

EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

AusCheck Act 2007

AusCheck (Major National Event—2024 Association of Southeast Asian Nations—Australia Special Commemorative Summit) Declaration 2023

- 1 The *AusCheck Act 2007* (the AusCheck Act) establishes a background checking function within the Department of Home Affairs (the Department). The purpose of the AusCheck Act is to provide a regulatory framework for coordinating and conducting centralised criminal, security and other background and identity checking and for related purposes. These functions may be exercised by the Department in relation to *major national events*.
- 2 An event is a *major national event* for the purposes of the AusCheck Act when the Minister for Home Affairs makes a declaration, by legislative instrument, under subsection 5A(1) of that Act that a specified event is a major national event. The Minister cannot make such a declaration unless the Minister is satisfied that it is in the national interest that the Commonwealth be involved in the conduct and coordination of background checks in connection with the accreditation of individuals in relation to the event (see subsection 5A(2)). Under subsection 5A(3), Minister may also have regard to, among other things, the significance of the event, any risk assessment relating to the event and the potential impact of any security incident relating to the event on Australia's reputation, when making a declaration.
- 3 The AusCheck (Major National Event—2024 Association of Southeast Asian Nations-Australia Special Commemorative Summit) Declaration 2023 (instrument), made under subsection 5A(1) of the AusCheck Act and for the purposes of the AusCheck Act, declares the 2024 Association of Southeast Asian Nations (ASEAN)—Australia Special Commemorative Summit (2024 ASEAN—Australia Special Commemorative Summit) to be a major national event.
- 4 The 2024 ASEAN—Australia Special Commemorative Summit is a major foreign policy event comprising a meeting between the leaders of Australia, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam and Timor-Leste that will take place in Melbourne, Australia in March 2024. The major national event also includes proposed Guest of Government activities run under the auspices of ASEAN around this time with dates to be advised.
- 5 This instrument enables the Department to conduct and coordinate background checks in connection with the accreditation of individuals who are working or volunteering at the event.
- 6 Section 21F of the *AusCheck Regulations 2017* (AusCheck Regulations) has effect that the Minister may, by notifiable instrument, declare that a background check of individuals in connection with major national event accreditation, must include assessment of information relating to one or more of the matters mentioned in paragraphs 5(a), (b), (c) and (d) of the AusCheck Act – those matters being an assessment of the individual's identity, criminal history, matters relevant to a security assessment of the individual and the individual's citizenship, residency status or their entitlement to work in Australia.

- 7 The declaration of the 2024 ASEAN–Australia Special Commemorative Summit as an major national event enliven relevant provisions in the AusCheck Regulations. For the purposes of the 2024 ASEAN–Australia Special Commemorative Summit, the notifiable instrument made under section 21F of the AusCheck Regulation will declare that a background check will include an assessment of:
- (a) the individual’s criminal history;
 - (b) matters relevant to a security assessment;
 - (c) citizenship and visa status; and
 - (d) an electronic and in-person identity verification check.
- 8 The instrument commences on the day after the instrument is registered on the Federal Register of Legislation, and is a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

Consultation

- 9 Consultation on the instrument was undertaken with the following stakeholders, who are all involved in The Department’s existing background checking activities, and were all supportive of the instrument being made. As our current business operations and methodologies are unchanged for the purposes of this event, further consultation was not deemed necessary:
- Australian Security Intelligence Organisation
 - Australian Federal Police
 - Australian Criminal Intelligence Commission
- 10 Consultation also occurred with Department of the Prime Minister and Cabinet. The Department of the Prime Minister and Cabinet is the sponsoring agency for the event. They have developed a Taskforce with dedicated officers to support the activities. They have established a security working group and the Department is the Secretariat.
- 11 The Office of Impact Analysis (OIA) has been consulted to advise if a regulatory impact statement is required for declarations under subsection 5A(1) of the AusCheck Act where the event meets certain criteria. OIA has advised that they consider the measure is unlikely to have a more than minor impact, and as such, the preparation of an Impact Analysis is not required (Reference: OIA23-05995).

Other

- 12 The instrument is subject to disallowance under section 42 of the Legislation Act. A Statement of Compatibility with Human Rights has been prepared in relation to the instrument, and provides that, to the extent that the instrument impacts human rights, the impact is reasonable, necessary and proportionate. The Statement is included at **Attachment A**.

Statement of Compatibility with Human Rights

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

AusCheck (Major National Event—2024 Association of Southeast Asian Nations–Australia Special Commemorative Summit) Declaration 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*.

Overview of the Disallowable Legislative Instrument

The *AusCheck Act 2007* (the AusCheck Act) enables the Department to conduct and coordinate background checks in connection with the accreditation of individuals in relation to a major national event (MNE), through a declaration by the Minister that a particular event is an MNE. The Minister will declare an event an MNE if satisfied that it is in the national interest that the Commonwealth be involved in the conduct and coordination of background checks in connection with the accreditation of individuals for the event.

This Disallowable Legislative Instrument operates to declare, under subsection 5A(1) of the AusCheck Act, the 2024 Association of Southeast Asian Nations (ASEAN)–Australia Special Commemorative Summit (2024 ASEAN–Australia Special Commemorative Summit) an MNE. The 2024 ASEAN–Australia Special Commemorative Summit is a major foreign policy event comprised of a meeting between the leaders of Australia, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam and Timor-Leste that will take place in Melbourne, Australia in March 2024. The major national event also includes proposed Guest of Government activities run under the auspices of ASEAN around this time with dates to be advised.

The effect of the declaration is to allow the Department to coordinate and conduct a background check in connection with the accreditation of individuals in relation to the 2024 ASEAN–Australia Special Commemorative Summit as an MNE.

Section 21F of the *AusCheck Regulations 2017* (AusCheck Regulations) has effect that the Minister may, by notifiable instrument, declare that a background check of individuals in connection with MNE accreditation, must include assessment of information relating to one or more of the matters mentioned in paragraphs 5(a), (b), (c) and (d) of the AusCheck Act – those matters being an assessment of the individual’s identity, criminal history, matters relevant to a security assessment of the individual and the individual’s citizenship, residency status or their entitlement to work in Australia.

The declaration of the 2024 ASEAN–Australia Special Commemorative Summit as an MNE enlivens relevant provisions in the AusCheck Regulations. For the purposes of the 2024 ASEAN–Australia Special Commemorative Summit, the notifiable instrument made under section 21F of the AusCheck Regulation will declare that a background check will include an assessment of:

- the individual’s criminal history;
- matters relevant to a security assessment;
- citizenship and visa status; and

- an electronic and in-person identity verification check.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

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

Rights to equality and non-discrimination

The declaration of an event as an MNE enables the Department to conduct background checks for the accreditation of individuals in relation to the declared MNE. To the extent that the declaration of an MNE enlivens the background check provisions in the AusCheck Regulations, the rights to equality and non-discrimination are engaged. Article 2(1) of the ICCPR and Article 2(2) of the ICESCR provide that the rights in both covenants are to be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Similarly, Article 26 of the ICCPR provides that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The differential treatment by the Department of individuals on the basis of criminal history engages the rights of equality and non-discrimination. Subdivision C of Division 5 of the AusCheck Regulations allows the Department to give advice about MNE background checks of individuals including an assessment of an individual's criminal history information. The Department will assess the individual's criminal history information against MNE-security-relevant offences, which are contained in Schedule 1 of the AusCheck Regulations.

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

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

Right to an effective remedy

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

To the extent that the declaration of an MNE enlivens the background check provisions in the AusCheck Regulations, the rights to effective remedy will be engaged. Section 26 of the AusCheck Regulations provides a right of review by the Administrative Appeals Tribunal (AAT) for an applicant:

- who is refused an exemption under section 21K(7) of the AusCheck Regulations in relation to identity verification requirements; or
- who receives an unfavourable criminal history decision.

The definition of ‘unfavourable criminal history’ in section 6 of the AusCheck Regulations includes an ‘MNE criminal record’. ‘MNE criminal record’ is defined in section 4 to be where there is a conviction of an MNE level 1 disqualifying offence, or conviction and imprisonment for an MNE level 2 or 3 offence.

Where an applicant is refused an exemption in relation to identity verification requirements or receives an unfavourable criminal history decision, the applicant may apply to the AAT for a review of that decision. The AAT is a competent administrative authority which has the power to review a decision made by the Department, and to set aside, remit or affirm that decision.

To the extent that an individual’s rights under the ICCPR may be violated, section 26 of the AusCheck Regulations promotes the right to an effective remedy.

Right to privacy

Article 17(1) of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. To the extent that the declaration of an MNE enlivens the background check provisions in the AusCheck Regulations and provides for the collection, use, storage and disclosure of personal information, including criminal history information, the instrument engages the right to privacy.

Part 3 of the AusCheck Act deals with the collection, retention, use, disclosure and protection of AusCheck scheme personal information. ‘AusCheck scheme personal information’ is defined in Section 4 of the AusCheck Act as personal information obtained under the AusCheck scheme, or that relates to the administration of the AusCheck scheme. Section 8 of the AusCheck Act establishes the AusCheck scheme, and subsection 8(1)(d) notes that the AusCheck scheme includes any background checks of individuals if the check is of an individual in connection with the accreditation of the individual in relation to a MNE. To the extent that the declaration of an MNE enlivens the relevant provisions of the AusCheck Act in relation to an MNE, the right to privacy will be engaged.

The limitation on the right to privacy is legitimately authorised by section 13 of the AusCheck Act.

The purpose of the authorisation in relation to the MNE background checking scheme within the AusCheck scheme is to:

- determine whether a background check is required or permitted
- conduct or advise on the outcome of a background check

- update information on an individual who has undertaken a background check, and
- verify the identity of an individual.

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

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

The instrument also engages the right to privacy through the prescription of the Department as excluded from restrictions under Division 3 of Part VIIC of the *Crimes Act 1914*, which provides a person a right of non-disclosure for offences that have been spent and limits the use and disclosure of information about those offences in certain circumstances.

The *Crimes Regulations 2019* prescribes an exclusion at Schedule 2 of Division 3 of Part VIIC in relation to MNE level 1 disqualifying offences for the purpose of an MNE background check. This limitation to the right of privacy is necessary to ensure that a conviction for an MNE level 1 disqualifying offence can be taken into account when assessing an individual's criminal history, even where it would otherwise be considered spent. These offences are directly related to national security and considered to be so serious in nature that disclosure is in the national interest. This enhances and protects the integrity of background checks conducted for MNE purposes under the AusCheck scheme. Without such an exclusion, the Department would not have capacity to direct that an MNE accreditation not be issued or be revoked in circumstances where a person has been convicted of such an offence and it would have otherwise have been spent.

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

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

Right to work

Article 6(1) of the ICESCR provides for the right to work, including the right of everyone to the opportunity to gain a living by work which the persons freely chooses or accepts. To the extent that the declaration of an MNE enlivens the relevant provisions of the AusCheck Act in relation to an

MNE, the right to work may be engaged. The assessment by the Department of an individual's criminal history or a national security assessment may lead to an obligation on an organising body not to issue an MNE accreditation, or to cancel an MNE accreditation, if the person has been convicted of an MNE level 1 disqualifying offence. Holding an MNE accreditation may be an essential requirement for people who work or volunteer at MNE, for example, people who work in secure areas of an MNE. Therefore the Department's assessment could limit the right to work of some individuals, particularly if an individual has been convicted of an MNE level 1 disqualifying offence or has an adverse or qualified security assessment.

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

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

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

Conclusion

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

The Honourable Clare O'Neil MP
Minister for Home Affairs