

REPLACEMENT EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs

AusCheck Act 2007

Aviation Transport Security Act 2004

Maritime Transport and Offshore Facilities Security Act 2003

Transport Security Legislation Amendment

(Criminal Intelligence Threshold) Regulations 2023

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 centralised criminal history, criminal intelligence, security, and other background checks on individuals in relation to aviation and maritime security.

This replacement explanatory statement provides further clarity regarding the meaning of the term ‘serious crime’, used within the *Transport Security Legislation Amendment (Criminal Intelligence Threshold) Regulations 2023* (the Amendment Regulations).

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 *Transport Security Amendment (Serious Crime) Act 2021* (Serious Crime Act) amended the Aviation Act and the Maritime 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.

Overview of the *Transport Security Legislation Amendment (Criminal Intelligence Threshold) Regulations 2023*

The Amendment Regulations introduce a threshold for a high risk criminal intelligence assessment, issued by the Australian Criminal Intelligence Commission (ACIC), in relation to the background check for aviation and maritime security identification card (ASIC and

MSIC) holders or applicants. The measure completes the implementation of the amendments made by the Serious Crime Act.

The Amendment Regulations amend the Aviation Regulations, the Maritime Regulations and the AusCheck Regulations to introduce the threshold for high risk criminal intelligence assessments into the ASIC and MSIC schemes and the AusCheck background checking scheme.

The Serious Crime Act introduced a legislative authority for the Australian Criminal Intelligence Commission (ACIC) to conduct criminal intelligence assessments, and for such assessments to be incorporated as part of the ASIC and MSIC background check.

The existing threshold for making an adverse criminal intelligence assessment under section 36A of the *Australian Crime Commission Act 2002* (the ACC Act) requires clarification to ensure that an adverse criminal intelligence assessment cannot be found to be invalid.

The Amendment Regulations establish a clear threshold, which ensures an ASIC or MSIC cannot be issued, or must be cancelled, if an adverse criminal intelligence assessment leads the Chief Executive Officer (CEO) of the ACIC to reasonably believe that such action is necessary or desirable to prevent the use of aviation, maritime transport, or offshore facilities, in connection with serious crime. This measure provides direction for the ACIC when considering issuing adverse criminal intelligence assessments as well as clarity for ASIC and MSIC holders and applicants regarding the threshold that will be applied. This will ensure the value of conducting criminal intelligence assessments on ASIC and MSIC applicants and holders, and to also maintain the integrity of the ASIC and MSIC cancellation and refusal frameworks.

ASICs and MSICs are identification cards that confirm the holder has passed a background check and meets the minimum security requirements to remain unsupervised in an aviation or maritime security zone. The background check is comprised of:

- an identity check;
- a criminal history check;
- a national security assessment;
- a criminal intelligence assessment; and,
- where required, an immigration check.

Applicants or holders with an adverse national security assessment, criminal history check or criminal intelligence assessment cannot be issued with or hold an ASIC or MSIC. Criminal intelligence assessments only apply to card holders or applicants who applied for an ASIC or MSIC on or after 22 June 2022.

Amendments to the ACC Act made by the Serious Crime Act, provide the authority for the ACIC to conduct criminal intelligence assessments, and for such assessments to be incorporated as part of the ASIC and MSIC background check.

The Regulations introduce a ‘high risk criminal intelligence assessment’ threshold. This is defined as an adverse criminal intelligence assessment that indicates the person issuing the assessment reasonably believes that it is necessary or desirable to prevent the individual from being an ASIC or MSIC holder due to the threat they present to aviation, maritime transport or offshore facilities because the individual may commit a serious and organised crime or will assist another person to commit a serious and organised crime.

Introducing this threshold creates a requirement for the person issuing the assessment to reasonably believe that the person should be prevented from holding an ASIC or an MSIC because it is necessary and desirable to prevent the use of either aviation, maritime transport or an offshore facility in connection with serious crime. That is, it creates a nexus between the relevant criminal information of the person and the likelihood of that person using their criminal connections to commit serious crime if they were to be issued with or maintain an ASIC or an MSIC. The introduction of the threshold will reduce ambiguity around when it is appropriate to determine that an individual should be prevented from holding an ASIC or an MSIC.

The reference to ‘serious crime’ within the definition of ‘high risk criminal intelligence assessment’ is not defined in the Amendment Regulations and therefore takes its ordinary meaning, which can be ascertained through its context.

In this context, the term ‘serious crime’ is intended to operate broadly within the definition of ‘high risk criminal intelligence assessment’, and particularly in relation to preventing the use of aviation, maritime transport or an offshore facility in connection with serious crime. The expression ‘serious crime’ is intended to be left to take on its ordinary meaning, contextualised by the reference occurring in the context of the ACIC issuing an adverse criminal intelligence assessment about matters of aviation and maritime security – rather than establishing a prescriptive definition in the legislation that may not be sufficiently flexible to deal with complex and evolving threats.

An ‘adverse criminal intelligence assessment’ is defined in section 4 of the AusCheck Regulations to have the same meaning as in section 36A of the ACC Act. An ‘adverse criminal intelligence assessment’ is defined in the ACC Act to relevantly mean a ‘criminal intelligence assessment’, which in turn is defined in section 4 of the ACC Act, and includes an assessment as to whether there is intelligence or information to suggest that the person may commit or assist with committing a serious and organised crime. ACIC will then consider whether that adverse criminal intelligence assessment meets the threshold for a high risk criminal intelligence assessment under the AusCheck Regulations, being whether preventing the person from holding the relevant card is necessary or desirable to prevent the use of that asset in connection with serious crime.

As a result, the Secretary of the Department of Home Affairs will receive a ‘high risk criminal intelligence assessment’ where the ACIC has issued an ‘adverse criminal intelligence assessment’ and the individual issuing such an assessment reasonably believes that preventing an applicant for or a holder of an ASIC or MSIC from holding either an ASIC or MSIC is necessary and desirable to prevent the use of aviation, maritime transport or an offshore facility in connection with serious crime.

The Amendment Regulations also amend the Aviation and Maritime Regulations to provide that an issuing body not issue an ASIC or an MSIC unless they have been notified by the Secretary of the Department of Home Affairs (the Department) in writing that the Department has not received an adverse criminal intelligence assessment in relation to an individual that indicates the person issuing the assessment reasonably believes that preventing the person from holding an ASIC or an MSIC is necessary or desirable to prevent the use of aviation, maritime transport or offshore facilities in connection with serious crime.

Further, the Regulations amend the Aviation and Maritime Regulations to provide that an issuing body cancel an ASIC or an MSIC if notified by the Secretary of the Department in writing that the Department has received an adverse criminal intelligence assessment in relation to an individual that indicates the person issuing the assessment reasonably believes that preventing the person from holding an ASIC or an MSIC is necessary or desirable to prevent the use of aviation, maritime transport or offshore facilities in connection with serious crime.

ASIC and MSIC holders have unsupervised access to the most secure areas of Australia’s airports, seaports and offshore facilities, as such, criminal intelligence assessments can greatly assist in preventing the use of these areas in connection to serious crime.

The measures in the Regulations provide clear direction for the ACIC when considering giving a high risk criminal intelligence assessment as well as providing clarity for ASIC and MSIC holders and applicants regarding the threshold that will be applied and actions that need to be taken consequent to the issuance of a high risk criminal intelligence assessment. Applicants for an ASIC or an MSIC have the right to seek merits review at the Administrative Appeals Tribunal (AAT). Providing a clear threshold for determining whether an individual should be prevented from holding an ASIC or an MSIC ensures a clear direction is also available for merits review and assists to maintain the integrity of the ASIC and MSIC frameworks.

The amendments to the AusCheck Regulations will also require the Secretary of the Department to advise the body issuing an ASIC or an MSIC whether or not the Department has received a high risk criminal intelligence assessment in respect of an applicant or holder of an ASIC or an MSIC. An issuing body must also notify the Department where they decide not to issue an ASIC or an MSIC even where the Department has not been given a high risk criminal intelligence assessment in relation to the individual.

Consultation

Stakeholder consultation across the aviation, maritime and offshore oil and gas sectors, and with relevant government agencies, was undertaken on the development, introduction and implementation of the Serious Crime Act, including in relation to criminal intelligence assessments. Further consultation on clarifying the threshold for an adverse criminal intelligence assessment was conducted with the ACIC and the Attorney-General's Department.

Other matters

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

The Office of Impact Assessment (OIA) has been consulted in relation to the making of the Instrument. OIA has advised that an Impact Analysis is not required (Reference Number: OBPR 21-01043).

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

The Amendment Regulations commence on the day after registration on the Federal Register of Legislation.

Details of the Amendment Regulations are set out in Attachment A.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Amendment Regulations engage human rights, and to the extent that the Amendment Regulations may limit human rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective. A copy of the Statement 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 *Transport Security Legislation Amendment (Criminal Intelligence Threshold) Regulations 2023*

Section 1 – Name

Section 1 provides that the name of the legislative instrument is the *Transport Security Legislation Amendment (Criminal Intelligence Threshold) Regulations 2023* (Amendment Regulations).

Section 2 – Commencement

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

Subsection 2(1) provides that each provision of the instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

The guiding note immediately below the table covered by 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.

The commencement of the Amendment Regulations completes the framework and mechanism for the Australian Criminal Intelligence Commission to make an adverse criminal intelligence assessment in relation to an individual who is the subject of an AusCheck background check that requires a criminal intelligence assessment to be conducted.

Section 3 – Authority

Section 3 provides that the Amendment Regulations are made under the *AusCheck Act 2007*, the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*.

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 relevant Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the relevant Act. In addition, paragraph 8(1)(ba) of the AusCheck Act provides a broad discretion for the making of regulations with respect to the conduct of background checks in relation to particular individuals under the AusCheck scheme.

Section 4 – Schedules

Section 4 provides that each instrument specified in a schedule to this instrument would be amended or repealed as set out in this instrument and any other item in a schedule to this instrument has effect according to its terms. There is one Schedule to the Amendment Regulations.

Schedule 1—Amendments

Part 1—Amendments

AusCheck Regulations 2017

Items 1 to 5 of Schedule 1 to the Amendment Regulations amend the AusCheck Regulations to clarify the threshold for giving criminal intelligence assessments as an element of a background check of an individual in connection with the individual being an applicant for, or holder of, an ASIC or MSIC.

Item 1 – Section 4

Item 1 inserts new definitions of *high risk criminal intelligence assessment* and *offshore facility* into section 4 of the AusCheck Regulations.

High risk criminal intelligence assessment is defined, in relation to an individual, to mean an adverse criminal intelligence assessment that indicates the person issuing the assessment reasonably believes:

- that preventing the individual holding an ASIC is necessary or desirable to prevent the use of aviation in connection with serious crime if the individual is an applicant for, or a holder of, an ASIC; or
- that preventing the individual holding an MSIC is necessary or desirable to prevent the use of maritime transport or an offshore facility in connection with serious crime if the individual is an applicant for, or a holder of, an MSIC.

“Reasonably believes”

The ‘reasonable belief’ referred to in this definition effectively requires that there is a reasonable basis for the person issuing the assessment believing that it is necessary or desirable to prevent the use of aviation, or maritime transport or an offshore facility, in

connection with serious crime if the individual is an applicant for, or a holder of, an ASIC or MSIC as the case may be. There must be objective facts from reliable and credible sources, including reasonable inferences drawn from those facts, which this belief is formed.

It also requires that the belief itself is reasonable – that another person with the same information, or criminal intelligence, as the person issuing the assessment, would form the same view. This threshold is a prerequisite before the power to give an adverse criminal intelligence assessment can be exercised by the person. As an example, the person issuing the assessment may be in possession of criminal intelligence about an applicant for, or a holder of, an ASIC or MSIC.

Depending on the nature and content of the criminal intelligence, being in possession of such information from a reliable and credible source might provide a basis for the person issuing the assessment's formulation of considering, or holding a particular view in relation to the individual, on 'reasonable grounds' for the purposes of this definition.

'Reasonably believing' something is a common threshold for the state of mind required before a decision maker takes a particular action. This threshold imposes a requirement that there be reasonable grounds for 'believing' that it is necessary or desirable to prevent the use of aviation, or maritime transport or an offshore facility, in connection with serious crime if the individual is an applicant for, or a holder of, an ASIC or MSIC. 'Reasonably believing' is a state of mind that requires that the person issuing the assessment must believe that the relevant facts, or 'criminal intelligence', exist and that the criminal intelligence is adverse in relation to the person, and that this belief is objectively reasonable. Therefore the grounds upon which the belief is based must be capable of inducing a similar belief in a reasonable person in the position of the person issuing the assessment.

Conducting criminal intelligence assessments.

In relation to the AusCheck Regulations, under the *Australian Crimes Commission Act 2002* the Australian Criminal Intelligence Commission (ACIC) has the function of conducting criminal intelligence assessments for purposes related to background checks required or permitted by the *Aviation Transport Security Act 2004*, the *Maritime Transport and Offshore Facilities Security Act 2003* or regulations made under those Acts.

An *adverse criminal intelligence assessment* is a term defined in section 36A of the *Australian Crimes Commission Act 2002* (ACC Act) to mean 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; 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.

The introduction of the definition of *high risk criminal intelligence assessment* in the AusCheck Regulations is intended to make clear that an *adverse criminal intelligence assessment* issued by the ACIC in relation to an applicant for, or holder of, an ASIC or MSIC indicates the person issuing the assessment reasonably believes that preventing the individual from holding an ASIC or MSIC, as the case may be, is necessary or desirable to prevent the use of aviation, or maritime transport or an offshore facility, in connection with serious crime.

“Serious crime”

The reference to ‘serious crime’ within the definition of ‘high risk criminal intelligence assessment’ is not defined in the Amendment Regulations and therefore takes its ordinary meaning, which can be ascertained through its context.

The expression ‘serious crime’ is intended to take on its ordinary meaning, contextualised by the reference occurring following the ACIC issuing an adverse criminal intelligence assessment (outlined above) about matters of aviation and maritime security – rather than establishing a prescriptive definition in the legislation that may not be sufficiently flexible to deal with complex and evolving threats.

A ‘criminal intelligence assessment’ within the meaning of ‘adverse criminal intelligence assessment’ is defined in section 4 of the ACC Act and includes an assessment as to whether there is intelligence or information to suggest that the person may commit or assist with committing a serious and organised crime. Section 4 of the ACC Act defines ‘serious and organised crime’ to mean offences that involve 2 or more offenders and substantial planning and organisation; involves (or ordinarily involves) the use of sophisticated methods and techniques and is committed (or ordinarily committed) in conjunction with other offences of a like kind and is an offence of a particular kind of specified offence. ACIC will then consider whether that adverse criminal intelligence assessment meets the threshold for a high risk criminal intelligence assessment under the AusCheck Regulations, being whether preventing the person from holding the relevant card is necessary or desirable to prevent the use of that asset in connection with serious crime.

Further context on the meaning of ‘serious crime’ can also be found in Schedule 1 to the *Aviation Transport Security Regulations 2005* and *Maritime Transport Security and Offshore Facilities Security Regulations 2003*. Both of the schedules were (introduced by the *Transport Security Legislation Amendment (Serious Crime) Regulations 2001* to give effect to amendments introduced by the *Transport Security Amendment (Serious Crime) Act 2021* for the purposes of preventing the use of aviation, maritime transport or offshore facilities in connection with serious crime. The schedules set out the aviation-security-relevant offences and the maritime-security-relevant offences.

In practice if the serious or organised crime considered under the ACC Act is not an offence that is listed in the relevant schedule 1, the ACIC will need to consider whether the serious crime is connected with aviation, maritime transport or offshore facilities.

Offshore facility is defined to have the same meaning as in the Maritime Act. Section 17A of the Maritime Act defines *offshore facility* to be a facility, located in an offshore area that is used in the extraction of petroleum from the seabed or its subsoil with equipment on, or forming part of, the facility, and includes:

- any structure, located in the offshore area, used in operations or activities associated with, or incidental to, activities of that kind; and
- any vessel, located in the offshore area, used in operations or activities associated with, or incidental to, activities of that kind.

The purpose and effect of the amendments made by item 1 is to include a definition for a term introduced by this instrument and to make clear that the term *offshore facility* has the same meaning as in the relevant Act.

Item 2 – Subsection 13(4A)

Item 2 amends section 13 of the AusCheck Regulations to repeal and replace subsection 13(4A) to deal with advice relating to a *high risk criminal intelligence assessment*. Currently, subsection 13(4A) provides 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.

New subsection 13(4A) provides that the Secretary must advise the issuing body whether or not the Department has been given a high risk criminal intelligence assessment of the individual.

The purpose and effect of the amendment by item 2 is to reflect what occurs operationally with respect to the Department receiving assessments, rather than them being given to the Secretary, and as a consequence of the amendment made by item 1, includes a reference to the new defined term *high risk criminal intelligence assessment*.

It should be noted that while new subsection 13(4A) requires the Secretary to advise the issuing body whether or not the Department has been given a high risk criminal intelligence assessment of the individual, it does not include a requirement to inform the individual of that advice.

This is because an obligation to provide advice to an individual with respect to the Department of Home Affairs having received an *adverse criminal intelligence assessment* is already imposed by subsection 36D(1) of the *Australian Crime Commission Act 2002* (ACC Act).

Subsection 36D(1) of the ACC Act requires that the Commonwealth agency, in this case the Department of Home Affairs, that has been given an *adverse criminal intelligence assessment* by the Australian Criminal Intelligence Commission under subsection 36C(1) must, unless a

certificate under subsection 36C(4) has been made, provide written notice of the assessment to the person.

In effect, this means that the Department of Home Affairs is already required by the ACC Act to provide written notice of a *high risk criminal intelligence assessment* to the person who is the subject of that advice if they are an applicant for, or holder of, an ASIC or MSIC and undergoing a background check for the purpose of the ASIC or MSIC schemes. As a consequence, including a corresponding provision that imposes an obligation under the AusCheck Regulations would in effect be duplicative of an overarching obligation in the ACC Act, and an unnecessary additional regulatory and administrative burden.

Protections for personal information

Appropriate safeguards on personal information collected under this measure 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 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 this amendment, and other amendments in the Amendment Regulations, 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 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.

New subsection 13(4A) engages the exception in Australian Privacy Principle (APP) 6.2(b), which allows for secondary use or disclosure of personal information which is required or authorised by law. In this instance, the Secretary would be disclosing a fact about the

existence of sensitive information to the issuing body, rather than disclosing the sensitive information itself.

The purpose of this amendment, and other amendments made by the Amendment Regulations, is to eliminate the possibility that access to secure areas in air or sea ports or on offshore facilities can be used by ASIC or MSIC holders in connection with serious crime. Giving advice to a issuing body that a person has a *high risk criminal intelligence assessment* is therefore reasonable, necessary and proportionate to achieving this legitimate aim, paying due regard to the nature of the relevant information and the overall objectives of the scheme.

Personal information collected by the discrete area within the Department of Home Affairs (the Department) that performs the AusCheck function (AusCheck), including the outcome of an element of a background check, is protected under the *AusCheck Act 2007* (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 Privacy Act.

Privacy Act and AusCheck Act

The Privacy Act applies in relation to the provisions amended, substituted or inserted by this item, and items 5, 8 and 12. However, the effect of these items is that disclosure of personal information by 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 6.2 (b) 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 in items 5, 8, 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 items 5, 8, 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 a issuing body in accordance with the amended regulations as set out in items 5, 8, 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, while this item and items 3, 8, 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 AusCheck provides advice about a background check for an individual for critical infrastructure 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 and *adverse security assessment* has been given in relation to the person must be given to a issuing body, thereby providing the relevant safeguards.

New subsection 13(4A) makes clear that the Secretary must advise the issuing body whether or not the Department has been given a *high risk criminal intelligence assessment* of the individual.

In effect, all that the Secretary is required to provide is advice that there is or is not a *high risk criminal intelligence assessment* in relation to the applicant. For example, there is no requirement that the Secretary must set out the nature of the *high risk criminal intelligence*

assessment. Therefore, subsection 13(4A) operates as an effective safeguard to protect an individual's privacy in relation to their criminal intelligence assessment.

Further, current subsection 13(4) provides that, if the Secretary advises the issuing body under subsection 13(2) that the individual has an *unfavourable criminal history*, the Secretary must inform the individual of that advice and the reasons for that advice. In effect, the individual would receive a list of offences that are the 'reasons' for the 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.

Item 3 – Subsection 14(6)

Item 3 amends section 14 of the AusCheck Regulations, which deals with advice relating to a *high risk criminal intelligence assessment*, to repeal and replace subsection 14(6). Currently subsection 14(6) provides that the Secretary must advise the issuing body for the ASIC or MSIC whether or not an adverse criminal intelligence assessment of the individual has been given to the Secretary.

New subsection 16(6) provides that the Secretary must advise the issuing body for the ASIC or MSIC whether or not the Department has been given a *high risk criminal intelligence assessment* of the individual.

Similar to the amendment by item 2 above, the purpose and effect of the amendment by item 3 reflects what occurs operationally with respect to the Department receiving assessments rather than them being given to the Secretary, and as a consequence of the amendment made by item 1, includes a reference to the new defined term *high risk criminal intelligence assessment*.

Item 4 – Subparagraph 23(b)(ia)

Item 4 amends paragraph 23(b) to repeal and replace subparagraph 23(b)(ia) as a consequence of the amendment by item 1.

Currently, subparagraph 23(b)(ia) operates to impose the obligation on an issuing body that if AusCheck undertakes a background check of an individual and the Secretary advises the issuing body under section 13 that an adverse criminal intelligence assessment of the individual has not been given to the Secretary, and the issuing body decides not to issue an ASIC or MSIC to the individual, the issuing body must inform the Secretary of that decision as soon as practicable after the decision is made.

New subparagraph 23(b)(ia) provides that the obligation on an issuing body is that if AusCheck undertakes a background check of an individual and the Secretary advises an issuing body under section 13 that a *high risk criminal intelligence assessment* of the individual has not been given to the Department, and the issuing body decides not to issue an ASIC or MSIC to the individual, the issuing body must inform the Secretary of that decision as soon as practicable after the decision is made.

The purpose and effect of the amendment to be made by item 4 is consequential to the amendment made by item 1, to include a reference to the new defined term *high risk criminal intelligence assessment*.

Item 5 – At the end of Part 5

This item creates new Division 7 in Part 5 of the AusCheck Regulations to contain new section 42, which deals with the application provisions for amendments made by the Amendment Regulations, as they relate to the AusCheck Regulations.

New section 42

New subsection 42(1) operates to provide that the amendments made by section 13, 14 and 23 of the Amendment Regulations apply in relation to any background check for which an application is made on or after the commencement of the Amendment Regulations.

New subsection 42(2) operates to provide that the amendments made by section 13, 14 and 23 of the Amendment Regulations also apply in relation to any background check of an individual in circumstances where:

- the application for a background check is made prior to the commencement of the Amendment Regulations; and
- the Secretary does not, before the commencement of the Amendment Regulations, advise the relevant issuing body whether or not an *adverse criminal intelligence assessment* in relation to an individual has been given to the Secretary.

This subsection applies in circumstances where an application for a background check had been made in relation to an individual before the Amendment Regulations commenced, but had either not been completed, or the outcome of that background check was otherwise not yet notified to the issuing body, at the time of commencement of the Amendment Regulations.

This application provision ensures that sections 13, 14 and 23 of the AusCheck Regulations apply, as amended, in relation to both:

- any background check where the application was made after the commencement of the Amendment Regulations; and
- any background check where the application was made before commencement but the Secretary had not yet advised the relevant issuing body whether or not an adverse criminal intelligence assessment of the individual has been given to the Secretary.

Criminal intelligence assessments came into effect from 22 June 2022, but as yet the ACIC has not issued an adverse criminal intelligence assessment. Applicants and cardholders

consented to a criminal intelligence assessment being conducted, if required, when applying for an ASIC or MSIC from this date.

This section makes clear that for an application for a background check made after the commencement of the Amendment Regulations, the amendments made to sections 13, 14 and 23 apply to any *adverse criminal assessment* given by the ACIC in relation to that person.

This is intended to make clear to any applicants who have made an application for a background check that the amendments made to section 13, 14 and 23 apply to any adverse criminal intelligence assessment given by the ACIC in relation to that person either after the commencement of the Amendment Regulations or after 22 June 2022, that has not yet been completed at the time the Amendment Regulations come into effect, or where the outcome of the background check had not been provided to the issuing body. This requires the Secretary to advise the issuing body whether or not the Department has been given a high risk criminal intelligence assessment of the individual, and is a completion of the measures introduced by Schedule 2 to the *Transport Security Legislation Amendment (Serious Crime) Regulations 2022*.

Aviation Transport Security Regulations 2005

Items 6 to 8 of Schedule 1 to the Amendment Regulations are consequential amendments to the Aviation Regulations to reflect the amendments to the AusCheck scheme that introduce the concept of a *high risk criminal intelligence assessment* being given in relation to an individual in connection with the individual being an applicant for, or holder of, an ASIC.

Item 6 – Paragraph 6.28(1)(ea)

Item 6 amends subregulation 6.28(1), which deals with issuing ASICs, to repeal and replace paragraph 6.28(1)(ea). Currently, subject to subregulations 6.28(3), (4), (4A) and (4D) and regulations 6.29, 6.31 and 6.35, paragraph 6.28(1)(ea) operates to provide that in conjunction with the requirements set out in paragraphs 6.28(1)(a), (b), (c), (d), (e) and (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* of the person has not been given to the Secretary.

New paragraph 6.28(1)(ea) replicates the intent of current paragraph 6.28(1)(ea) except to the extent that an issuing body may issue an ASIC to a person only if the issuing body has been notified in writing by the Secretary that the Department has not been given an *adverse criminal intelligence assessment* that indicates the person issuing the assessment reasonably believes that preventing the person to be issued an ASIC from holding an ASIC is necessary or desirable to prevent the use of aviation in connection with serious crime.

As noted in respect of the amendment made by item 1 above, appropriate safeguards on personal information is provided for through the Privacy Act. In addition, the personal information the Secretary must disclose to an issuing body under this provision 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.

The purpose and effect of this amendment is to reflect the amendment made by item 1 above, and to reflect what occurs operationally with respect to the Department receiving assessments rather than them being given to the Secretary.

Item 7 – Paragraph 6.43(2)(bb)

Item 7 amends subregulation 6.43(2), which deals with when an ASIC must be cancelled, to repeal and replace paragraph 6.43(2)(bb). Currently, paragraph 6.43(2)(bb) operates to provide that an issuing body must immediately cancel an ASIC issued by the issuing 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.

New paragraph 6.43(2)(bb) would replicate the intent of current paragraph 6.43(2)(bb), except to the extent that an issuing body must immediately cancel an ASIC issued by the issuing body if the Secretary has notified the issuing body in writing that the Department has been given an *adverse criminal intelligence assessment* that indicates the person issuing the assessment reasonably believes that preventing the holder from holding an ASIC is necessary or desirable to prevent the use of aviation in connection with serious crime.

The purpose and effect of this amendment is to reflect the amendment made by item 1 above, and to reflect what occurs operationally with respect to the Department receiving assessments rather than them being given to the Secretary.

Item 8 – At the end of Part 10

This item creates new Division 23 in Part 10 of the Aviation Regulations to contain new regulation 10.54, which deals with the application provisions for amendments made by the Amendment Regulations, as they relate to the Aviation Regulations.

New subregulation 10.54(1) provides that the amendments of regulation 6.28 made by Schedule 1 to the Amendment Regulations 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 that Schedule.

New subregulation 10.54(2) provides that the amendments of regulation 6.28 made by Schedule 1 to the Amendment Regulations also apply in relation to the issue of an ASIC if:

- the application is made before the commencement of Schedule 1 of the Amendment Regulations; and
- the Secretary does not, before the commencement of Schedule 1 of the Amendment Regulations, notify the issuing body mentioned in regulation 6.28 in writing whether or not an *adverse criminal intelligence assessment* of the person who is the subject of the assessment has been given to the Secretary.

New subregulation 10.54(3) provides that the amendments of regulation 6.43 made by Schedule 1 to the Amendment Regulations also apply in relation to any ASIC issued before or after the commencement of Schedule 1 of the Amendment Regulations.

The purpose and effect of this application provision is to make clear to any applicants who have made an application for a background check that the amendments made to regulations 6.28 and 6.43 apply to any *adverse criminal intelligence assessment* given by the ACIC in relation to that person either after the commencement of the Amendment Regulations or after 22 June 2022 that has not yet been completed at the time the Amendment Regulations come into effect, or where the outcome of the background check had not been provided to the issuing body. This would require the Secretary to advise the issuing body whether or not the Department has been given an adverse criminal intelligence assessment of the individual, and is a completion of the measures introduced by Schedule 2 to the *Transport Security Legislation Amendment (Serious Crime) Regulations 2022*.

Criminal intelligence assessments came into effect from 22 June 2022, but as yet the ACIC has not issued an adverse criminal intelligence assessment. Applicants and cardholders consented to a criminal intelligence assessment being conducted, if required, when applying for an ASIC or MSIC from this date.

This regulation also makes clear that for an application for a background check made after the commencement of the Amendment Regulations that the amendments made to regulations 6.28 and 6.43 apply to any *adverse criminal assessment* given by the ACIC in relation to that person.

Maritime Transport and Offshore Facilities Security Regulations 2003

Items 9 to 12 of Schedule 1 to the Amendment Regulations would make consequential amendments to the Maritime Regulations to reflect the amendments to the AusCheck scheme that introduce the concept of a *high risk criminal intelligence assessment* being given in relation to an individual in connection with the individual being an applicant for, or holder of, an MSIC.

Item 9 – Paragraph 6.08C(1)(da)

Item 9 amends subregulation 6.08C(1), which deals with the issuing of MSICs, to repeal and replace paragraph 6.08C(1)(da). Currently, paragraph 6.08C(1)(da) operates to provide that, in conjunction with the criteria set out in paragraphs 6.08C(1)(a), (b), (c), (d) and (e), 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* of the person has not been given to the Secretary.

New paragraph 6.08C(1)(da) would replicate current paragraph 6.08C(1)(da), except to the extent that an issuing body would have the discretion to issue an MSIC to a person if the issuing body has been notified in writing by the Secretary that the Department has not been given an *adverse criminal intelligence assessment* that indicates the person issuing the assessment reasonably believes that preventing the person to be issued an MSIC from

holding an MSIC is necessary or desirable to prevent the use of maritime transport or an offshore facility in connection with serious crime.

As above, appropriate safeguards on personal information is provided for through the Privacy Act. In addition, the personal information the Secretary must disclose to an issuing body under this provision 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.

This is a consequential amendment that is necessary to reflect the amendment made by item 1 above.

Item 10 – Paragraph 6.08D(1)(b)

Item 10 amends subregulation 6.08D(1), which deals with when a disqualifying notice must be issued to a person, to repeal and replace paragraph 6.08D(1)(b).

Currently, paragraph 6.08D(1)(b) operates to provide that regulation 6.08D applies if, as a result of a background check, an adverse criminal intelligence assessment of an applicant for an MSIC is given to the Secretary.

New paragraph 6.08D(1)(b) would replicate current paragraph 6.08D(1)(b), except to the extent that regulation 6.08D would apply if as a result of a background check, the Department is given an *adverse criminal intelligence assessment* that indicates the person issuing the assessment reasonably believes that preventing an applicant for an MSIC holding an MSIC is necessary or desirable to prevent the use of maritime transport or an offshore facility in connection with serious crime.

This is a consequential amendment that is necessary to reflect the amendment made by item 1 above.

Item 11 – Paragraph 6.08M(1)(cb)

Item 11 amends subregulation 6.08M(1), which deals with the circumstances in which an MSIC must immediately be cancelled, to repeal and replace paragraph 6.08M(1)(cb).

Current paragraph 6.08M(1)(cb) operates to provide that an issuing body must immediately cancel an MSIC 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.

New paragraph 6.08M(1)(cb) would replicate current paragraph 6.08M(1)(cb), except to the extent that it provides that an issuing body must immediately cancel an MSIC issued by the body if the Secretary has notified the issuing body in writing that the Department has been given an adverse criminal intelligence assessment that indicates the person issuing the assessment reasonably believes that preventing the holder from holding an MSIC is necessary

or desirable to prevent the use of maritime transport or an offshore facility in connection with serious crime.

This is a consequential amendment that is necessary to reflect the amendment made by item 1 above.

Item 12 – At the end of Schedule 2

This item creates new Part 14 in Schedule 2 of the Maritime Regulations to contain new clause 122, which deals with the application provisions for amendments made by the Amendment Regulations, as they relate to the Maritime Regulations.

New clause 122

New subclause 122(1) provides that the amendments of regulations 6.08C and 6.08D made by Schedule 1 to the Amendment Regulations 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 that Schedule.

New subclause 122(2) provides that the amendments of regulations 6.08C and 6.08D made by Schedule 1 to the Amendment Regulations apply in relation to any MSIC if:

- the application for the background check on the MSIC applicant is made before the commencement of that Schedule; and
- the Secretary does not, before the commencement time, notify the issuing body mentioned in regulation 6.08C or 6.08D in writing whether or not an *adverse criminal intelligence assessment* of the person who is the subject of the assessment has been given to the Secretary.

This subclause requires that both elements are met for the amendments to regulation 6.08C or 6.08D of the Amendment Regulations to apply. This occurs in circumstances where an application for a background check had been made in relation to an individual before the time of commencement of the Amendment Regulations but had either not been completed, or the outcome of that background check was otherwise not yet notified to the issuing body, at the time of commencement of the Amendment Regulations.

The purpose and effect of this application provision is to make clear to any applicants who have made an application for a background check that the amendments made to paragraph 6.08C and 6.08D apply to any *adverse criminal intelligence assessment* given by the ACIC in relation to that person either after the commencement of the Amendment Regulations or after 22 June 2022 that has not yet been completed at the time the Amendment Regulations come into effect, or where the outcome of the background check had not been provided to the issuing body. This would require the Secretary to advise the issuing body whether or not the Department has been given an adverse criminal intelligence assessment of the individual, and is a completion of the measures introduced by Schedule 2 to the *Transport Security Legislation Amendment (Serious Crime) Regulations 2022*.

Criminal intelligence assessments came into effect from 22 June 2022, but as yet the ACIC has not issued an adverse criminal intelligence assessment. Applicants and cardholders consented to a criminal intelligence assessment being conducted, if required, when applying for an ASIC or MSIC from this date.

New subclause 122(3) provides that the amendments of regulation 6.08D made by Schedule 1 to the Amendment Regulations do not affect the validity of a disqualifying notice issued under subregulation 6.08D(2) before the commencement of the Amendment Regulations.

New subclause 122(4) provides that the amendments of regulation 6.08M made by Schedule 1 to the Amendment Regulations apply in relation to any MSIC issued before or after the commencement of Schedule 1 to the Amendment Regulations.

Replacement Statement of Compatibility with Human Rights

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

Transport Security Legislation Amendment (Criminal Intelligence Threshold) Regulations 2023

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*.

This replacement Statement of Compatibility with Human Rights provides further clarity regarding the meaning of the term ‘serious crime’, used within the *Transport Security Legislation Amendment (Criminal Intelligence Threshold) Regulations 2023*.

Overview of the Disallowable Legislative Instrument

The *Transport Security Legislation Amendment (Criminal Intelligence Threshold) Regulations 2023* (the Regulations) introduce a threshold for a high risk criminal intelligence assessment, issued by the Australian Criminal Intelligence Commission (ACIC), in relation to the background check for aviation and maritime security identification card (ASIC and MSIC) holders or applicants. The measure completes the implementation of the amendments made by the *Transport Security Amendment (Serious Crime) Act 2021* (Serious Crime Act).

The Regulations amend the *Aviation Transport Security Regulations 2005* (the Aviation Regulations), the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Maritime Regulations) and the *AusCheck Regulations 2017* (AusCheck Regulations) to introduce the threshold for high risk criminal intelligence assessments into the ASIC and MSIC schemes and the AusCheck background checking scheme.

ASICs and MSICs are identification cards that confirm the holder has passed a background check and meets the minimum security requirements to remain unsupervised in an aviation or maritime security zone. The background check is comprised of:

- an identity check;
- a criminal history check;
- a national security assessment;
- a criminal intelligence assessment; and,
- where required, an immigration check.

Applicants or holders with an adverse national security assessment, criminal history check or criminal intelligence assessment cannot be issued with or hold an ASIC or MSIC. Criminal intelligence assessments only apply to card holders or applicants who applied for an ASIC or MSIC on or after 22 June 2022.

Amendments to the *Australian Crime Commission Act 2002* (ACC Act) made by the Serious Crime Act, provide the authority for the ACIC to conduct criminal intelligence assessments, and for such assessments to be incorporated as part of the ASIC and MSIC background check.

The Regulations introduce a ‘high risk criminal intelligence assessment’ threshold. This is defined as an adverse criminal intelligence assessment that indicates the person issuing the assessment reasonably believes that it is necessary or desirable to prevent the individual from being an ASIC or MSIC holder due to the threat they present to aviation, maritime transport or offshore facilities because the individual may commit a serious and organised crime or will assist another person to commit a serious and organised crime.

The reference to ‘serious crime’ within the definition of ‘high risk criminal intelligence assessment’ is not defined in the Regulations and therefore takes its ordinary meaning, which can be ascertained through its context.

The expression ‘serious crime’ is intended to take on its ordinary meaning, contextualised by the reference occurring following the ACIC issuing an adverse criminal intelligence assessment about matters of aviation and maritime security – rather than establishing a prescriptive definition in the legislation that may not be sufficiently flexible to deal with complex and evolving threats.

A ‘criminal intelligence assessment’ within the meaning of ‘adverse criminal intelligence assessment’ is defined in section 4 of the ACC Act and includes an assessment as to whether there is intelligence or information to suggest that the person may commit or assist with committing a serious and organised crime. Section 4 of the ACC Act defines ‘serious and organised crime’ to mean offences that involve 2 or more offenders and substantial planning and organisation; involves (or ordinarily involves) the use of sophisticated methods and techniques and is committed (or ordinarily committed) in conjunction with other offences of a like kind and is an offence of a particular kind of specified offence. ACIC will then consider whether that adverse criminal intelligence assessment meets the threshold for a high risk criminal intelligence assessment under the AusCheck Regulations, being whether preventing the person from holding the relevant card is necessary or desirable to prevent the use of that asset in connection with serious crime.

Under s36A of the ACC Act, there is no threshold for when the ACIC can determine that information held by the ACIC on an applicant or cardholder should mean that they should be prevented from being issued or holding an ASIC or an MSIC. Introducing this threshold creates a requirement for the person issuing the assessment to reasonably believe that the person should be prevented from holding an ASIC or an MSIC because it is necessary and desirable to prevent the use of either aviation, maritime transport or an offshore facility in connection with serious crime. That is, it creates a nexus between the relevant criminal information of the person and the likelihood of that person using their criminal connections to commit serious crime if they were to be issued with or maintain an ASIC or an MSIC. The introduction of the threshold will reduce ambiguity around when it is appropriate to determine that an individual should be prevented from holding an ASIC or an MSIC.

The Regulations also amend the Aviation and Maritime Regulations to provide that an issuing body not issue an ASIC or an MSIC unless they have been notified by the Secretary of the Department of Home Affairs (the Department) in writing that the Department has not received an adverse criminal intelligence assessment in relation to an individual that indicates the person issuing the assessment reasonably believes that preventing the person from holding an ASIC or an MSIC is necessary or desirable to prevent the use of aviation, maritime transport or offshore facilities in connection with serious crime.

Further, the Regulations amend the Aviation and Maritime Regulations to provide that an issuing body cancel an ASIC or an MSIC if notified by the Secretary of the Department in writing that the Department has received an adverse criminal intelligence assessment in relation to an individual that indicates the person issuing the assessment reasonably believes that preventing the person from holding an ASIC or an MSIC is necessary or desirable to prevent the use of aviation, maritime transport or offshore facilities in connection with serious crime.

ASIC and MSIC holders have unsupervised access to the most secure areas of Australia's airports, seaports and offshore facilities, as such, criminal intelligence assessments can greatly assist in preventing the use of these areas in connection to serious crime.

The measures in the Regulations provide clear direction for the ACIC when considering giving a high risk criminal intelligence assessment as well as providing clarity for ASIC and MSIC holders and applicants regarding the threshold that will be applied and actions that need to be taken consequent to the issuance of a high risk criminal intelligence assessment. Applicants for an ASIC or an MSIC have the right to seek merits review at the Administrative Appeals Tribunal (AAT). Providing a clear threshold for determining whether an individual should be prevented from holding an ASIC or an MSIC ensures a clear direction is also available for merits review and assists to maintain the integrity of the ASIC and MSIC frameworks.

The amendments to the AusCheck Regulations will also require the Secretary of the Department to advise the body issuing an ASIC or an MSIC whether or not the Department has received a high risk criminal intelligence assessment in respect of an applicant or holder of an ASIC or an MSIC. An issuing body must also notify the Department where they decide not to issue an ASIC or an MSIC even where the Department has not been given a high risk criminal intelligence assessment in relation to the individual.

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 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 of 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 2011 Parliamentary Joint Committee on Law Enforcement *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime*.

The measure engages the right to work and right to non-discrimination, as the consequence of a high risk criminal intelligence assessment is that an issuing body is required to refuse an application for an ASIC or an MSIC, or cancel an existing ASIC or MSIC. This may result in an applicant being denied employment in certain jobs that require a person to hold an ASIC or an MSIC. The cancellation or denial is on the basis of the person's criminal history or likely criminal involvement and the reasonable belief that the individual's criminal information may have implications for the person's employment in security sensitive areas. 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. The limitation is also the least rights restrictive as it only prevents a person from working in these highly sensitive environments.

The vast majority of ASIC or MSIC holders do not appear in the ACIC's intelligence holdings and are not anticipated to be impacted by the introduction of the threshold. The introduction of the threshold in the Regulations will mean that only those subject to a high risk criminal intelligence assessment will have their ASIC or MSIC refused or cancelled.

To the extent that the threshold limits the opportunity for an individual to gain employment of their choosing and may discriminate against them on the basis of their criminal information or likely criminal activity, 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 an MSIC. The measures are reasonable, necessary and proportionate in safeguarding security controlled airports and security regulated seaports and offshore facilities 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 measure engages the right to an effective remedy in line with Article 2(3) of the ICCPR. The Aviation Regulations and the Maritime Regulations contain existing merits review schemes. To the extent that an individual claims that an adverse criminal intelligence assessment discriminates against them on the basis of their criminal information or likely criminal involvement, they have the right of appeal to the AAT.

The introduction of this threshold is an appropriate inclusion to ensure that there is a clear and unambiguous standard upon which a decision to refuse or cancel an ASIC or MSIC is made.

The amendments also engage the right to be equal before the courts and tribunals in Article 14(1) of the ICCPR. As stated above, high risk criminal intelligence assessments will only be issued if information held by the ACIC allows a person to issue an assessment where they reasonably believe the individual may or has committed a serious and organised crime or will assist another person to commit a serious and organised crime and as such, the person issuing the assessment reasonably believes that it is necessary or desirable to prevent the person from holding an ASIC or an MSIC. Individuals whose background check establishes a high risk 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 a high risk 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 a high risk adverse criminal intelligence assessment and is equal before the tribunal in relation to such a review.

The introduction of the threshold will not alter the existing arrangements for individuals to seek AAT review of an adverse criminal intelligence assessment.

Right to Privacy

Article 17 of the ICCPR provides:

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy,

(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. The measure engages Article 17 of the ICCPR by providing that the Secretary of the Department must advise issuing bodies whether or not the Department has been given a high risk criminal intelligence assessment in relation to an individual applying for or holding an ASIC or an MSIC, where the applicant has applied for a card on or after 22 June 2022. To the extent that this measure limits the right to privacy, it is reasonable, necessary and proportionate, as an issuing body is only made aware of the status of a person's high risk criminal intelligence assessment, and not the details of that assessment. Being made aware of a high risk criminal intelligence assessment requires an issuing body to refuse or cancel an ASIC or an MSIC. This is intended to minimise the risk of aviation, maritime transport or offshore facilities being used in connection with serious and organised crime. To the extent that the measure limits a person's right to privacy, the measure is necessary to prevent a person assessed to have an adverse criminal intelligence assessment from having access to secure areas of airports, seaports and offshore facilities. As such, the limitation is aimed at achieving a legitimate objective of ensuring that the Department is able to provide the issuing body with the relevant information to inform decision making on ASICs and MSICs.

Section 36D of the ACC Act sets out when individuals must be notified of adverse criminal intelligence assessments, and what information must be shared with the individual including the grounds for the assessment and information concerning the person's right to seek AAT review of an adverse criminal intelligence assessment. If the ACIC gives an adverse criminal intelligence assessment to a Commonwealth agency, such as the Department, then the agency must give written notice to the person, unless withholding the information is essential for security reasons. This existing measure promotes good privacy and transparency practices, which the introduction of the threshold will not alter.

Conclusion

The Disallowable Legislative Instrument engages 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 Clare O'Neil MP
Minister for Home Affairs