraph 6.43(2)(b),(bb), (c), (d) or (db).

This amendment is consequential to the amendment made by the item above, which introduces a new paragraph 6.43(2)(bb), and the purpose and effect of the amendment is to include a reference to new paragraph 6.43(2)(bb).

Item 16 – At the end of Division 22 of Part 10

New regulation 10.53 is an application provision that deals with the application of amendments made by Schedule 2 to this instrument.

New subregulation 10.53(1) provides that the amendments of regulation 6.27AA made by Schedule 2 to this instrument apply in relation to any application for a background check made after the commencement of Schedule 2 to this instrument.

New subregulation 10.53(2) provides that the amendments of regulation 6.28 made by Schedule 2 to this instrument apply in relation to any issue of an ASIC if the application for the background check on the applicant for the issue of the ASIC is made after the commencement of Schedule 2 to this instrument.

New subregulation 10.53(3) provides that the amendments of regulation 6.43 made by Schedule 2 to this instrument apply in relation to any ASIC issued before or after the commencement of Schedule 2 to this instrument.

New subregulation 10.53(4) provides that the amendments of regulation 6.43F made by Schedule 2 to this instrument apply in relation to any cancellation of an ASIC after the commencement of Schedule 2 to this instrument, whether the ASIC, VIC or TAC was issued before or after that commencement.

Maritime Transport and Offshore Facilities Security Regulations 2003

The amendments to the *Maritime Transport and Offshore Facilities Security Regulations 2003* (the Maritime Regulations) proposed by Schedule 2 to this instrument introduces new requirements in relation to criminal intelligence assessments which may affect the eligibility of the person to hold, or be issued, an MSIC.

Item 17 – Subregulation 1.03(1)

This item inserts a signpost, in the definitions provision in regulation 1.03(1), which refers the reader to the new definition of *adverse criminal intelligence assessment* in subregulation 6.07B(1).

This new definition is followed by a guiding note that reminds the reader that, for a person's notification and review rights in relation to an adverse criminal intelligence assessment, the reader should see section 36D and Subdivision C of Division 2A of Part II of the *Australian Crime Commission Act 2002*.

The amendment made by this item is consequential to amendments proposed below. The purpose and effect of inserting a signpost in the definition section is to assist the reader to locate the meaning for the defined term.

Item 18 – Subregulation 6.07B(1)

This item introduces a new definition of *adverse criminal intelligence assessment* in subregulation 6.07B(1), to provide that *adverse criminal intelligence assessment* has the same meaning as in section 36A of the *Australian Crime Commission Act 2002*.

As noted above in relation to the same amendment made to the Aviation Regulations, section 36A of the ACC Act modelled after the definition of ‘adverse security assessment’ in subsection 35(1) of the ASIO Act, provides that *adverse criminal intelligence assessment* means a criminal intelligence assessment in respect of a person that contains:

- any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person (paragraph (a)); and
- a recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person (paragraph (b)).

Also as noted above in relation to ASICs, broadly speaking, if the ACIC provides an *adverse criminal intelligence assessment* in respect of an individual it is intended that the Secretary will be notified by the ACIC of the adverse assessment, who will then notify the individual. The individual thereafter has the opportunity to seek merits review of the adverse assessment in the AAT as well as any judicial review that may be available. However, if the *adverse criminal intelligence assessment* remains in place after the conclusion of such reviews, or where the person does not seek any review of the decision, an MSIC cannot be issued to the individual.

In practice, an adverse criminal intelligence assessment will be issued by the ACIC where there is intelligence or information that suggests that the person may commit a ‘serious and organised crime’ (as defined by subsection 4(1) of the ACC Act), or may assist another person to commit such a crime. In these circumstances it is considered to be appropriate to issue a disqualification notice to an individual that would prevent them from holding an MSIC. As noted above, review in the Security Division of the AAT of an adverse criminal intelligence assessment remains available to the individual.

The amendment made by this item is consequential to amendments proposed below.

The purpose and effect of the amendment made by this item is to provide a definition for the concept in the Aviation Regulations. This will give effect to the amendments made by Schedule 2 to the Serious Crime Act which introduced the concept of criminal intelligence assessments.

Item 19 – After paragraph 6.08C(1)(d)

This item introduces a new criterion (in new paragraph 6.08C(1)(da)) into subregulation 6.08C(1) that must be satisfied before an issuing body may issue an MSIC to a person.

This amendment, in conjunction with the other criteria in subregulation 6.08C(1), has the purpose and effect that an issuing body may issue an MSIC to a person if the issuing body has been notified in writing by the Secretary that an adverse criminal intelligence assessment in relation to the person has not been given to the Secretary.

Item 20 – Paragraph 6.08C(4)(a)

This item omits “and (d)”, and substitutes “, (d) and (da)” in paragraph 6.08C(4)(a).

This is a technical amendment that is consequential to the amendment proposed by item 19 above.

The amendment has the purpose and effect of including a reference to new paragraph 6.08C(1)(da) in subregulation 6.08C(4), which deals with when an issuing body may issue an MSIC to a person who is younger than 18 years of age.

Item 21 – Subregulation 6.08D(1)

This item repeals the previous subregulation 6.08D(1), and substitutes a new subregulation 6.08D(1).

The effect of new subregulation 6.08D(1) is that regulation 6.08D applies in circumstances where the background check of an applicant for an MSIC reveals that the person has been convicted of a tier 1 offence (as described in table 1 of Schedule 1 to the Maritime Regulations), or the person is the subject of an *adverse security assessment* that is not a qualified security assessment; or where an *adverse criminal intelligence assessment* in relation to an applicant for an MSIC is given to the Secretary.

This substantially replicates the content of previous subregulation 6.08D(1), and adds a new circumstance where an *adverse criminal intelligence assessment* in relation to an applicant for an MSIC is given to the Secretary.

New subregulation 6.08D(1) is followed by a guiding note that reminds the reader that, for a person’s notification and review rights in relation to an *adverse criminal intelligence assessment*, they should see section 36D and Subdivision C of Division 2A of Part II of the ACC Act.

The guiding note reflects the note following the signpost for the definition of *adverse criminal intelligence assessment*, and is added here for completeness.

Item 22 – Subregulation 6.08LC(1)

This item amends subregulation 6.08LC(1) to omit all of the words after “reasonable grounds”, and to substitute words that include the former circumstances in paragraphs 6.08LC(1)(a) and (b) and adds an additional circumstance in new paragraph 6.08LC(1)(c). New paragraph 6.08LC(1)(c) provides a new discretion to apply for a background check where the Secretary considers on reasonable grounds that there is a risk that the person would use maritime transport or an offshore facility in connection with serious crime.

Currently, subregulation 6.08LC(1), gives the Secretary a discretion to apply for a background check if the Secretary considers on reasonable grounds that the person has been convicted of a maritime-security-relevant offence or that the person constitutes a threat to maritime transport or offshore facility security.

A background check may only be conducted where a person has consented in accordance with paragraphs 9(1)(a) and (b), or is deemed to have consented under subsection 9(4), of the AusCheck Regulations. This consent and deemed consent is given when the person applies for an MSIC, or applies for their MSIC to be renewed. Deemed consent is relevant to the background check that is undertaken at the mid-point (two year anniversary of the original background check) of a four year MSIC.

“Reasonable grounds” to consider that the person has been convicted of a maritime-security-relevant offence may be derived from the self-reporting obligation in regulation 6.08LB. Direct consent to a background check is sought from the MSIC holder in those circumstances. However, “reasonable grounds” to consider that the person constitutes a threat to maritime transport or offshore facility security or that there is a risk that the person would use maritime transport or an offshore facility in connection with serious crime may come from information provided by an investigation or law enforcement body, and no direct consent would be sought.

This amendment will apply to a person who makes an application for an MSIC, or who applies for their MSIC to be renewed, after the date this amendment comes into effect. See the application provision in subregulation 121(2) below for further detail.

This subregulation does not include merits review. The guidance in Chapter 4 of the Administrative Review Council’s *What decisions should be subject to merit review?* provides that preliminary decisions may justify excluding merits review, because preliminary or procedural decisions facilitate or lead to the making of a substantive decision.

The Administrative Review Council takes this view since “review of preliminary or procedural decisions may lead to the proper operation of the administrative decision-making process being unnecessarily frustrated or delayed”. The beneficial effect of merits review is limited by the fact that preliminary or procedural decisions do not generally have substantive consequences. The benefits of review are outweighed by the cost of potentially frustrating the making of substantive decisions.

In accordance with the guidance given in 4.3 of Chapter 4 6.08LC(1) is a preliminary or procedural decision. In the case of subregulation 6.08LC(1), the decision to apply for a background check on an applicant for an MSIC or an MSIC holder based on reasonable grounds could necessarily lead to a substantive decision (such as disqualification). Merits review of a subregulation 6.08LC(1) decision would have limited benefit and is outweighed by the cost of frustrating the making of substantive decisions.

The purpose and effect of this amendment is that a background check may be conducted, with the person’s consent, if the Secretary considers on reasonable grounds that the person has been convicted of a maritime-security-relevant offence or that the person constitutes a threat to maritime transport or offshore facility security, or there is a risk that the person would use maritime transport or an offshore facility in connection with serious crime.

Item 23 – Subregulation 6.08LC(2)

This item amends subregulation 6.08LC(2) to omit “paragraph (1)(a) or (b)”, and to substitute “paragraph (1)(a), (b) or (c)”. This amendment is machinery in nature and is consequential to the amendment proposed by item X above, which has the effect of adding a new paragraph 6.08LC(1)(c).

Item 24 – After paragraph 6.08M(1)(ca)

This item inserts a new paragraph 6.08(1)(cb) to provide for the issuing body to cancel an MSIC it has issued in circumstances where the Secretary has notified the issuing body in writing that an adverse criminal intelligence assessment of the holder has been given to the Secretary.

This amendment is consequential to the amendment made in item 23 above, and has the purpose and effect of requiring an issuing body to cancel an MSIC it has issued if the Secretary has notified the body in writing that an adverse criminal intelligence assessment of the holder has been given.

Item 25 – Paragraphs 6.08M(2A)(a) and (2B)(a)

This item amends paragraphs 6.08M(2A)(a) and (2B)(a) to insert “(cb),” after “(ca),”.

This amendment has the effect that subregulation 6.08M(2A) makes it an offence for an issuing body to fail to immediately cancel an MSIC, if the body is required to do so under paragraphs 6.08M(1)(c), (ca),(cb), (e), (ea) or (eb).

Similarly, the amendment has the effect that subregulation 6.08M(2B) makes it an offence for an issuing body to fail to tell the holder of an MSIC in writing as soon as is practicable after the day the MSIC is cancelled, if the body is required to cancel the MSIC under paragraphs 6.08M(1)(c), (ca),(cb), (e), (ea) or (eb).

The purpose of this amendment is to amend former issuing body offence provisions to make a failure to immediately cancel an MSIC under paragraph 6.08M(1)(cb) an offence for an issuing body, and to make a failure to tell the MSIC holder in writing that their MSIC has been cancelled under paragraph 6.08M(1)(cb) an offence for an issuing body.

Item 26 – At the end of Part 13 of Schedule 2

This item inserts new Part 13 in Schedule 2 to the Maritime Regulations to deal with the application of amendments made by Schedule 2 to the instrument, and inserts new regulation 121.

Subregulation 121(1) is an application provision, which operates to provide that the amendments of regulation 6.08C made by Schedule 2 to this instrument apply in relation to any issue of an MSIC if the application for the background check on the MSIC applicant is made after the commencement of Schedule 2 to this instrument.

Subregulation 121(2) is an application provision, which operates to provide that the amendments of regulation 6.08LC made by Schedule 2 to this instrument apply in

relation to any application for a background check made after the commencement of Schedule 2 to this instrument.

Subregulation 121(3) is an application provision, which operates to provide that the amendments of regulation 6.08M made by Schedule 2 to this instrument apply in relation to any MSIC issued before or after the commencement of Schedule 2 to this instrument.

Statement of Compatibility with Human Rights

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

Transport Security Legislation Amendment (Serious Crime) Regulations 2022

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 *Transport Security Legislation Amendment (Serious Crime) Regulations 2022* (the Regulations) completes the implementation of the additional purpose of the *Aviation Transport Security Act 2004* (the Aviation Act) and the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act), as introduced by the *Transport Security Amendment (Serious Crime) Act 2021* (the Act), to prevent the use of aviation or maritime transport or offshore facilities, in connection with serious crime.

The Regulations will amend the *Aviation Transport Security Regulations 2005* (the Aviation Regulations), *Maritime Transport and Offshore Facilities Security Regulations 2003* (Maritime Regulations) and *AusCheck Regulations 2017* (AusCheck Regulations) to introduce criminal intelligence assessments into the aviation and maritime security identification card (ASIC and MSIC) schemes, and the AusCheck background checking scheme, to give effect to Schedule 2 to the Act.

Several independent reviews have noted that serious and organised criminals are exploiting the ASIC and MSIC schemes for criminal purposes. The 2011 Parliamentary Joint Committee on Law Enforcement (PJCLE), *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime* (the PJCLE Inquiry), recognised that the ASIC and MSIC schemes were originally designed to prevent terrorism and they should be extended to protect against the threat of exploitation by serious and organised crime.

The PJCLE Inquiry recommended the Government be given the power to revoke an ASIC or MSIC if it was determined that the person was not fit to hold a card on the basis of compelling criminal intelligence. The PJCLE Inquiry noted that the criminal intelligence held by law enforcement agencies should be used to prevent known criminal figures from holding an ASIC or MSIC.

Similarly, the *2015 National Ice Taskforce Report* (the Taskforce) recognised that airports and seaports are gateways for crystal methamphetamine ('Ice') importation. The Taskforce recommended the Government continue to protect the aviation and

maritime environments against organised crime by establishing a legal mechanism to enable compelling criminal intelligence to be used in determining suitability of workers to hold an ASIC or MSIC. The Taskforce found that the use of criminal intelligence in the background checking process for ASICs and MSICs could help identify links to organised crime among workers at airports and seaports and enhance the effectiveness and integrity of the regime in mitigating the risk from trusted insiders.

These regulatory amendments align with the independent reviews by:

- introducing criminal intelligence assessments into the background checking process for applicants for, and holders of, ASICs and MSICs;
- providing that an adverse criminal intelligence assessment would affect an applicant's and holder's eligibility to be issued or hold an ASIC or MSIC;
- implementing the additional purpose of the ASIC and MSIC schemes by providing the Secretary of the Department of Home Affairs (the Secretary) an additional ground to initiate a new background check on a holder of an ASIC or MSIC if the Secretary considers on reasonable grounds that the person may use aviation or maritime transport or an offshore facility in connection with serious crime;
- permitting applications to be made to the Secretary for reconsideration of decisions made by the Secretary in relation to the issue, suspension and cancellation of ASICs. Therefore, ASIC holders and applicants will be able to apply to the Secretary to seek reconsideration of certain decisions made by the Secretary, which largely aligns with the Maritime Regulations; and
- removing references that Administrative Arrangement Orders from December 2017 have made redundant.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- the right to work in Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),
- the right to freedom from discrimination under Article 2(2) of the ICESCR and Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR),
- the right to an effective remedy and right to justice and a fair trial in Articles 2(3) and 14 of the ICCPR, and
- the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation in Article 17 of the ICCPR.

Right to work and freedom from discrimination

Article 6(1) of the ICESCR provides that the right to work includes the right of everyone to the opportunity to gain their living by work which they freely choose or

accept, allowing them to live in dignity. The right to work does not equate to a guarantee to particular employment. As the Parliamentary Joint Committee on Human Rights (PJCHR) notes in its Guide to Human Rights, the right to work:

... is not to be understood as providing an unconditional right to obtain employment or for the state to provide everyone with employment; rather it is a right to choose an occupation and engage in work. It applies to all types of work, both in the public and private sectors, and to the formal and informal labour market.

The United Nations Committee on Economic Social and Cultural Rights (the UN Committee) recognises that the right to work in Article 6 does not equate to a guarantee of full employment. The UN Committee recognises the existence of international factors beyond the control of countries, which may hinder the full employment of the right to work in many countries (for example, transnational, serious and organised crime). The Committee has stated that the right to work affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly.

Article 2(2) of the ICESCR provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will 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.

Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, 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.

In its General Comment 18 on discrimination, the UN Human Rights Committee stated that:

The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Similarly, in its General Comment on Article 2 of the ICESCR (E/C.12/GC/20), UNCESCR has stated (at 13) that:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in

a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

Under Article 4 of the ICESCR, the rights in Article 6 may only be limited as determined by law for the purposes of promoting general welfare in a democratic society. Any limitations need to be reasonable, necessary and proportionate to the legitimate objective sought to be achieved. The UN Committee has stated that such limitations must be proportional, and must be the least restrictive alternative where several types of limitations are available, and that even where such limitations are permitted, they should be subject to review.

The Government is committed to act in accordance with the right to work in Article 6 of the ICESCR and the right to non-discrimination in Article 2 of the ICESCR and Article 26 of the ICCPR. That said, these amendments are reasonable and necessary to limit the influence of serious criminal activity in the aviation and maritime or offshore facilities environments, consistent with recommendations made by the 2015 National Ice Taskforce and the PJCLE Inquiry.

The amendments engage the right to work and right to non-discrimination, as the consequence of an adverse criminal intelligence assessment is that an applicant is denied an ASIC or MSIC and therefore may be denied certain jobs that require a person to hold an ASIC or MSIC, including on the basis of the person's criminal history or likely criminal involvement. Given the significant impact that serious crime (in particular the sale of illicit drugs) has on the economic and social prosperity of Australia, the amendments are reasonable, necessary and proportionate to prevent Australia's security controlled airports, security regulated seaports, and security regulated offshore oil and gas facilities from being used in connection with serious crime. They are also the least rights restrictive as they only prevent a person from working in these highly sensitive environments.

Under the new background checking requirements, the Australian Criminal Intelligence Commission (ACIC) will review its intelligence holdings and assess individuals to determine if they have known links to serious and organised crime groups, including outlaw motorcycle gangs. The assessments will be used to prevent individuals with known links to serious and organised crime groups from exploiting trusted positions at airports and seaports to facilitate illicit activities.

An adverse criminal intelligence assessment is established where the ACIC assesses information that reasonably suggests the person may commit a serious and organised crime or assist another person to commit a serious and organised crime. The vast majority of ASIC/MSIC holders and applicants do not appear in the ACIC's intelligence holdings and are not anticipated to be impacted by the implementation of criminal intelligence assessments. To the extent that any applicant or holder is found to have an adverse criminal intelligence assessment, they have the right of appeal to the Administrative Appeals Tribunal (AAT).

To the extent that the measure limits the opportunity for an individual to gain employment of their choosing and may discriminate against them on the basis of their criminal history or likely criminal involvement, the measure is proportionate and least rights restrictive, as it only limits their ability to gain employment in locations that

require an ASIC or an MSIC. It would not prevent the individual from gaining employment of their choosing in a location that does not require an ASIC or MSIC. The measures are reasonable, necessary and proportionate in safeguarding security controlled airports and security regulated seaports against the impact of transnational and serious organised crime.

Right to an effective remedy and right to justice and a fair trial

Article 2(3) of the ICCPR provides:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted. Article 14(1) of the ICCPR provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The right to an effective remedy in Article 2(3) of the ICCPR encompasses an obligation to provide appropriate reparation for the infringement of a right under the ICCPR, which can include compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices.

Article 14 of the ICCPR includes protections relating to justice and ensuring a fair hearing. The right to a fair trial and a fair hearing applies to both criminal and civil proceedings, and in cases before both courts and tribunals. The right is concerned with procedural fairness, rather than with the substantive decision of the court or tribunal. The proposed amendments engage this right by providing for review of an adverse criminal intelligence assessment by the AAT.

The amendments engage the right to an effective remedy in Article 2(3) of the ICCPR. To the extent that an individual claims that an adverse criminal intelligence assessment discriminates against them on the basis of their criminal history or likely criminal involvement (‘other status’), the amendments provide that a person can seek AAT review of an adverse criminal intelligence assessment.

The amendments also engage the right to be equal before the courts and tribunals in Article 14(1) of the ICCPR. As stated above, adverse criminal intelligence assessments will only be issued if information held by the ACIC reasonably suggests the person may commit a serious and organised crime or assist another person to commit a

serious and organised crime. Individuals whose background check establishes an adverse criminal intelligence assessment will have the ability to make an application for merits review to the Security Division of the AAT.

Utilising the Security Division of the AAT enables a thorough and independent review of a decision made by the ACIC to issue an adverse criminal intelligence assessment, while also protecting the inherently sensitive intelligence which might otherwise be subject to a public interest immunity claim. In addition, it provides individuals the opportunity to present their case to the AAT in a fair hearing by a competent, independent and impartial tribunal established by law. This engages the right to equality before courts and tribunals and the principle that all parties should have a reasonable opportunity to present their case. The measures promote the rights in Article 14 by ensuring that a person can seek review of an adverse criminal intelligence assessment and is equal before the tribunal in relation to such a review.

Separately, a right to an effective remedy under Article 2(3) of the ICCPR will also be engaged by the amendments introducing a means, via new regulation 8.01A(2) of the Aviation Regulations, for ASIC applicants and holders to re-seek the Secretary's review of decisions in relation to ASICs and related matters prior to seeking review at the AAT. These include where the Secretary made a decision to:

- grant, or to refuse to grant, an issuing body an exemption from needing the relevant airport operator's approval to issue an airport specific ASIC to a person under regulation 6.27A; or
- refuse to approve the issuing of an ASIC; or
- approve the issuing of an ASIC subject to a condition; or
- give the issuing body for an ASIC a direction under subregulation 6.31(3); or
- direct the suspension of an ASIC; or
- refuse to set aside the cancellation of an ASIC under regulation 6.43B or 6.43C; or
- set aside the cancellation of an ASIC subject to a condition under regulation 6.43D.

The ability for an ASIC applicant/holder to re-seek the Secretary's review of certain decisions is broadly consistent with the reconsideration mechanism in the Maritime Regulations and will provide ASIC applicants and holders an additional opportunity to present their case for reconsideration prior to applying to the AAT for the matter to be reconsidered.

However, this measure will not be extended to decisions in relation to criminal intelligence assessments, mirroring the approach taken for Australian Security Intelligence Organisation's security assessments for ASIC and MSIC applicants/holders. ASIC and MSIC holders have unsupervised access to the most secure areas of Australia's airports, seaports and offshore facilities, as such, the regulatory amendments will greatly assist in preventing the use of these areas in connection to serious crime. Not allowing criminal intelligence assessments to be reconsidered by the Secretary is proportionate given the highly sensitive nature of the

information and the need for its potential protection under a public interest immunity claim, while still providing applicants/holders with the ability to seek review of a decision regarding a criminal intelligence assessment before the AAT.

The measure promotes the rights in Articles 2(3) and 14 by ensuring that persons have a reasonable opportunity to present their case.

Right to Privacy

Article 17 of the ICCPR provides:

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence. The proposed amendments engage Article 17 by amending subsections 13(4A) and 14(6) of the AusCheck Regulations, to provide that an issuing body can provide personal information to ACIC for the purposes of obtaining a criminal intelligence assessment, and that ACIC can provide a criminal intelligence assessment on an individual to an issuing body, to confirm the person's eligibility to hold an ASIC or an MSIC. To the extent that this measure limits the right to privacy, it is reasonable and proportionate, as the provisions ensure that an issuing body is only made aware of the status of a person's criminal intelligence assessment, and not the details of that assessment. Being made aware of an adverse criminal intelligence assessment allows an issuing body to refuse or cancel an ASIC or MSIC. This is intended to minimise the risk of aviation or maritime transport being used in connection with serious and organised crime. To the extent that the measures limit a person's right to privacy, the measures are necessary to prevent a person with an adverse criminal intelligence assessment from having access to secure areas of airports, seaports and offshore facilities.

Appropriate safeguards on personal information collected under these measures are provided for through the *Privacy Act 1988* (Privacy Act). All personal information collected and held by the Government and issuing bodies must adhere to the Australian Privacy Principles (APPs) as set out under the Privacy Act. Specifically, the proposed amendments apply APP 6.2(b) *the secondary use or disclosure of the personal information is required or authorised by or under an Australian law or a court/tribunal order*. In effect, this means the regulatory amendments will apply this exception to the prohibition on use or disclosure of information where a disclosure is required or authorised by Australian law. However, the personal information the Secretary must disclose to issuing bodies under the amendments made to AusCheck Regulations will also be AusCheck scheme personal information (as defined in subsection 4(1) of the AusCheck Act). The use and disclosure of AusCheck scheme personal information is subject to even more stringent safeguards under sections 13, 14 and 15 of the AusCheck Act.

As an APP entity, failure to comply with privacy obligations can have serious legal, financial and reputational consequences for the Department of Home Affairs (the Department). The Office of the Australian Information Commissioner (OAIC) has the power to seek court enforced fines of up to \$2.1 million for serious or repeated interferences with a person's privacy. The Privacy Commissioner also has a range of other powers, including the power to make a determination that the Department contravened the Privacy Act. These determinations are publically available on the OAIC's website and can therefore cause reputational harm. The Privacy Commissioner also has the power to conduct privacy assessments and publish the findings of these assessments on the OAIC's website.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights, and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective.

The Honourable Karen Andrews MP, Minister for Home Affairs