2010-2011-2012-2013

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS AND AUSCHECK LEGISLATION AMENDMENT (ORGANISED CRIME AND OTHER MEASURES) BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by authority of the

Minster for Home Affairs, the Hon Jason Clare MP)

CUSTOMS AND AUSCHECK LEGISLATION AMENDMENT (ORGANISED CRIME AND OTHER MEASURES) BILL 2013

GENERAL OUTLINE

This Bill will mitigate vulnerabilities in Australia's aviation and maritime sectors that can be exploited by organised crime through measures, which are included in this Bill, to strengthen access controls to Customs places, information and systems and secure areas of ports, wharves and airports. It will also amend the eligibility requirements for membership of the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (PJC-ACLEI) to make them more consistent with similar statutory committees.

Two recent reports have highlighted organised crime threats and vulnerabilities in the maritime and aviation sectors: the Parliamentary Joint Committee on Law Enforcement (PJCLE) 2011 report following its *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime*, and a 2012 report prepared by Joint Task Force Polaris that examined criminality in the Sydney maritime environment.

Issues identified by Polaris and the PJCLE report include:

- concerns about particular individuals having access to restricted zones at airports and seaports
- individuals using access to cargo movement information to track illicit goods and providing that information to criminal groups, and
- individuals accessing containers in terminals to collect illicit goods for criminal groups.

This Bill amends the *Customs Act 1901*, *AusCheck Act 2007* and *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act). It contains measures to:

- strengthen the cargo supply chain against criminal infiltration, through:
  - the creation of new obligations on cargo terminal operators and cargo handlers
  - the creation of new offences for using information from the Integrated Cargo System (ICS) to aid a criminal organisation, and
  - the adjustment of existing controls and sanctions under the Customs Act to increase their utility
- introduce the power for the Secretary of the Attorney-General's Department to suspend Aviation and Maritime Security Identification Cards (ASICs and MSICs), or processing of applications for ASICs or MSICs, if the cardholder or applicant has been charged with a serious offence, and
- remove the prohibition on the Deputy Speaker of the House of Representatives and Deputy President of the Senate being members of the PJC-ACLEI.

PURPOSE

Schedules 1 and 2 will strengthen the Government's ability to prevent and disrupt national security threats, particularly serious and organised crime, in the aviation and maritime industries and the supply chain.

Schedule 1 will seek to strengthen the cargo supply chain against criminal infiltration by amending the Customs Act to:

- place obligations on cargo terminal operators and those that load and unload cargo, which are similar to those that the Customs Act imposes on holders of depot and warehouse licences
- create new offences for using Customs information to commit or aid criminal activity,
- provide that the Chief Executive Officer (CEO) of Customs and Border Protection can consider the refusal, suspension or cancellation of an ASIC or MSIC when determining whether the person is fit and proper under the Customs Act
- align aspects of the customs broker licensing scheme with that of depots and warehouses, including providing the CEO of Customs and Border Protection with the power to impose new licence conditions at any time and making it an offence to breach certain licence conditions, and
- adjust other controls and sanctions in the Custom Act, including increasing penalties for certain strict liability offences and the offences in section 234, and improving the utility of the infringement notice scheme, by for example, increasing the relevant penalties.

Schedule 2 will amend the AusCheck Act to allow the suspension of a person's ASIC or MSIC where the card holder has been charged with a serious offence. It will also preclude a person from being issued an ASIC or MSIC while the person is charged with a serious offence. These amendments will ensure that individuals charged with serious offences involving conduct demonstrating they could pose a high security or organised crime risk are excluded from secure areas of airports and seaports pending resolution of the charge.

Schedule 3 will amend the LEIC Act to make membership eligibility for the PJC-ACLEI consistent with Parliamentary committees with similar functions, including the Parliamentary Joint Committee on Law Enforcement and the Parliamentary Joint Committee on Intelligence and Security.

FINANCIAL IMPACT STATEMENT

The costs of implementing the amendments to the AusCheck Act will be fully cost recovered through an increase in application fees for ASICs and MSICs. The amount of this increase will be determined as part of AusCheck's regular Cost Recovery Impact Statement (CRIS) process. The fee increase will be applied in the first CRIS cycle following the commencement of the Bill.

The amendments in this Bill will not apply to any other schemes for which AusCheck undertakes background checks under the AusCheck Act

Other items will have little or no impact on Government revenue.

ACRONYMS AND ABBREVIATIONS

AAT	Administrative Appeals Tribunal
AGD	Attorney-General's Department
ANAO	Australian National Audit Office
ASIC	Aviation Security Identification Card
AusCheck Regulations	*AusCheck Regulations 2007*
Aviation Regulations	*Aviation Transport Security Regulations 2005*
Card	Aviation Security Identification Card or Maritime Security Identification Card
CRIS	Cost Recovery Impact Statement
CTO	Cargo Terminal Operator
Customs or Customs and Border Protection	Australian Customs and Border Protection Service
ICESCR	International Convention on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICS	Integrated Cargo System
LEIC Act	*Law Enforcement Integrity Commissioner Act 2006*
Maritime Regulations	*Maritime Transport and Offshore Facilities Security Regulations 2003*
MSIC	Maritime Security Identification Card
PJC-ACLEI	Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity
PJCLE	Parliamentary Joint Committee on Law Enforcement
Secretary	Secretary of the Attorney-General's Department
Transport Secretary	Secretary of the Department administered by the Minister who administers the *Aviation Transport Security Act 2004* (currently the Secretary of

Department of Infrastructure and Transport).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Customs and Auscheck Legislation Amendment (Organised Crime and Other Measures) Bill 2013

This Bill 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*.

An overview of measures in the Bill and their human rights implications is below.

Overview of the Bill

The bill will mitigate vulnerabilities in Australia's aviation and maritime sectors that can be exploited by organised crime through measures to strengthen access controls to Customs places, information and systems and secure areas of ports and airports. The Bill is part of the Government's response to the 2012 report of Joint Agency Task Force Polaris, which is investigating serious and organised crime on the Sydney waterfront, and the PJCLE's 2011 *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime*.

The bill will amend the *Customs Act 1901* to strengthen the cargo supply chain against criminal infiltration by:

- Placing statutory obligations on cargo terminal operators (CTOs) and those that load and unload cargo, which are similar to those that the Customs Act imposes on holders of depot and warehouse licences. These obligations would include mandatory reporting of unlawful activity, ensuring the physical security of relevant premises and cargo, and fit and proper person checks on management at Customs' request. Non-compliance would attract criminal or administrative sanctions.
- Creating new offences for using information from the Integrated Cargo System (ICS) to aid a criminal organisation.
- Providing that the CEO of Customs can consider the refusal or cancellation of an ASIC or MSIC when determining whether the person is fit and proper under the Customs Act.
- Aligning aspects of the customs broker licensing scheme with that of depots and warehouses, including providing the CEO of Customs and Border Protection with the power to impose new licence conditions at any time and making it an offence to breach certain licence conditions.
- Adjusting other controls and sanctions in the Customs Act, including increasing penalties for certain strict liability offences and the offences in section 234, and improving the utility of the infringement notice scheme by for example increasing the relevant penalties.

The bill will also amend the *AusCheck Act 2007* to:

- enable follow up background checks to be carried out without the consent of the card holder where the individual is reasonably known or suspected to have been convicted of a relevant offence, and
- enable the Secretary of the Attorney-General's Department to suspend an Aviation or Maritime Security Identity Card where the Secretary has reasonable grounds to consider the holder has been charged with a serious offence.

The bill will also amend the *Law Enforcement Integrity Commissioner Act 2006* to remove the prohibition on the Deputy Speaker of the House of Representatives and Deputy President of the Senate being appointed as members of the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity

Human rights implications

The bill affects the following rights:

- the right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR)
- the rights to equality and non-discrimination under Article 26 of the ICCPR and Article 2(2) of the International Convention on Economic, Social and Cultural Rights (ICESCR)
- the right to work under Article 6 of the ICESCR, and
- the right to the presumption of innocence under Article 14 of the ICCPR.

Amendments to the Customs Act

The right to protection against arbitrary and unlawful interference with privacy

Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. Accordingly, interferences with the right to privacy will be permitted provided they are not arbitrary and are authorised by law. In order for an interference with the right to privacy not to be 'arbitrary', the interference must be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality, appropriateness and necessity. In essence, this will require that:

- limitations serve a legitimate objective
- limitations adopt a means that is rationally connected to that objective, and
- the means adopted are not more restrictive than they need to be to achieve that objective.

Measures that allow for the collection, use, sharing and disclosure of personal information will engage the right to privacy.

The Bill will limit the right to protection against arbitrary and unlawful interferences with privacy as the new sections 102CE and 102EA will place obligations on CTOs to collect and provide personal information of persons who enter a cargo terminal to authorised Customs officers upon request. The measures in the new section 102E also provide powers to authorised Customs officers to access electronic equipment and take extracts from and make copies of any document at a terminal.

The measures are consistent with current obligations imposed on other entities involved in the cargo supply chain including customs depot and warehouse licence holders. The measures

will give Customs and Border Protection greater visibility of persons entering and operating in the cargo terminals that could have access to and interfere with cargo.

The *Privacy Act 1988* applies to both public and private sector entities. As such, Customs officers are bound by the Privacy Principles in the Privacy Act when dealing with personal information. The private sector provisions in the Privacy Act are likely to extend to most CTOs. While the private sector provisions in the Privacy Act apply to an individual, a body corporate, a partnership, other unincorporated associations and a trust, certain small businesses are not covered by the Privacy Act. In the context of CTOs, this exemption would need to be considered on a case by case basis. Nonetheless, it is considered that the Privacy Act would extend to most CTOs. Further, the general powers of authorised officers are restricted by the purpose of the powers, that being to determine whether the provisions of any Customs-related law has been, or is being, complied with. This ensures that the powers will be executed on a targeted basis rather than on a random or arbitrary basis.

Placing a higher level of accountability on CTOs is reasonable, necessary and proportionate to the need to eliminate vulnerabilities in the cargo supply chain and maritime and aviation sectors that organised crime may exploit.

The right to equality and non-discrimination

Article 26 of the ICCPR and Article 2(2) of the ICESCR protect the rights of equality and non-discrimination, in that all people have the right to be treated equally. Laws, policies and programs should not discriminate on the basis of grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'. The grounds of prohibited discrimination are not closed. The UN Human Rights Committee has not attempted to define 'other status', but has decided it on a case-by-case basis to encompass a clearly definable group of people linked by their common status. Though not binding on Australia, the European Court of Human Rights has also interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of criminal record.[1]

Differential treatment will not constitute discrimination where it is aimed at a legitimate objective and is based on reasonable and objective criteria and is proportionate to the objective to be achieved.

The Bill may limit the right to equality and non-discrimination by the introduction of measures that treat persons whose ASICs or MSICs have been refused, cancelled or suspended differently from others. These measures, contained in Schedule 1, Part 1 and the new section 102BA, require the Chief Executive Officer (CEO) of Customs to have regard to a refusal, cancellation or suspension of an ASIC or MSIC when determining whether the person is fit and proper under the Customs Act.

Currently, the CEO is required to have regard to a number of matters in making a determination of whether a person is fit and proper including whether the person or company has committed certain offences, is insolvent, under administration, or has been wound up or has supplied misleading or false information.

The new measures are limited in a number of ways. First, the CEO is obliged only to have regard to whether a person has received a refusal, cancellation or suspension of an ASIC or MSIC in addition to a range of other matters, as opposed to solely basing his or her decision on the matter, to determine whether that person is fit and proper. Additionally, the measures

[1] Thlimmenos v Greece, 6 April 2000, Application No 34369/97

are restricted to a refusal, cancellation or suspension of an ASIC or MSIC that occurred within the 10 years immediately preceding the relevant decision. This is a reasonable period and is consistent with the requirement to have regard to any conviction of the person committed within the 10 years immediately preceding the relevant decision, which currently exists in the Customs Act. The offences that lead to a refusal, suspension or cancellation of an ASIC or MSIC are largely limited to those directly relating to port and airport security as specified in the *Aviation Transport Security Regulations 2005* (Aviation Regulations) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Maritime Regulations). Further, the matters that lead to a refusal, suspension or cancellation are operationally relevant to those in the management of a CTO, cargo handler, depot, warehouse, broker, special reporter or re-mail reporter who undergo a fit and proper assessment.

Further, the processes undertaken by the Attorney-General's Department and the Department of Infrastructure and Transport in determining whether a person's ASIC or MSIC should be refused, suspended or cancelled are rigorous and incorporate the rules of natural justice.

It is reasonable and necessary to consider conduct connected directly to the duties undertaken by a person in the management of customs controlled places to determine whether they are fit and proper. The measures are proportionate to the need to eliminate vulnerabilities in the cargo supply chain and maritime and aviation sectors that organised crime may exploit.

The right to work

Article 6 of the ICESCR provides for the right to work which includes the right of everyone to the opportunity to gain his or her living by work he or she freely chooses or accepts and the right not to be deprived of work unfairly. Article 7 sets out the rights in work, including the enjoyment of just and favourable conditions of work. Article 4 of the ICESCR provides that countries may subject economic, social and cultural rights only to such limitations 'as 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 UN Committee on Economic, Social and Cultural Rights has stated that such limitations must be proportional, and must be the least restrictive alternative where several types of limitations are available.

The measure in new section 102F of Schedule 1, Part2, enabling the CEO to direct that a cargo terminal operator or cargo handler, or where that entity is a body corporate an executive officer of the body corporate, who fails to meet the fit and proper person test not be involved in the loading, unloading, handling or storage of goods subject to Customs control may limit the right to work.

The measure seeks to disrupt the ability of organised criminal groups to use trusted insiders to engage in or facilitate criminal activity by limiting a person who the CEO of Customs has determined is no longer a fit and proper person, having regard to legislatively prescribed matters, from working in and accessing information in relation to the movement of cargo.

The exercise of this power is limited to instances where it necessary for the protection of the revenue or to ensure compliance with Customs Acts or any other law of the Commonwealth or States and Territories prescribed by the regulations. Persons subject to such a direction also have the right to apply to the Administrative Appeals Tribunal for review of the decision. This measure is consistent with other parts of the Customs Act. The Customs Act already enables the CEO of Customs to refuse, suspend or cancel a customs broker, depot and warehouse licence if the applicant or holder of the licence is not a fit and proper person or in some cases, certain employees of that person are not fit and proper.

Although the application of this measure may limit a person's right to work, it is appropriately circumscribed and proportionate to the need to eliminate vulnerabilities in the cargo supply chain and maritime and aviation sectors that organised crime may exploit.

The right to the presumption of innocence

Article 14(2) of the ICCPR provides that persons charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. It imposes on the prosecution the burden of proving a criminal charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. In its first report for 2013, the Parliamentary Joint Committee on Human Rights has stated that the imposition of strict liability offences should be in pursuit of a legitimate objective and constitute a reasonable and proportionate measure in order to achieve that goal. It has also stated that the question of whether there are less restrictive means to achieve the legitimate objective will be relevant to the assessment of reasonableness and proportionality. Factors going towards reasonableness include whether the matter is peculiarly within the knowledge of the defendant, whether the offence is regulatory in nature, and the level of the penalty imposed.

The Bill limits the right to the presumption of innocence as it introduces measures for new strict liability offences in Schedule 1, Part 2 in the new sections 102CK, 102DE and 102FA as well as Part 6, in section 183CGC. The Bill also limits the right by imposing strict liability to existing offences and increasing the penalties for some existing strict liability offences in Schedule 1, Part 5 and Part 6 at items 129, 135 and 136 of the Bill.

These amendments will standardise the penalties for many Customs Act strict liability penalties and significantly enhance the effectiveness of the enforcement regime in deterring conduct that undermines the integrity of the Australian border and the collection of revenue.

The new and existing strict liability offences are regulatory in nature, often occur in high volume and attract relatively minor penalties, the majority of which provide for a maximum of 60 penalty units or less, as recommended in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Further, defences contained in the *Criminal Code* such as mistake of fact are available to persons alleged to have a committed a strict liability offence.

There are several exceptions where the maximum penalty for new strict liability offences exceeds 60 penalty units. To ensure consistency across like offences in section 60 of the Customs Act, strict liability will apply to the offences in subsections 60(2) and (3) and the offences will attract the same maximum penalty of 100 penalty units. An additional defence balances the higher penalty. It is a defence to a prosecution for these strict liability offences where compliance with the provision is prevented due to stress of weather or other reasonable cause. The defendant bears the legal burden in relation to this defence but the matters required to be proved by the defendant are peculiarly within the knowledge of the defendant.

The Bill also introduces an offence for a failure to comply with a direction given by the CEO to a CTO or cargo handler, or where that entity is a body corporate an executive officer of the body corporate. The offence attracts a maximum penalty of 100 penalty units. Although this is a higher penalty than the suggested maximum for a strict liability offence of 60 penalty units contained in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, it is justified in these circumstances given the serious nature of the direction and the possible consequences for security, community safety, and revenue for failing to comply. As a safeguard, a person subject to such a direction also has the right to apply to the Administrative Appeals Tribunal for review of the direction decision.

The standard of proof for all Customs prosecutions under the Customs Act is that of a criminal standard, including strict liability offences. Therefore, all Customs prosecutions for strict liability offences are required to be proved beyond a reasonable doubt.

The measures are reasonable, necessary and proportionate to the threat to the Australian community and economy posed by non-compliance with cargo control requirements.

Amendments to the AusCheck Act

Right to work

The right to work is contained in Article 6 of the ICESCR. The Article provides that everyone has the right to the opportunity to gain his or her living by work which he or she freely chooses or accepts. The United Nations Committee on Economic, Social and Cultural Rights has indicated that Article 6 also implies the right not to be deprived of work unfairly.

The suspension on charge measure will limit the right to work of those persons who are required to hold a valid Aviation Security Identification Card or Maritime Security Identification Card (card) for their work where the Secretary of the Attorney-General's Department (Secretary) has confirmed that the person has been charged with a serious offence. A person will be required to hold a valid card in order to access secure zones in airports and seaports and to undertake their duties as an employee or contractor. Under the suspension on charge measure, if a person is charged with a serious offence, the person's card will be suspended until the charge has been resolved. The Bill defines 'serious offence' as an aviation-security-relevant or maritime-security-relevant offence that is prescribed in regulations. The Secretary will not have any discretion in this matter.

In cases where a person has applied for a card and has been charged with a serious offence, AusCheck will suspend processing the application. If the person's prospective employer or contractor cannot deploy the person to a position that does not require them to hold a valid card, the employer or contractor may refuse to engage the person.

Similarly, in cases where a person's card has been suspended, the person's employer or contractor may also choose to deploy the person to a position that does not require them to hold a valid card. Where that is not possible, an employer or head contractor may decide to suspend a person's employment or contract for services, pending the outcome of any criminal trial, or to terminate that employment or contract.

Under Article 4 of the ICESCR, States may subject rights under the Covenant to limitations where those limitations are determined by law and are compatible with the nature of the rights under the Covenant and solely for the purpose of promoting the general welfare in a democratic society. Under international human rights law, limitations on the right to work must be proportional to the end to be achieved and the least restrictive where several alternatives are available.

The suspension on charge measure is part of the Government's response to operational law enforcement advice that organised criminals are successfully targeting and exploiting airports, seaports and the cargo supply chain to facilitate their criminal activities. The PJCLE also found that criminal networks have infiltrated Australia's aviation and maritime sectors and supply chain in its June 2011 report on its *Inquiry into the Adequacy of Aviation and Maritime Security Measures to Combat Serious and Organised Crime*.

Temporarily suspending the access to secure areas of airports and seaports of persons charged with serious offences is designed to enhance the existing aviation and maritime security schemes' capacity to mitigate national security threats, including serious and organised crime.

Currently, a card can only be cancelled or refused when someone has been convicted of, and sentenced to imprisonment for, an aviation- or maritime-security-relevant offence. Persons who pose a security or organised crime risk can access secure areas of airports and seaports, even where they have been charged with serious offences. The amendments in this bill are designed to mitigate this risk. They will ensure that the security of these areas of airports and seaports is not compromised while serious charges remain on foot.

The measures are necessary to disrupt organised criminal groups' infiltration of the maritime and aviation industries and the supply chain. In this way, the measures are necessary to promote the general welfare.

The Government decided that suspension of an application or card should be automatic following a charge for a serious offence. However, the Secretary will only be able to suspend a person's application or card if the person is charged with a serious aviation-security-relevant or maritime-security offence that has been prescribed in regulations. The list of offences prescribed in regulations will be targeted and limited to offences involving conduct demonstrating that they pose a national security threat or may use their access to a secure area to engage in or facilitate serious and organised criminal activity. It will not include minor offences or offences not related to national security or organised crime. The Government has decided it is not appropriate for a person charged with a serious offence to access secure areas where they may continue to pose a security or organised crime risk.

Right to privacy

Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. Accordingly, interferences with the right to privacy will be permitted provided they are not arbitrary and are authorised by law. In order for an interference with the right to privacy not to be 'arbitrary', the interference must be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality, appropriateness and necessity. In essence, this will require that:

- limitations serve a legitimate objective
- limitations adopt a means that is rationally connected to that objective, and
- the means adopted are not more restrictive than they need to be to achieve that objective.

The suspension on charge measure will interact with the right to privacy in that it will require applicants and card holders to notify the Secretary if they are charged with a serious offence. The measure would also authorise law enforcement agencies to notify the Secretary when they charge an applicant or card holder with a serious offence. This will require AusCheck to share personal information about applicants and card holders with law enforcement officers charging card holders with serious offences. AusCheck will also be authorised to notify issuing bodies that they are required to not issue a card (where the person has been found eligible but a card has not yet been issued) or suspend the card of an existing card holder where AusCheck determines that the person had been charged with a serious offence. The measure does not propose that AusCheck would advise issuing bodies of the particulars of the offence or offences with which the person had been charged.

The right to privacy will also be engaged when there is the collection, use, storage and sharing of personal information. While the measure allows for information about a person to be shared between certain Commonwealth, State and Territory agencies and, to a lesser

extent, issuing bodies, it is not an arbitrary or unlawful interference with that person's privacy. As set out above, the suspension on charge measure is part of the Government's response to operational law enforcement advice about organised criminal groups' infiltration of airports, seaports and the cargo supply chain. The PJCLE has also made similar findings about organised crime vulnerabilities at the border. The information sharing requirements are necessary to facilitate the prevention and disruption of serious and organised crime at airports, seaports and the supply chain.

The measure would require mandatory self-notification of relevant charges for applicants and card holders, consistent with the existing requirement for card holders to self-report convictions for relevant offences. Offences for a card holder or applicant failing to self-report charge with a serious offence will be contained in the regulations. It is proposed that these offences will attract a monetary penalty.

The measure also allows for information about whether a person who has been charged with a serious offence has applied for or holds a card to be shared between AusCheck, law enforcement agencies and issuing bodies. These mechanisms build on existing arrangements and are necessary for the successful operation of the suspension on charge measure. Without this information, AusCheck would not know when to suspend a person's card and law enforcement would not know when to notify AusCheck of a charge and persons of potential security and criminal concern would be granted or allowed continued access to secure areas.

The measure is also consistent with the existing application process in which AusCheck accesses and assesses each applicant's criminal history in order to determine whether the person is eligible to hold a card or should be refused a card on the basis that the person would pose a security risk if given unescorted access to secure maritime or aviation areas.

Authorising AusCheck to:

- access and assess information about serious charges laid against applicants and card holders
- disclose the fact that a person holds a card to relevant law enforcement officers, and
- disclose to issuing bodies the fact that a card holder or applicant has been charged with a serious offence (but not details of the offence)

is reasonable in achieving the end of preventing and disrupting serious and organised crime at airports, seaports and in the supply chain.

The measure's limitation on the right to privacy is also proportionate to the end of preventing and disrupting serious and organised crime. The personal information AusCheck is to collect and share is either already on the public record (as information about whether or not a person has been charged with an offence is a matter of public record at the time of the charge) or forms part of a Government licensing scheme (in the case of information about whether or not a person holds a card). This information will continue to be protected through existing privacy protections in the AusCheck scheme. These protections include criminal offences for the unlawful disclosure of AusCheck scheme personal information (existing section 15 of the AusCheck Act) and a range of secrecy provisions in Commonwealth, State and Territory legislation that prohibit a person from unlawfully disclosing personal and other information obtained during the course of their duties. Following the resolution of a charge for a serious offence, AusCheck will be authorised to access and assess the person's criminal history for the purposes of determining the person's continued eligibility to hold a card. Where the person is acquitted, the charges have been otherwise discontinued or the person has been

found guilty of an offence that is not a serious offence, AusCheck will use the person's criminal history to confirm their continued eligibility to hold a card. Where the person is convicted of a serious offence, AusCheck will consider the person's eligibility or continued eligibility to hold a card in accordance with the existing legislation. This will apply to individuals who applied for and were issued a card both before and after the commencement of these amendments.

In addition, the Bill will authorise AusCheck to conduct a background check of a person's criminal history without the person's consent for that further background check in limited circumstances. This will be confined to individuals who have applied for a card following the commencement of the amendments, and who have been advised by the relevant card issuing body that such additional checks may be undertaken without consent. To ensure all individuals who apply for a card following the commencement of the amendments are aware that they could be subject to a further background check of their criminal history, AusCheck will amend the Privacy Notice provided to all applicants by card issuing bodies before the individual applies. For those individuals, the Transport Secretary will be able to request a background check of a card holder's criminal history on the basis that the Transport Secretary has reasonable grounds to consider the person has been convicted of an aviation or maritime relevant security offence. In these circumstances and if requested by the Transport Secretary, AusCheck will be authorised to undertake the criminal history background check to confirm the card holder's continued eligibility to hold the card. This measure will reduce the risk that an individual who has been convicted of a security-relevant offence can continue to have access to secure aviation and maritime areas. The measure is a reasonable and proportionate means of addressing this risk. It will only apply to persons notified at the time they apply for a card that they could be subject to further background checks of their criminal history for the duration of their card. The measure will not apply to individuals who applied for or were issued a card before the commencement of the amendments. The consent of those individuals will continue to be required before AusCheck can conduct a criminal history check.

Rights to equality and non-discrimination

Articles 26 of the ICCPR and 2(2) of the ICESCR protect a person's right to equality and non-discrimination, providing that all people have the right to be treated equally. Laws, policies and programs should not discriminate on a number of listed grounds, including race, sex, religion and 'other status'. The European Court of Human Rights has interpreted 'other status' to include non-discrimination on the basis of criminal record.[2] Because Australia is not a party to the European Convention on Human Rights, the European Court's jurisprudence is not binding on Australia. However, that interpretation provides useful guidance in relation to grounds which may fall within 'other status'.

Accordingly, to the extent that a person's 'other status' may include charge with a criminal offence, the suspension on charge measure will engage the right to equality and non-discrimination. The measure will result in the differential treatment of persons who have been charged with a serious offence in that their application or card will be suspended pending the resolution of the charge.

Differential treatment will not constitute discrimination where it is aimed at a legitimate objective and is based on reasonable and objective criteria and is proportionate to the objective to be achieved.

[2] Thlimmenos v Greece, 6 April 2000, Application No. 34369/97

As set out above, the measure is necessary to mitigate vulnerabilities to organised crime at the border and in the supply chain that operational law enforcement agencies and the PJCLE have identified. It will disrupt organised criminal groups' ability to use trusted insiders to facilitate engage in or facilitate criminal activity by temporarily suspending card holders' access to secure where they have been charged with a serious offence. Not all charges will result in the suspension of a card or processing of an application for a card. It is only on charge with a serious offence that a person's application or card will be suspended. The regulations to be made following this bill will only prescribe as serious offences those offences demonstrating that the person charge poses a national security threat or may use their access to a secure area to engage in or facilitate serious and organised criminal activity. The suspension on charge measure is therefore a proportionate method of addressing the organised crime risks identified by operational law enforcement and a reasonable limitation on the right to equality and non-discrimination.

Conclusion

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

NOTES ON CLAUSES

Clause 1 – Short title

This clause provides that, when enacted, the Bill may be cited as the *Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Act 2013*.

Clause 2 – Commencement

This clause sets out when the Act will commence.

Parts 1, 2, 4, 5 and 6 of Schedule 1 will commence on a day or days to be fixed by proclamation. However, if any of the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.

Part 3 of Schedule 1 will commence the day after the Act receives the Royal Assent.

Sections 1 to 3, Schedules 2 and 3, and anything in the Act not otherwise covered, will commence the day the Act receives the Royal Assent.

Clause 3 – Schedule(s)

This is a formal clause that enables the Schedules to amend Acts by including amendments under the title of the relevant Act.

Schedule 1 – Amendment of the Customs Act 1901

GENERAL OUTLINE

1. The purpose of Schedule 1 is to make a range of amendments to the Customs Act to strengthen the cargo supply chain against criminal infiltration. These amendments respond to operational law enforcement advice that some holders of customs broker, depot and warehouse and members of other key organisations in the trading community had links to serious and organised crime and were using their positions to carry out or facilitate criminal activity.

Part 1 – Fit and Proper person tests

2. All persons applying for a broker licence must satisfy the CEO of Customs or his or her delegate that they are a 'person of integrity'. Where a company or partnership applies for a licence, this means directors and certain employees of the company or partners and certain employees of the partnership must be 'persons of integrity'. This does not include all persons who work for the individual, company or partnership, but there is an ongoing obligation for the licence holder to ensure that all persons who participate in the work of the customs broker are persons of integrity.
3. For depots and warehouse applicants, the CEO of Customs or his delegate must be satisfied that the applicant is a `fit and proper person'. Where a company or partnership applies for a licence, this means any director, officer or shareholder of the company who would participate in management and control of the place, to be covered by the licence or any partner of the partnership. The Customs Act also requires all employees of the applicant who would participate in the management and control of the proposed depot or warehouse to be fit and proper persons.
4. All persons applying to be registered as special reporters or re-mail reporters must satisfy the CEO of Customs or his delegate that the applicant is a `fit and proper person'.
5. The amendments made by this Part will replace the term 'person of integrity' with 'fit and proper person' to ensure consistency in terminology. The amendments will also require the CEO of Customs to consider, in determining whether a person is fit and proper, whether the person has been refused an aviation security identification card (ASIC) or a maritime security identification card (MSIC) or had an ASIC or MSIC suspended or cancelled.
6. The CEO is obliged only to have regard to whether a person has received a refusal, cancellation or suspension of an ASIC or MSIC in addition to a range of other matters, as opposed to solely basing his or her decision on the matter, to determine whether that person is fit and proper. Further, the measure is restricted to a refusal, cancellation or suspension of an ASIC or MSIC that occurred within the 10 years immediately preceding the relevant decision. This is a reasonable period and is consistent with the requirement to have regard to any conviction of the person

committed within the 10 years immediately preceding the relevant decision, which currently exists in the Customs Act.

Item 1 – subsection 4(1)

7. Item 1 will insert a definition of transport security identification card which is defined as:

   - an aviation security identification card issued under the *Aviation Transport Security Regulations 2005*; and
   - a maritime security identification card issued under the *Maritime Transport and Offshore Facilities Security Regulations 2003*.

Item 2 – 67EB(3)

8. Section 67EB contains matters the CEO must consider in registering a person as a special reporter. This includes consideration of whether a person is a fit and proper person. Subsection 67EB(3) contains matters the CEO must have regard to in deciding whether a person is a fit and proper person.

9. The amendment contained in this item will amend subsection (3) to require the CEO to consider whether a person has had an ASIC or MSIC refused, cancelled or suspended in deciding whether a person is a fit or proper person.

Item 3 – 67H(2)

10. Subdivision E of Division 3 contains provisions regarding registering re-mail reporters. This includes a fit and proper person test contained in section 67H. Paragraph 67G(1)(c) requires the CEO to be satisfied a person meets the fit and proper person test before the CEO can register them as a re-mail reporter.

11. The amendment made by this item will require the CEO to consider whether a person has had an ASIC or MSIC refused, cancelled or suspended in deciding whether a person is a fit or proper person.

Item 4 – 77K(2)

12. Section 77K contains the requirements for the grant of a depot licence. Subsection (1) provides the CEO must not grant a licence unless, in the CEO's opinion, the matters in that subsection are met. This includes a requirement that the CEO is satisfied a person, certain employees or certain persons where the applicant is a partnership or company, are fit and proper.

13. 77K(2) contains the matters the CEO must have regard to in determining whether a person is fit and proper for the purposes of section 77K. The amendment made by this item will require the CEO to consider whether a person has had an ASIC or MSIC refused, cancelled or suspended in deciding whether a person is a fit or proper person.

Item 5 – 77N(2)(d)

14. Section 77N contains general conditions to which a depot licence is subject. Subsection (2) requires the depot licence holder to notify the CEO in writing where certain events occur. This includes, at paragraph (d), a requirement to notify the CEO when certain persons are convicted of certain offences or become an insolvent under administration.

15. The amendment made by this item will extend this notification requirement to require a depot licence holder to notify the CEO where those certain persons described in paragraph (d) have been refused an ASIC or MSIC or had an ASIC or MSIC suspended or cancelled.

Item 6 – 77V(2)

16. Section 77V allows the CEO to give notice of intended cancellation of a depot licence to a licence holder where the CEO is satisfied one or more of the matters described in subsection (1) exists. This includes a situation where the CEO is no longer satisfied the licence holder, or certain persons where the licence holder is a company or partnership, are fit and proper.

17. Subsection (2) contains a list of matters the CEO must have regard to in deciding whether a person is fit and proper under subsection (1). The amendment made by this item will require the CEO to consider whether a person has had an ASIC or MSIC refused, cancelled or suspended in deciding whether a person is fit or proper.

Items 7 and 8 – 81(2)

18. Section 81 contains the requirements for the grant of a warehouse licence. Subsection (1) provides the CEO must not grant a licence unless, in the CEO's opinion, the matters in that subsection are met. This includes a requirement that the CEO is satisfied a person, certain employees or certain persons where the applicant is a partnership or company, are fit and proper.

19. 81(2) contains the matters the CEO must have regard to in determining whether a person is fit and proper for the purposes of section 81. The amendment made by item 8 will require the CEO to consider whether a person has had an ASIC or MSIC refused, cancelled or suspended in deciding whether a person is a fit or proper person.

20. Item 7 makes a minor, technical amendment relating to item 8.

Items 9 to 13 - 82(1)(c)

21. Section 82 contains general conditions to which a warehouse licence is subject. Subsection (2) requires the warehouse licence holder to notify the CEO in writing where certain events occur. This includes, at paragraph (c), a requirement to notify the CEO when certain persons are convicted of certain offences or become an insolvent under administration.

22. The amendment made by item 10 will extend this notification requirement to require a warehouse licence holder to notify the CEO where those certain persons described in paragraph (d) have been refused an ASIC or MSIC or had an ASIC or MSIC suspended or cancelled.

23. Items 9, 11, 12 and 13 make minor technical amendments consequential to item 10 and to ensure the provisions are consistent with current drafting practices.

Items 14 to 19 – 86(1A)

24. Section 86 provides for the suspension of warehouse licences. Subsection (1) allows the CEO to give notice to suspend a warehouse licence where the CEO has reasonable grounds for believing one of the things in subsection (1) exist. This includes where the CEO has reasonable grounds for believing that a person, certain employees or certain persons where the applicant is a partnership or company, are fit and proper.

25. Subsection (1A) contains the matters which the CEO must take into account when considering whether a person is fit and proper. Item 19 will insert new paragraph (1A)(d) which will require the CEO to determine whether a person has been refused an ASIC or MSIC in determining whether a person is fit and proper.

26. Items 14 to 18 make minor technical amendments to ensure the provisions are consistent with current drafting practices.

Items 20 to 26 – 86(1B)

27. These items make minor technical amendments to ensure the provisions are consistent with current drafting practices.

Items 27 to 30– 183CC

28. Items 27 and 28 will substitute the words ‘person of integrity’ with ‘fit and proper person’ to ensure consistency across the Customs Act.

29. Section 183CC provides for broker’s licences. Subsection (1) provides the CEO must not grant a broker’s licence unless, in the CEO’s opinion, the matters in that subsection are met. Subsection (1) includes a requirement that the CEO is satisfied a person, certain employees or certain persons where the applicant is a partnership or company, are fit and proper.

30. 183CC(4) contains the matters the CEO must have regard to in determining whether a person is fit and proper for the purposes of section 183CC. The amendment made by item 29 will require the CEO to consider whether a person has had an ASIC or MSIC refused, cancelled or suspended in deciding whether a person is a fit or proper person.

31. Item 30 make a technical amendment consequential to item 29.

Items 31 to 40 – 183CG(3)

32. Section 183CG contains general conditions to which a broker’s licence is subject. Subsection (1) requires a licence holder to notify the CEO where certain events occur. Items 31 to 34 amend that subsection to require the licence holder to notify where the licence holder has an ASIC or MSIC refused, suspended or cancelled.

33. Subsection (3) contains general conditions to which a broker’s licence held by a customs broker is subject. Items 36 and 37 amend this subsection to include an

obligation to notify the CEO where certain persons have an ASIC or MSIC refused, suspended or cancelled.

34. Paragraph (4)(a) provides a broker's licence held by a customs broker is subject to the condition that the broker shall do all things necessary to ensure that all person who participate in the work of the customs broker are persons of integrity. Item 40 will replace the words 'persons of integrity' with 'fit and proper persons' in section 183CG to ensure consistency across the Customs Act.

Item 41 – Subsection 183CQ(1)

35. Section 183CQ relates to the investigation of matters relating to a broker's licence. The CEO may give notice under subsection (1) where the CEO has reasonable grounds to believe one of the things contained in subsection exist.

36. This item will insert a reference to the refusal, suspension or cancellation of an ASIC or MSIC, allowing the CEO to give notice on that ground.

Division 2 – Application of amendments

Item 42 – Application of amendments

37. This item provides that the amendments made by Part 1 apply in relation to an application for, or the renewal of any of the following made on or after commencement of the item:

(a) registration as a special reporter
(b) registration as a re-mail reporter
(c) a depot licence
(d) a warehouse licence, and
(e) a broker's licence.

38. Sub item 42(2) provides that the amendments made by Part 1 will, subject to sub item (3), apply in relation to a refusal, suspension or cancelation of a transport security identification card, whether the refusal, suspension or cancellation: occurs before, on or after the commencement of this item; or relates to a registration made or a licence granted before, on or after that commencement.

39. Sub item 42(3) provides that where the amendments made by Part 1 will require notification to the CEO of a refusal, cancellation or suspension of an ASIC or MSIC that occurred before commencement, the person will have 90 days to comply with the requirement after commencement of Part 1. This will give those people subject to the requirement time to comply with it.

Part 2 – Cargo Terminal Operators

Item 43 – After Part V

40. This item will insert new Part VAAA.

41. New Division 1 contains definitions relevant for the purposes of new Part VAAA.

42. New section 102B will contain the definitions for the purposes of new Part VAAA including definitions of ***cargo handler***, ***cargo terminal*** and ***cargo terminal operator.***

43. ***Cargo terminal operator*** is defined in new section 102B as meaning, 'in relation to a cargo terminal, a person who manages the cargo terminal'. This definition is deliberately broad to ensure the full range of persons that may manage a cargo terminal are covered and to ensure that new or varied business models do not create gaps in the control framework. In the current environment, this definition would for example include persons who have long-term exclusive access to a designated area of a port and who manage the operations and the security of the area. The definition also applies to a Port Authority (or other body) who allows third parties to use their facilities on a short-term basis (e.g. multi user berths). In the airport environment, and depending on where the goods are located immediately before being loaded or immediately after being unloaded, it could apply to the entity with responsibility for the airport as a whole or persons who have long-term exclusive access to a designated area of an airport and who manage the operations and the security of that area.

44. Where a cargo terminal operator also holds a depot or warehouse licence for the same premises the CTO obligations in this part do not apply. This is common at international airports. In such cases, the Customs depot licensing scheme would apply, not the new obligations, as the former would already achieve the aim of the new obligations.

45. New section 102BA will contain the meaning of ***fit and proper person*** for the purposes of new Part VAAA. The definition contained here is consistent with other fit and proper person tests contained throughout the Customs Act.

46. New Division 2 contains obligations, which will be imposed on cargo terminal operators.

47. New section 102C will require a CTO to notify Customs of the terminal it operates and the terminal's physical address.

48. New section 102CA will require a CTO to ensure that a cargo terminal has adequate physical security of the terminal and of any goods at the terminal.

49. New subsection 102CA(2) contains minimum requirements, which a CTO must meet in relation to physical security at a cargo terminal and new subsection 102CA(3) will require a CTO to notify Customs of any substantial changes to the cargo terminal that would affect the physical security of the terminal or of goods at the terminal.

50. New section 102CB will prevent a CTO from moving a sign placed by Customs at or near a cargo terminal without the written approval of an authorised officer.

51. New section 102CC will require a CTO to notify Customs where the CTO becomes aware of certain events occurring in relation to goods. A CTO will need to notify Customs when they become aware of any of the following events:

- unauthorised movement of goods subject to Customs control in or from a cargo terminal;
- unauthorised access to goods subject to Customs control in the cargo terminal or on a ship or aircraft within or adjacent to the terminal;
- unauthorised access to an information system, whether electronic or paper based, relating to goods subject to Customs control;
- enquiries relating to goods subject to Customs control from a person who does not have a commercial connection with the goods;
- a theft, loss or damage of goods subject to Customs control;
- a break in and entry, or attempted break in, of the cargo terminal
- a change that may adversely affect the security of the terminal; and
- a suspected breach of a Customs-related law in the cargo-terminal.

52. A CTO will be required to notify Customs as soon as practicable but no later than 5 days after becoming aware of the event.

53. New section 102CD will require a CTO to notify Customs where goods not belonging to the CTO remain at the terminal for more than 30 days.

54. New section 102CE will require a CTO to keep records of each person who enters the terminal.

55. New subsection (6) clarifies that the record keeping requirement contained in this section does not apply to an employee of a cargo terminal or an officer or an employee of, or of an authority of, the Commonwealth or a State or Territory. The obligation contained in this section will require this information be provided to Customs by the operator within 30 days of being requested. The *Privacy Act 1988* applies to both public and private sector entities. As such, Customs officers are bound by the Privacy Principles in the Privacy Act when dealing with personal information. The private sector provisions in the Privacy Act are likely to extend to most CTOs.

56. New section 102CF will require CTOs to take all reasonable steps to ensure that they are a fit and proper person and, if the CTO is a body corporate, each executive officer of the body corporate is a fit and proper person.

57. New subsection 102CF(2) will require a CTO to provide, if requested to do so by an authorised officer, information that would support an assessment that the CTO is a fit and proper person and if the CTO is a body corporate each executive of the body corporate is a fit and proper person.

58. New section 102CG requires a CTO to take all reasonable steps to educate and train its employees or other persons involved in the CTO's business to ensure awareness of the CTO's responsibilities and obligations in relation to goods subject to Customs control.

59. New section 102CH will require a CTO to comply with any written direction given by an authorised officer under new section 102EB.

60. New section 102CI requires a CTO to provide an authorised officer with all reasonable facilities and assistance for the effective exercise of their powers under a Customs-related law.

61. New section 102CJ will allow the CEO to, by legislative instrument, impose additional obligations on CTOs generally. This will provide Customs greater flexibility in dealing with new and emerging threats in this domain.

62. The power to impose new obligations is circumscribed by reference to the protection of the revenue, ensuring compliance with Customs Acts, any other law of the Commonwealth prescribed by the regulations or a law of a State or Territory prescribed by the regulations, or for any other purpose. The reference to "any other purpose" in these provisions is limited to purposes of the Customs Act. It is not practical to list all the purposes of the Customs Act and those purposes may change from time to time. An example of a purpose not specifically identified in these provisions would be the *effective operation* of the Customs Act, which could be reflected in an obligation that further facilitates the exercise of powers by Customs Officers. For example, the CEO might consider it necessary to place obligations on CTOs requiring them to make available an adequate power supply to run specialist equipment or to facilitate space and access arrangements for mobile x-ray units.

63. New section 102CK creates a strict liability offence where a CTO fails to comply with an obligation or requirement set out in new Division 2 or under a legislative instrument made under new section 102CJ.

64. In developing this offence, consideration was given to both the Senate Standing Committee for the Scrutiny of Bills Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

65. The offence is regulatory in nature and has a maximum penalty of 60 penalty units.

66. New Division 3 will impose obligations on cargo handlers.

67. ***Cargo handlers*** are defined in new section 102B as a person involved in any of the following activities at a cargo terminal:

(a) the movement of goods subject to Customs control into, within or out of the terminal;
(b) the unloading, loading or handling of goods subject to Customs control at the terminal;
(c) the storage, packing or unpacking of goods subject to Customs control at the terminal.

68. New section 102D will impose the obligations which apply to CTOs contained in new sections 102CC and 102CF to 102CI, described above, on cargo handlers. These obligations are:

- notification requirements relating to goods;
- the requirement to take reasonable steps to ensure the cargo handler and certain persons are fit and proper ;
- the obligation to take all reasonable steps to train staff;
- compliance with written directions; and
- the requirement to provide all reasonable facilities and assistance.

69. New section 102DA will impose an obligation on a cargo handler to not allow a container to be unpacked without the written approval of an authorised officer. This obligation does not apply if the goods are unpacked in a depot in accordance with the customs depot licence.

70. New section 102DB will impose an obligation on a cargo handler to not allow transhipment or export of goods, which are imported into Australia and still subject to Customs control without the written approval of an authorised officer.

71. New section 102DC requires a cargo handler to use its establishment ID for a port, airport or wharf when communicating with Customs unless the cargo handler has written permission from Customs to use a contingency code.

72. New section 102DD allows the CEO to, by legislative instrument, impose additional obligations on a cargo handler. This will provide Customs greater flexibility in dealing with new and emerging threats in this domain.

73. The power to impose new obligations is circumscribed by reference to the protection of the revenue, ensuring compliance with Customs Acts, any other law of the Commonwealth prescribed by the regulations or a law of a State or Territory prescribed by the regulations, or for any other purpose. The reference to "any other purpose" in these provisions is limited to purposes of the Customs Act. It is not practical to list all the purposes of the Customs Act and those purposes may change from time to time. An example of a purpose not specifically identified in these provisions would be the *effective operation* of the Customs Act, which could be reflected in an obligation that further facilitates the exercise of powers by Customs Officers.

74. New section 102DE creates a strict liability offence where a cargo handler fails to comply with an obligation or requirement set out in new Division 2 or under a legislative instrument made under new section 102DD.

75. In developing this offence, consideration was given to both the Senate Standing Committee for the Scrutiny of Bills Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

76. The offence is regulatory in nature and has a maximum penalty of 60 penalty units.

77. New Division 4 contains provisions relating to the powers of authorised officers.

78. New section 102E contains general powers of authorised officers. New subsection (1) provides that, for the purpose of determining whether a provision of any Customs-related law has been, or is being, complied with, an authorised officer may enter a cargo terminal and exercise the power to:

- inspect any document at the terminal;
- take extracts from, or make copies of, any such document;
- to take into the terminal such equipment and materials as the authorised person requires for the purpose of exercising powers under a Customs-related law in relation to the terminal.

79. New subsection 102E(2) allows an authorised officer, while at a cargo terminal, to:

- access electronic equipment at the terminal; and

- use a disk, tape or other storage device that is at the terminal or can be used with the equipment or is associated with it, if the authorised officer has reasonable ground for suspecting that the electronic equipment, disk, tape or other storage device is or contains information relating to certain matters.

80. These provisions allow authorised Customs officers with the power to enter, search and access information at cargo terminals without a warrant.

81. *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that legislation should only authorise entry to premises by consent or under a warrant. The Senate Standing Committee for the Scrutiny of Bills has stated that entry without consent or warrant should only be allowed in limited circumstances. One of these circumstances is if a person obtains a licence or registration for the premises, which can be taken to accept entry by an inspector for the purpose of ensuring compliance with licence or registration conditions. While the proposed provisions do not establish a licensing scheme for cargo terminal operators and cargo handlers, the obligations imposed on these parties are of similar nature to a licence including those imposed under customs licensing arrangements for depot and warehouses. In addition, section 102DC could be taken to be a requirement for cargo terminal operators to register with Customs.

82. Under the Customs Act, Customs officers have a range of powers that they can exercise at a 'customs place' including ports, airports and wharves. These provisions in no way limit any of those powers.

83. New section 102EA allows an authorised officer to make requests to CTOs and cargo handlers.

84. New subsection 102EA(1) allows an authorised officer to request, in writing, a CTO provide documentation to the officer of the procedures and methods in place for ensuring the security of goods at the terminal or records relating to each person who enters the terminal. These powers will complement the obligations imposed on a CTO to maintain physical security and maintain records. These powers will also enable an authorised officer ensure a CTO is complying with those obligations.

85. New subsection 102EA(2) will give an authorised officer the power to, in writing, request that a CTO or cargo handler:

- provide information to the officer that would support an assessment that the operator or handler, or certain persons are fit and proper; and
- give the officer access to electronic equipment at the terminal for the purposes of obtaining information for certain matters.

86. New section 102EA does not provide a minimum timeframe a CTO will have to comply with a request made by an authorised officer. This has been left open to allow the maximum amount of flexibility in the provision. When issuing a notice an authorised officer will have regard to what a reasonable timeframe to provide the requested information is in the circumstances.

87. New section 102EB gives an authorised officer the power to give, in writing, certain directions to CTOs and cargo handlers. New section 102EB provides that any directions given under that section are not legislative instruments. This is included to

assist readers as the directions are not legislative instruments within the meaning of section 5 of the *Legislative instruments Act 2003*.

88. Subsection 5 of new section 102EB enables an authorised officer to give directions to anyone at a cargo terminal for specified purposes involving interference with goods subject to Customs control or preventing interference with the exercise of powers or functions of an authorised person at a cargo terminal. Directions given under this subsection are not required to be in writing.

89. CTOs and cargo handlers have an obligation to comply with any directions given under new section 102EB.

90. New section 102F inserts a power for the CEO to give a direction, in writing, to a CTO or cargo handler that they not be involved, either indefinitely or for a specified period, in any way, in the loading, unloading, handling or storage of goods subject to Customs control in the cargo terminal. Where the CTO or cargo handler is a body corporate, the CEO can also give such a direction to an executive officer of that entity.

91. New subsection 102F(3) requires the CEO, before giving a direction, to be satisfied that: the person to whom the direction will be given is not a fit and proper person; or the direction is necessary for the protection of the revenue or for the purpose of ensuring compliance with Customs Acts or any other law of the Commonwealth or of a State or Territory prescribed by the regulations.

92. New section 102FA creates a strict liability offence for failing to comply with a direction under new section 102F. The offence is regulatory in nature and has a maximum penalty of 100 penalty units.

93. In developing this offence, consideration was given to both the Senate Standing Committee for the Scrutiny of Bills Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

94. Although this is a higher penalty than the suggested maximum for a strict liability offence of 60 penalty units contained in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, it is justified in these circumstances given the serious nature of the direction and the possible consequences for security, community safety, and revenue for failing to comply. As a safeguard, a person subject to such a direction also has the right to apply to the Administrative Appeals Tribunal for review of the decision.

Part 3 – Using information held by Customs

Item 45 – After section 233BABAE

95. This item will insert new section 233BABAF in the Customs Act, which creates two new criminal offences for obtaining and using restricted information to commit an offence, and for unlawfully disclosing restricted information obtained from Customs.

96. New subsection 233BABAF(1) creates a new criminal offence where a person obtains restricted information from Customs and uses it to commit an offence against a law of the Commonwealth, a State or Territory. The offence will be punishable by a maximum of imprisonment for 2 years or 120 penalty units, or both.

97. Subsection (2) clarifies that in prosecuting a person under subsection (1), it is not necessary to prove that the defendant knew the offence was one against a law of the Commonwealth, a State or Territory.

98. New subsection 233BABAF(3) will create an additional offence where a person obtains restricted information from Customs, then unlawfully discloses that information to another person. This offence will also be punishable by a maximum of imprisonment for 2 years or 120 penalty units, or both.

99. Restricted information is defined as information, which is held in a computer owned, leased or operated by Customs; and to which access is restricted by an access control system associated with a function of the computer.

100. This offence is deliberately broad in its application. It does not matter how a person obtains the restricted information and it is not necessary for a person to obtain the information from a Customs computer. To prove information is restricted information it will be enough to show that the information which is obtained is stored on a Customs computer – the information does not have to be obtained from the place it is stored.

101. For example, where a person accesses information related to Customs that is contained on the computer of a Customs broker and then uses that information to commit an offence against a law of the Commonwealth, as long as the information which is obtained is held on a computer owned, leased or operated by Customs to which access is restricted by an access control system associated with a function of the computer, that is, the information is restricted information, then provided the relevant fault elements are present then the person will have committed an offence under new subsection 233BABAF(1).

Part 4 – Infringement Notices

102. Infringement notices supplement offences and provide an alternative to prosecution for an offence

103. Australian National Audit (ANAO) Report No. 15 2011-12 included the following recommendation about the Customs Act infringement notice scheme:

"To improve the usefulness of the Infringement Notice Scheme as a mechanism for improving compliance and discouraging non-compliance, the ANAO recommends that Customs and Border Protection:

(a) reviews the operation of the Scheme to identify the impediments to its wider use and whether these impediments can be rectified, and if required

(b) seeks any necessary administrative or legislative changes to the existing scheme to improve its effectiveness."

104. The amendments made by Part 4 are in part a response to that ANAO recommendation and seek to improve the utility of the Customs Act infringement notice scheme by increasing penalties to encourage greater compliance and to move some aspects of the scheme into subordinate legislation to provide some flexibility and simplification.

105. Part 4 will repeal Division 5 of Part XIII of the Customs Act, which contains the infringement notice scheme and replaces that Part with a regulation making power, which will allow most aspects of the infringement notice scheme to be prescribed by regulation. Any regulation made under the new provision will be subject to disallowance under the *Legislative Instruments Act 2003* and will therefore still be subject to Parliamentary scrutiny. Further, inherent in any infringement notice scheme is the ability of the person who receives the notice to refuse to pay the fine and have the matter heard by a court.

106. The approach of prescribing an infringement notice scheme by regulation is consistent with *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and other Commonwealth legislation such as the *Airports Act 1996, Therapeutic Goods Act 1989* and the *Great Barrier Reef Marine Park Act 1975*.

107. The regulations will specify all matters in relation to the infringement notice scheme except the maximum penalty, which the Customs Act prescribes. The Act also specifies that an infringement notice may only apply to strict liability and absolute liability offences contained in the Act.

108. New section 243X will contain this regulation making power.

109. New subsection 243X(2) provides that the maximum penalty under the scheme must not exceed either:

(a) one-quarter of the maximum penalty a court could impose on a person for that penalty; and
(b) either 15 penalty units for a natural person or 75 penalty units for a body corporate.

110. A note at the end of new subsection 243X(2) highlights that subsection 4(3) of the *Crimes Act 1914* allows a court to impose a fine on a body corporate that is up to five times the maximum that could be imposed on an individual convicted of the same offence. This note is included for the purposes of new subsection 243X(2)(a) to clarify that the corporate multiplier applies to infringement notice penalties.

111. *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that infringement notice provisions should generally ensure that the amount payable under a notice for a person is 1/5 of the maximum penalty a court could impose, but not more than 12 penalty units for a natural person and 60 penalty units for a body corporate. To increase the deterrence effect of the infringement notice scheme the ratio has increased to 1/4 of the maximum penalty a court could impose, but not more than 15 penalty units for a natural person and 75 penalty units for a body corporate. This ration is consistent with other Commonwealth legislation including for example section 1313 of the *Corporations Act 2001*.

112. Subsection 243X(3) provides an exception to maximum penalties in paragraph 243X(2)(b). In some cases under the Customs Act, the maximum penalty a court can impose for a strict or absolute liability offence is determined by reference to the amount of duty or value of the goods. Section 243T of the Act is an example. Consistent with current arrangements under the Customs Act, the amount payable under an infringement notice will be limited to 1/5 of the maximum penalty a court could impose only.

113. In addition to the regulation making power, Division 5 will also contain provisions regarding forfeiture of goods that are prohibited imports if an infringement notice is paid and compensation in certain circumstances. Both of these provisions exist in the current infringement notice scheme.

114. Item 58 will contain a savings provision, which provides that the existing Division 5 in Part XIII will continue to operate until regulations are made under new subsection 243X(1).

Part 5– Strict liability offences

115. Part 5 will increase the penalties for a significant number of existing strict liability offences and apply strict liability to several other offences. These amendments will standardise the penalties for many Customs Act strict liability offences and significantly enhance the effectiveness of the enforcement regime in deterring conduct that undermines the integrity of the Australian border and the collection of revenue. The strict liability offences are regulatory in nature, often occur in high volume and attract relatively minor penalties, the majority of which provide for a maximum of 60 penalty units or less, as recommended in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Items 59 to 60- subsection 60(3)

116. Subsection 60(3) creates an offence where the pilot of an aircraft causes the aircraft to land at a boarding station which is not appointed and does not, as soon as practicable, bring the aircraft for boarding to a boarding station appointed for that aircraft and permit the aircraft to be boarded.

117. Similar offence provisions exist in subsection 60(1) and (2). Subsection 60(1) is a strict liability offences and strict liability applies to certain elements of subsection 60(2).

118. To ensure consistency across the like offences in section 60 of the Customs Act, Item 60 will apply strict liability to the offences in subsections 60(2) and (3) and the offences will attract the same maximum penalty of 100 penalty units. An additional defence balances the higher than usual penalty for strict liability offences. It is a defence to a prosecution for an offence against subsection 60(2) and (3) where compliance with the provision is prevented due to stress of weather or other reasonable cause. The defendant bears the legal burden in relation to this defence but the matters required to be proved by the defendant are peculiarly within the knowledge of the defendant.

Items 61 to 104 and 125

119. The amendments made by these items will standardise penalty units for a number of strict liability offences across the Customs Act to either 30 or 60 penalty units.

Items 105 to 120 – sections 240 and 240AB

120. Section 240 places obligations on the owner of goods to keep relevant commercial documents for the purposes of enabling a Collector to verify the correctness of information provided to Customs. The documents must be kept for a specified period of time.

121. Owner of goods is defined very broadly in the Customs Act and includes any person being or holding himself out to be the owner, exporter, consignee, agent or person

possessed of, or beneficially interested in, or having control of, or power of disposition over goods.

122. Section 240 contains a number of offences relating to the commercial documents.

123. Similarly to section 240, section 240AB of the Customs Act requires a person who makes a communication to Customs or who gives someone else information for the purposes of communicating information to Customs to keep, in accordance with section 240AB, a record that verifies the contents of the communication.

124. Section 240AB also contains a number of offences relating to the keeping of records.

125. The amendments will apply strict liability to the offences in sections 240 and 240AB.

126. Applying strict liability to these offences will improve the effectiveness of the enforcement regime. Further, the offences are regulatory in nature and carry relatively small penalties not exceeding 30 penalty units.

Item 121 – Section 243SA

127. Section 243SA contains offences where a person fails to answer a question asked by an officer or monitoring officer.

128. Item 121 will amend section 243SA to apply strict liability to these offences. Applying strict liability to these offences will improve the effectiveness of the enforcement regime. Further, the offences are regulatory in nature and carry relatively small maximum penalties of 30 penalty units.

129. Section 243SC of the Customs Act explicitly preserves the privilege against self-incrimination where a person is required to answer questions under section 243SA.

Items 122 and 123 –section 243SB

130. Section 243SB contains an offence where a person fails to produce a document or records that an officer, pursuant to a power conferred on the officer by the Customs Act, requires the person to produce.

131. Item 123 will amend section 243SB to apply strict liability to the offence. Applying strict liability to this offence will improve the effectiveness of the enforcement regime. Further, the offence is regulatory in nature and carries a relatively small maximum penalty of 30 penalty units.

132. Section 243SC of the Customs Act explicitly preserves the privilege against self-incrimination where a person is required to produce a document or record under section 243SB.

133. Item 122 makes a minor technical amendment.

Item 124 – subsection 243T(3)

134. Subsection 243T(1) provides that a person commits an offence where they make a false or misleading statement which results in the loss of duty. Subsection (3) provides that the penalty for a conviction against subsection (1) is an amount of not more than the excess.

135. The amendment made by this item will provide that the penalty for a conviction will be an amount not exceeding the greater of 60 penalty units and the amount of the excess.

Part 6 – Other amendments

Division 1 - Amendments

Items 126 to 128

136. Part V of the Customs Act sets out provisions that govern the granting and renewal of warehouse licences. Licensed warehouses are used to store imported goods in respect of which customs duty has not been paid. Such goods remain subject to Customs control until duty has been paid and the goods are delivered into home consumption.

137. Section 82 of the Customs Act sets out the statutory conditions to which a warehouse licence is subject. The section also empowers the CEO of Customs to impose additional conditions that the CEO considers necessary and reasonable for three purposes (subsection 82(3)). Section 82A also empowers to CEO to impose additional conditions on a warehouse licence for the same purposes at any time after a warehouse licence has been granted, and section 82B empowers to CEO to vary both sets of these conditions. Under section 82C of the Customs Act, it is an offence to breach of the conditions to which a warehouse licence is subject.

138. Warehouse licences are only valid for up to 12 months at a time and they remain in force until 30 June of any year, but may be renewed under section 84 of the Customs Act. Under subsection 84(2), where a warehouse licence is renewed, the CEO may specify conditions that are different to from those in the original licence.

139. The amendments contained in these items clarify that the CEO may specify different conditions upon the renewal of a licence than those imposed at the time the licence was granted or was last renewed.

Item 129 – section 100

140. Under section 68 of the Customs Act, imported goods must be entered either for home consumption or for warehousing. If goods are entered for home consumption, once all duties and taxes are paid and an authority to deal is granted by Customs, the goods can be taken directly into home consumption. If goods are entered for warehousing, the goods must be stored in a licensed warehouse and duty is not payable on the goods until they are entered for into home consumption from the warehouse.

141. However, section 100 of the Customs Act provides that where goods are entered for warehousing, the goods may be entered for home consumption and be delivered into home consumption without having to first go through a warehouse. The person making such an entry for home consumption must provide certain details to Customs and the holder of the warehouse licence where it was intended that the goods be warehoused.

142. There is concern that that goods dealt with in this way may avoid proper scrutiny by, and accountability to, Customs. Item 129 removes the ability to use this mechanism, unless permission is obtained.

Items 130 to 132

143. Division 3 of Part XI of the Customs Act sets out the licensing regime for customs brokers. Under section 181 of the Act, an owner of goods may authorise a person to be their agent if a person is a natural person who is an employee of the owner or the person is a customs broker.

144. The amendments contained in these items will make changes to the customs broker licensing provisions to improve the flexibility of the regime and to treat non-compliance more effectively.

145. Section 183CG of the Customs Act sets out the statutory conditions to which a broker's licence is subject. Subsection (6) empowers the CEO to impose additional conditions that the CEO considers necessary and reasonable for two purposes. However, there is no power in Division 3 of Part XII whereby the CEO may impose additional conditions on a broker's licence for the same purposes at any time after a broker's licence has been granted. Neither is there a power for the CEO to vary conditions on his or her own initiative.

146. Item 132 inserts new sections 183CGA, 183CGB and 183CGC.

147. New section 183CGA will allow the CEO to impose additional conditions on a broker's licence at any time if the CEO considers the conditions to be necessary or desirable for the protection of the revenue, for the purpose of ensuring compliance with the Customs Acts, or for any other purpose. This is similar to the powers that the CEO has in relation to the imposition of conditions on customs depot and warehouse licence holders.

148. New subsection 183CGA(2) will require the CEO to give the holder of the broker's licence written notice of the change in licence conditions. New paragraph 183CGA(2)(b) provides that any additional conditions imposed in a notice cannot take effect before 30 days after the giving of the notice or, if the CEO considers it necessary, the end of a shorter period specified in the notice.

149. New section 183CGB allows the CEO to vary the conditions imposed on the grant of a licence under 183CG or any additional obligations imposed under new section 183CGA. The conditions must be varied by written notice to the holder of the broker's licence and cannot take effect within 30 days of the issue of the notice unless the CEO considers it is necessary for any variation to commence earlier.

150. New section 183CGC creates a strict liability offence for the breach of any condition to which the licence is subject. The maximum penalty under this section is 60 penalty units.

151. In developing this offence, consideration was given to both the Senate Standing Committee for the Scrutiny of Bills Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The offence is also similar to offences relating to breaches of customs depot and warehouse licence conditions.

152. Item 133 repeals sub section 183CJ(4).

153. Item 134 inserts a note at the end of section 183CJ which clarifies a broker's licence may be subject to additional conditions under section 183CGA and the conditions may be varied under section 183CG(7) or section 183CGA.

Items 135 and 136 – section 234

154. Section 234 of the Act sets out several offences, including offences relating to the provision of information that is false or misleading in a material particular (paragraph 234(1)(d)). Under paragraph 234(2)(c), an offence against paragraph 234(1)(d) is

punishable by a penalty not exceeding 100 penalty units. Where the offence under paragraph 234(1)(d) is in respect of the amount of duty payable on particular goods, the penalty is an amount not exceeding the sum of 50 penalty units plus twice the amount of the duty payable on the goods (subsection 234(3)).

155. To improve the deterrent effect of these penalties, item 135 will increase the maximum penalty under paragraph 234(2)(c) from 100 penalty units to 250 penalty units and item 136 will increase the maximum penalty under subsection 243(3) from 50 penalty units to 100 penalty units.

Items 137 to 138

156. Section 240 of the Customs Act sets out the record keeping obligations on owners of goods imported into Australia or exported from Australia, those people who cause goods to be imported into Australia or exported from Australia and those people who receive goods that have been imported into Australia or are to be exported from Australia. These people must keep all relevant commercial documents that are necessary to satisfy Customs of the correctness of information communicated to Customs. Such documents must be kept for 5 years (from the commencement of the relevant activity) and can be required to be produced to Customs under section 240AA of the Customs Act.

157. Section 240AB sets out a different record keeping obligation on a person who makes a communication to Customs (for example a customs broker or a cargo reporter) or gives someone else information for inclusion in such a communication. Subsection 240AB states that the purpose of section 240AB is to help Customs to verify the content of communications to Customs (as opposed to the correctness of information) and to trace information that is communicated to Customs. Such records must be kept for one year after the relevant activity and can be required to be produced to Customs under section 240AC of the Customs Act.

158. The current arrangement creates an inconsistency in reporting between the parties involved in the cargo environment. This is not ideal and can create problems in dealing with the procurement of documents from parties involved, or to deal with non-compliance. The issue of inconsistent timeframes is exacerbated when one organisation performs a number of industry functions some with a five year document retention requirement and some with a one year document retention requirement. The one year document retention requirement does not always provide sufficient coverage when checking past compliance of an organisation.

159. The amendments made by items 137 and 138 will increase the time period in section 240AB from one year to five years for which a person must keep a record that verifies the contents of a communication made to Customs. This will ensure consistency with the record keeping obligations contained in section 240.

Items 139 to 142 – Section 243T

160. Section 243T sets out the strict liability offence of making a statement to an officer of Customs in respect of particular goods that is false or misleading in a material particular that results in either a loss of duty or an overpayment of a refund or drawback. It is also a strict liability offence to omit from a statement to an officer in respect of particular goods any matter or thing without which the statement is false or misleading in a material particular that has the same results. However, no matter who

makes such a statement, or omits matters from such a statement, only the owner of the goods (not being a person who is to be treated as the owner of the goods because the person is an agent of the owner) commits the offence. This qualification on who is the owner is necessary due to the broad definition of "owner" in subsection 4(1) of the Customs Act. Under this provision, if an importer gives correct information to a customs broker and the broker incorrectly transcribes it and then communicates this incorrect information to Customs, the importer is the person who commits the offence, not the broker.

161. Section 243T does not apply to statements or omissions made in a cargo report or an outturn report. These reports are dealt with separately under section 243V.

162. Sections 243U and 243V set out strict liability offences for statements made to an officer of Customs in similar circumstances to section 243T that *do not* result in either a loss of duty or an overpayment of a refund or drawback. Unlike section 243T, the offence is committed by the person who makes the statement or omits matters from the statement, or causes the statement to be made or causes the matter to be omitted. For example, an importer of goods may provide incorrect information about goods to a customs broker who then communicates this information to Customs. In that instance, while the broker may be the person who communicates the incorrect information, the importer is the person who caused the false statement to be made. However, if a customs broker receives correct information from an importer and incorrectly transcribes it and then communicates this incorrect information to Customs, the broker is the person who caused the false statement to be made to Customs.

163. In order to improve the utility of section 243T, the amendments made by these items provide that liability for the offence will apply in the same way as under section 243U and 243V.

164. These amendments provide that the person who makes, or causes to be made, or omits or causes to be omitted, the statement that is false or misleading in a material particular will commit an offence under this section and not only the owner of the goods. This is fair and appropriate.

Division 2 – Application

Item 143 – Application of amendments

165. Item 143 inserts an application for the purposes of Part 5.

Schedule 2 – Amendments to the AusCheck Act 2007

GENERAL OUTLINE

166. Schedule 2 will strengthen the ability of the ASIC and MSIC schemes to mitigate national security threats, including serious and organised crime by authorising the Secretary, through AusCheck, to suspend a person's ASIC or MSIC (a card) if the person is charged with a serious offence. The Secretary will also be able to suspend processing an application for a card if the applicant is charged with a serious offence and will be able to direct a card issuing body not to issue a card to a person who has been found eligible but is charged with a serious offence before a card is issued.

167. Schedule 2 forms part of the Government's response to the recommendations of the Polaris and PJCLE Reports. The amendments will assist in preventing and stopping high-risk individuals from accessing secure areas of airports and seaports and in disrupting organised criminal groups' infiltration of the maritime and aviation industries and the supply chain.

168. The current ASIC and MSIC regimes are administered by the Transport Secretary and are set out in the Aviation and Maritime Regulations. Under the Aviation and Maritime Regulations, a person is required to hold a card in order to access secure areas of airports and seaports without escort and on an ongoing basis.

169. The Aviation and Regulations provide for the cancellation of a card in specified circumstances, including where the card holder is convicted of, and sentenced to imprisonment for, an aviation- or maritime-security-relevant offence. The Transport Secretary may also suspend a card of a card holder who has been convicted of an aviation- or maritime-security-relevant offence but not yet sentenced.

170. The power to suspend a person's card following charge with a serious offence will build upon these arrangements. Schedule 2 will provide a regulatory framework to:

- require card holders and applicants to notify AusCheck or their card issuing body when they have been charged with a serious offence
- allow appropriate law enforcement officers to determine whether an individual the subject of a serious charge is a card holder or applicant
- enable AusCheck to conduct background checks to determine whether a card holder or applicant has been charged with a serious offence
- enable the Secretary to suspend a card or application where the card holder or applicant has been charged with a serious offence, and
- enable AusCheck to conduct a further background check following the resolution of the charge to confirm the individual's eligibility to hold a card.

171. Further details of this framework will be implemented through regulations made under the AusCheck Act, including by creating offences for conduct such as failing to report a charge for a serious offence, similar to existing offences for failing to report a conviction for an aviation- or maritime-security-relevant offence. These offences will carry pecuniary penalties.

172. The AusCheck Branch of the Attorney-General's Department conducts background checks for the ASIC, MSIC, and National Health Security schemes, operating under the AusCheck Act and *AusCheck Regulations 2007* (AusCheck Regulations).

173. The amendments in this Bill will only apply to the ASIC and MSIC schemes.

AusCheck Act 2007

Part 1—Amendments

Item 1 – Subsection 4(1)

174. Item 1 inserts a definition of ***ASIC*** (short for aviation security identification card) into subsection 4(1) of the AusCheck Act. ASIC will have the same meaning as in the Aviation Regulations.

175. Item 1 also inserts a definition of ***aviation-security-relevant offence*** into subsection 4(1) of the AusCheck Act. This item provides that ***aviation-security-relevant offence*** has the same meaning as in the Aviation Regulations. Suspension of cards and applications will only be authorised where the person has been charged with an offence that is a serious offence, which must be an ***aviation-security-relevant offence***. See Item 5 in relation to the full definition of serious offence.

Item 2 – Subsection 4(1) (definition of *aviation security identification card*)

176. Item 2 repeals the existing definition of ***aviation security identification card*** in the AusCheck Act which is replaced by the definition of ASIC in Item 1. The existing definition of ***aviation security identification card*** refers to "an identification card issued under" the Aviation Regulations and could, therefore, refer to identification cards other than ASICs that are not relevant to the ASIC scheme. The repeal of the existing definition and replacement with the more limited definition is designed to ensure the provisions in the AusCheck Act, including the new provisions providing for the suspension on charge measure, do not have unintended application to other types of identification cards that could be issued under the Aviation Regulations.

Item 3 – Subsection 4(1)

177. Item 3 inserts a definition of ***charged*** into subsection 4(1) of the AusCheck Act. This Item provides that, for the purposes of the suspension on charge measure, an individual is taken to have been ***charged*** with a serious offence if an information is laid against the individual for the offence.

178. The amendments will only authorise a background check to confirm that a person has been charged with a serious offence where the Secretary considers on reasonable grounds that the individual has been ***charged*** with a serious offence**.** It is important that this occur at the earliest opportunity to ensure high-risk individuals do not access secure areas. Accordingly, where an arrest warrant has been issued in relation to an

applicant or card holder, it will be possible for a background check to be undertaken before the individual has been advised of the charge.

179. Item 3 also inserts a definition of ***issuing body*** into subsection 4(1). This definition provides that the term has the same meaning as in the Aviation Regulations and Maritime Regulations for the purposes of ASICs and MSICs, respectively.

180. Item 3 also inserts a definition of ***maritime-security-relevant offence*** into subsection 4(1). Item 3 provides that ***maritime-security-relevant offence*** has the same meaning as in the Maritime Regulations. Suspension of cards and applications will only be authorised where the person has been charged with an offence that is a serious offence, which must be a ***maritime-security-relevant offence***.

Item 4 – Subsection 4(1) (definition of *maritime security identification card*)

181. Item 4 repeals the existing definition of ***maritime security identification card*** in the AusCheck Act, which is replaced by the definition of MSIC in Item 5. The existing definition refers to "an identification card issued under" the Maritime Regulations and, could, therefore refer to identification cards other than MSICs. The new definition is designed to ensure the provisions in the AusCheck Act do not have unintended application to other cards that could be issued under the Maritime Regulations.

Item 5 – Subsection 4(1)

182. Item 5 inserts a definition of ***MSIC*** (short for maritime security identification card) into subsection 4(1) of the AusCheck Act. MSIC has the same meaning as in the Maritime Regulations.

183. Item 5 inserts a definition of ***resolved*** into subsection 4(1) of the AusCheck Act for the purposes of the suspension on charge measure. This Item provides that when a charge for a serious offence is ***resolved*** in relation to an individual is set out in proposed new subsection 4(3).

184. Item 5 inserts the definition of ***Secretary*** to mean the Secretary of the Department. The relevant Department is the Attorney-General's Department.

185. Item 5 also inserts a definition of ***serious offence*** into subsection 4(1) of the AusCheck Act for the purposes of the suspension on charge measure. Paragraph (a) of the definition provides that a ***serious offence*** for the purposes of an ASIC means an ***aviation-security-relevant offence*** within the meaning of the Aviation Regulations that is also specified in regulations made under the AusCheck Act. Paragraph (b) of the definition provides that a ***serious offence*** for the purposes of an MSIC means an ***maritime-security-relevant offence*** within the meaning of the Maritime Regulations that is also specified in regulations made under the AusCheck Act.

186. The definition of serious offence ensures that a serious offence will also always be an aviation- or maritime security-relevant-offence, but leaves it open to the regulations to further limit the offences to allow the list to appropriately target serious offences that demonstrate an individual poses a potential threat to aviation or maritime security.

187. Item 5 also inserts a definition of ***Transport Secretary*** into subsection 4(1) of the AusCheck Act. This definition provides that the ***Transport Secretary*** means the Secretary of the Department administered by the Minister who administers the *Aviation Transport Security Act 2004*.

Item 6 – Before subsection 4(2)

188. Item 6 inserts the subheading "*Meaning of* ***personal information***" before existing subsection 4(2) of the AusCheck Act, which provides the avoidance of doubt provision in relation to the meaning of ***personal information*** in subsection 4(1) of the AusCheck Act.

Item 7 – Subsection 4(2) (paragraph (a) of the definition of *personal information*)

189. Item 7 omits the words "aviation security identification card or a maritime security identification card" and substitutes "ASIC or MSIC" into the definition of ***personal information***.

Item 8 – At the end of section 4

190. Item 8 adds a new subsection into existing section 4 of the AusCheck Act to provide clarity around when a charge in relation to a serious offence is ***resolved.*** Proposed new subsection 4(3) provides that a charge for a serious offence in relation to an individual is ***resolved*** for the purposes of the AusCheck Act, if the charge is finally dealt with through either the withdrawal of the charge, the dismissal of the charge by a court, the discharge of the individual by a court following a committal hearing, the acquittal of the individual for the charge by a court, or a finding by a court that the individual is guilty of the offence.

191. The withdrawal of a charge would include the discontinuation of a charge and the substitution of another charge. A finding by a court that the individual is guilty of the offence would include circumstances where the court sentences the individual for the offence as well as circumstances where the court makes an order relating to the offence under section 19B of the *Crimes Act 1914* (discharge without proceeding to conviction), or a corresponding provision of a law of a State or Territory.

Item 9 – After paragraph 5(a)

192. Item 9 inserts a new paragraph after existing paragraph 5(a) of the AusCheck Act. Proposed new paragraph 5(aa) provides for an additional type of check that can be undertaken by AusCheck as a background check or as part of a background check that consists of one or more other elements as set out in existing section 5.

193. Proposed new subparagraph 5(aa)(i) provides that, if required or permitted under a regulation made under subsection 8(3) of the AusCheck Act, AusCheck can undertake a background check to determine whether an individual has been charged with a serious offence. Such checks will be necessary to determine whether the Secretary is required to suspend an individual's application for an ASIC or MSIC or suspend an

ASIC or MSIC that has been issued, or is required to direct a card issuing body or another person not to issue a card or not to authorise access to a secure area.

194. Proposed new subparagraph 5(aa)(ii) provides that, if required or permitted under a regulation made under subsection 8(3), AusCheck can undertake a background check to determine whether a charge for a serious offence has been resolved. In practice, after AusCheck is notified that a charge has been resolved, AusCheck will conduct a check to confirm that information.

Item 10 – At the end of subsection 8(1)

195. Item 10 adds a new paragraph to existing subsection 8(1) of the AusCheck Act. Proposed new paragraph 8(1)(c) acknowledges that regulations may be made under proposed new subsection (3) (see Item 12) requiring or permitting a background check of an individual to be conducted for specified purposes.

Item 11 – Before subsection 8(2)

196. Item 11 inserts the heading *National security background checks* before existing subsection 8(2) of the AusCheck Act. This amendment improves the readability of section 8 of the AusCheck Act.

Item 12 – At the end of section 8

197. Item 12 adds a new subsection to existing section 8 of the AusCheck Act. Proposed new subsection 8(3), *Background checks required or permitted under the regulations–charges for serious offences,* will authorise the making of regulations requiring or permitting a background check in specified circumstances. The regulation making power will be limited to purposes related to the suspension on charge measure.

198. It is appropriate to limit the new regulation making power as it will not be necessary or appropriate to conduct a background check in relation to an individual's security assessment (see paragraph 5(b)) or citizenship status, residency status, or entitlement to work (see paragraph 5(c)) in furtherance of the suspension on charge measure, as checks in relation to those matters will have been undertaken at the time the individual made their initial application, and could not reasonably be expected to have changed simply because the individual has been charged with a serious offence.

199. Where an applicant self reports that he or she has been charged with a serious offence, it may only be necessary to conduct a background check to confirm the applicant's identity and to determine whether the person has been charged with a serious offence before making a decision to suspend the application. Where a card holder self reports that he or she has been charged with a serious offence, it may only be necessary to conduct a background check to determine whether the person has been charged with a serious offence before making a decision to suspend the card.

200. Where the holder of a suspended card advises that the charge for the serious offence has been resolved, it would be appropriate to conduct a background check to confirm that information. Where AusCheck determines that the person continues to be the subject of a charge for one or more serious offences, it would not be necessary to

conduct a criminal history check (to assess eligibility) as the card would remain suspended. Where the check confirms that there are no outstanding charges, AusCheck may need to conduct a criminal history check. If that check reveals the card holder has been convicted of a security-relevant offence, AusCheck would assess the individual's continued eligibility to hold a card. Where a card holder is found not eligible on the basis of the new criminal history, the Secretary would direct the card issuing body to cancel the card under the existing Aviation and Maritime Regulations.

201. It is proposed that the regulations will provide that, when the Secretary considers on reasonable grounds that an individual has been charged with a serious offence, a background check to determine this matter will be an element of a background check in relation to ASIC and MSIC applicants. In those cases, it will not be necessary to make a decision as to whether the individual is eligible to hold a card until it has been determined that there are no outstanding charges for serious offences in relation to the person (i.e. that all serious charges have been resolved).

202. Proposed new paragraph 8(3)(a) will limit the regulation making power to certain circumstances as specified.

203. The reference to applications throughout this Explanatory Memorandum is intended to include both initial and subsequent applications for an MSIC under the two year/four year regime (an individual with a four year MSIC must have a follow up background check at the two year mark). The reference to applications would also cover situations where, for example, an ASIC or MSIC is cancelled by a card issuing body because the card holder temporarily has no operational need for a card as he or she has taken extended leave and then the card is later issued once the individual had an operational need. The later issue of a card by the card issuing body also involves an application for a card. An individual always has to apply to be issued a card.

204. Proposed new paragraph 8(3)(b) will further limit the regulation making power to circumstances where the Secretary considers on reasonable grounds that the individual has been charged with a serious offence or that a charge for a serious offence has been resolved in relation to the individual.

205. Item 12 inserts a note at the end of subsection 8(3) to clarify that the matters referred to in paragraphs 5(a), (aa) and (d) cover the individual's criminal history, whether the individual has been charged with a serious offence or has had a charge for such an offence resolved, and the individual's identity.

206. Item 12 also inserts subsection 8(4) to ensure that a regulation made under subsection 8(3) may only require or permit a background check to be conducted for purposes related to determining whether it is appropriate for the individual to enter certain areas or zones.

Item 13 – Section 9 (at the end of the heading)

207. Item 13 adds the words "**—background checks required or permitted other than under regulations made under this Act**" to the heading for section 9. This differentiates the matters covered by the AusCheck scheme in relation to background checks performed pursuant to authority *other than* under regulations made under the AusCheck Act from background checks performed pursuant to the AusCheck Act itself (see proposed new section 10).

Item 14 – Subsection 9(1)

208. Item 14 inserts the words ", for the purposes of paragraphs 8(1)(a) and (b)," into existing subsection 9(1) of the AusCheck Act after the word "may". This differentiates the matters for which the AusCheck scheme may make provision in relation to existing background checks as opposed to those for which the AusCheck scheme may make provision in relation to the new suspension on charge measure.

Item 15 – Paragraph 9(1)(h)

209. Item 15 omits the semicolon after the word "check" in existing paragraph 9(1)(h) of the AusCheck Act and replaces it with a full stop. This is because Item 16 repeals paragraph 9(1)(i) (which is reinserted without material change by Item 21), making existing paragraph 9(1)(h) the last paragraph in subsection 9(1).

Item 16 – Paragraph 9(1)(i)

210. Item 16 repeals paragraph 9(1)(i), which is later reinserted in Item 21 as proposed new section 10A without material change.

Item 17 – Paragraphs 9(2)(a)

211. Item 17 omits "under the AusCheck scheme" and substitutes "for the purposes of paragraphs 8(1)(a) and (b)". This amendment is necessary as paragraph 9(2)(a) does not relate to the suspension on charge measure.

Item 18 – Subparagraphs 9(4)(a)(i) and (ii)

212. Item 18 repeals subparagraphs 9(4)(a)(i) and (ii) and inserts a new subparagraph 9(4)(a)(i) into existing paragraph 9(4). This amendment replaces the words "an aviation security identification card" and "a maritime security identification card" with the short form "an ASIC or MSIC".

Item 19 – Paragraph 9(4)(b)

213. Item 19 omits the words "the other person" from existing paragraph 9(4)(b) and substitutes "the person to whom the application was made". This is intended to avoid confusion and to clarify that the person to whom paragraph 9(4)(b) refers is the person to whom the application is made. In practice, this will be the individual's card issuing body which will have notified the individual that a background check was a precondition to the issuing of a card and continuing eligibility to hold a card.

Item 20 – Paragraph 9(4)(b)

214. Item 20 omits the words "to the issuing of the card, licence, permit or authorisation" from existing subparagraph 9(4)(b)(i) and replaces them with proposed new subparagraphs 9(4)(b)(i) and 9(4)(b)(ii). This is because, once this amendment commences operation, a card issuing body will be required to notify applicants that a background check is a precondition to the issue of a card and to the individual's continuing eligibility to hold a card. This amendment means an individual who has been properly notified will be taken to have consented to the conduct of any further background check required or permitted other than under the AusCheck Act.

215. Currently, under the Aviation and Maritime Regulations, the Transport Secretary can apply for a background check on the holder of an ASIC or MSIC if the Transport Secretary considers on reasonable grounds that the holder has been convicted of an aviation or maritime security-relevant offence or constitutes a threat to aviation or maritime security. This amendment will ensure that AusCheck is duly authorised to undertake the background check, by providing that an individual who has been properly notified will have been taken to have consented to the further background check.

216. This amendment will only apply in relation to individuals who apply for an ASIC or MSIC on or after the amendments in this Bill have commenced operation and who have received the relevant notification information from their card issuing body. This ensures applicants are providing informed consent. An individual who does not wish to be the subject to an initial or a subsequent background check has the option of not applying for an ASIC or MSIC. Consent for background checks is discussed further in the Statement of Compatibility.

217. This amendment is not relevant to consent in relation to background checks required or permitted under the AusCheck Act (as opposed to those background checks required or permitted under another authority, such as the Aviation or Maritime Regulations). Specifically, the amendment has no application to background checks undertaken for purposes related to the suspension on charge measure.

Item 21 – After section 9

218. Item 21 inserts proposed new section 10 after existing section 9 of the AusCheck Act. Proposed new section 10, **Matters covered by AusCheck scheme–background checks required or permitted under regulations made under this Act**, provides that the AusCheck scheme may, for the purposes of new paragraph 8(1)(c), make provision for and in relation to:

- giving the Secretary certain information
- the criteria against which a background check is to be assessed
- the decision or decisions that may be made as a result of a background check
- the form of advice to be given to an individual and other persons following a background check.

219. Proposed new subsection 10(2) provides that the matters referred to in subsection 10(1) may relate to all background checks to be conducted for the purposes of

paragraph 8(1)(c) or a specified class of background checks. This will ensure consistency with paragraph 9(2)(a) of the AusCheck Act.

220. Proposed new subsection 10(3) provides that the AusCheck scheme may, for the purposes of new paragraph 8(1)(c), make provision for and in relation to an individual or a card issuing body notifying the Secretary or the Transport Secretary of certain matters in particular circumstances as specified in the subsection.

221. Item 21 also inserts proposed new section 10A, **Matters covered by AusCheck scheme–online verification service**, into the AusCheck Act. Proposed new section 10A replaces existing paragraph 9(1)(i), which is repealed by Item 16 of the Bill. There is no substantial change to the effect of this section.

Item 22 – Before subsection 11(2)

222. Item 22 inserts the heading *Directions about advising whether licence etc. has been issued to individual* before existing subsection 11(2) of the AusCheck Act. This is to improve readability of section 11.

Item 23 – At the end of section 11

223. Item 23 adds proposed new subsections 11(3) to 11(6) at the end of existing section 11 of the AusCheck Act.

224. Proposed new subsection 11(3), *Directions in connection with background checks required or permitted under the regulations–charges for serious offences,* provides for the AusCheck scheme to empower the Secretary to give a direction to a card issuing body to delay consideration of an application for, or suspend, an ASIC or MSIC in the specified circumstances, and to the Transport Secretary to delay consideration of an application for an ASIC or MSIC or to delay consideration of an application to set aside the cancellation of an ASIC or MSIC.

225. Proposed new subsection 11(4), *Giving further directions referred to in subsection (3),* provides for the giving of directions by the Secretary. Proposed new paragraph 11(4)(b) requires the Secretary to give a direction where all charges for serious offences have been resolved in relation to the individual and a background check of the individual's criminal history has been conducted. Proposed new paragraph 11(4)(b) authorises the Secretary to give a further direction at any time before the background checks of charge for serious offences and criminal history checks referred to in proposed new paragraph 11(4)(a) have been completed.

226. Proposed new subsection 11(5), *Directions under subsection (3) to suspend ASICs or MSICs–other card also taken to be suspended,* provides that the suspension of an ASIC or MSIC results all cards issued to an individual who has multiple ASICs or/and MSICs. In addition, proposed new subsection 11(5) would prevent an individual from using other cards issued under the Aviation or Maritime Regulations, such as a Visitor Identification Card or a Temporary Aircrew Card.

227. Proposed new subsection 11(6), *Other matters connected with giving directions under subsection (3),* provides for making of provision for matters connected with the giving

of a direction under new subsection 11(3). The matters about which provision may be made are listed in proposed new paragraph 11(6) and include:

- preventing the making any other application by the individual
- preventing entry into certain areas or zones
- preventing the issue of any card to the individual
- preventing the individual obtaining escorted access to certain areas
- the return of a suspended card issued to an individual
- updating registers of cards and other records kept by a card issuing body
- preventing unlawful interference with aviation, maritime transport or offshore facilities
- preventing the commission of an offence, and
- preventing an incident that poses a threat to national security.

228. The types of card or access intended to be captured by proposed new paragraph 11(6)(a) to 11(6)(c) would include, but not be limited to, an ASIC or MSIC, Visitor Identification Card, Temporary Aircrew Card, or temporary ASIC or MSIC, and escorted access

Item 24 – Before paragraph 13(1)(a)

229. Item 24 inserts a new paragraph in existing subsection 13(1) of the AusCheck Act. Proposed new paragraph 13(1)(aa) provides that the collection, use and disclosure of personal information (other than identity verification information) for purposes directly relating to determining whether a background check under the AusCheck scheme is required or permitted to be conducted in respect of a particular individual is authorised for the purposes of the *Privacy Act 1988*.

230. The collection, use and disclosure of personal information will occur for the purposes of the suspension on charge measure to confirm, for example, where incomplete information has been provided to AusCheck and the disclosure is needed to determine whether a background check is required to be undertaken. This disclosure would not in itself amount to the commencement of a background check.

Item 25 – Subparagraphs 13(1)(c)(i) and (ii)

231. Item 25 omits the words "aviation security identification card or a maritime security identification card" from existing subparagraphs 13(1)(c)(i) and 13(1)(c)(ii) of the AusCheck Act and replaces those words with the words "ASIC or MSIC".

Item 26 – After subparagraph 14(2)(b)(i)

232. Item 26 inserts a new subparagraph into existing paragraph 14(2)(b) of the AusCheck Act. Proposed new subparagraph 14(2)(b)(ia) will authorise the use or disclosure of AusCheck scheme personal information (other than identity verification information) for the purposes of monitoring and enforcing compliance with a requirement under the AusCheck scheme, the Aviation Regulations or the Maritime Regulations to notify the Secretary or the Transport Secretary of a specified matter. This amendment would allow AusCheck to disclose personal information about an individual's failure to

self-report a conviction and sentence for a security-relevant-offence (an existing requirement under the Aviation and Maritime Regulations) to the Transport Secretary.

Item 27 – At the end of paragraph 14(2)(b)

233. Item 27 adds a new subparagraph to paragraph 14(2)(b) of the AusCheck Act. Proposed new subparagraph 14(2)(b)(iv) will authorise the use or disclosure of AusCheck scheme personal information about an individual for the purposes of determining whether an individual has been charged with a serious offence or whether such a charge has been resolved. The provision will be limited to information about the individuals covered by subsection 8(3).

Item 28 – Paragraph 14(2A)(a)

234. Item 28 omits the words "aviation security identification card or a maritime security identification card" from existing paragraph 14(2A)(a) of the AusCheck Act and replaces them with the words "ASIC or MSIC".

Item 29 – Paragraph 14(2A)(b)

235. Item 29 omits the words "such an identification card" from existing paragraph 14(2A)(b) of the AusCheck Act and replaces them with the words "an ASIC or MSIC".

Item 30 – Paragraph 18(2)(c)

236. Item 30 replaces the number "50" in existing paragraph 18(2)(c) with the number "100".

237. The monetary value of a penalty unit in relation to an offence under a Commonwealth law is $170 (see subsection 4AA(1) of the *Crimes Act 1900*). Accordingly, Item 30 will increase the maximum penalty that can be imposed by regulations made under the AusCheck Act from $8,500 to $17,000 for an individual or from $42,500 to $85,000 for a body corporate (see subsection 4B(3) of the *Crimes Act 1900*).

238. This amendment will not increase the penalty for any offences already prescribed in the AusCheck Regulations. However, it will provide scope to impose appropriate penalties for offences proposed to be made under regulations made under the AusCheck Act, such as failing to report a charge in relation to a serious offence.

239. A maximum penalty of 100 penalty units would ensure the penalty for an offence for failing to self-report a charge for a serious charge is consistent with penalties for similar offences, such as the offence for failure to self-report a conviction under regulation 6.08LBA of the Maritime Regulations.

Part 2—Application of amendments

240. Part 2 of Schedule 2 provides for consequential and transitional matters related to the amendments made by Schedule 2 of the Bill.

Item 31 – Application of amendments

241. Item 31 provides for a broad application of the amendments made by Schedule 2 of the Bill to ensure that all persons who applied for or were issued an ASIC or MSIC – whether before, on or after the commencement of the amendments – are subject to the suspension on charge measure if they are charged on or after the commencement of the amendments. If an individual has an outstanding charge at the time the amendments commence they will not be subject to the new suspension on charge measure.

242. These transitional arrangements reflect the importance of taking immediate action to mitigate the threat to national security by serious and organised crime in the aviation and maritime sectors. Given ASICs are valid for 2 years and MSICs are valid for either 2 or 4 years, if these transitional amendments were not put in place it would take up to 4 years before all card holders had reapplied for a new card and were subject to the suspension measure. This delay presents an unacceptable risk.

243. Item 31 also provides that sections 13 and 14 of the AusCheck Act, as in force on and after the commencement of these amendments, apply in relation to personal information whether it is collected before, on or after that commencement.

Item 32 – Savings provision—online verification service

244. Item 32 provides that, despite the repeal of paragraph 9(1)(i) of the AusCheck Act, regulations in force for the purposes of paragraph 9(1)(i) immediately before the commencement of Item 32 continue in force. This ensures the continuity of regulations relevant to (former) paragraph 9(1)(i) that will apply for the purposes of proposed new section 10A following commencement of section 10A.

Schedule 3 – Amendments to the Law Enforcement Integrity Commissioner Act 2006

GENERAL OUTLINE

245. The purpose of this schedule is to amend the LEIC Act to ensure that the Deputy Speaker of the House of Representatives and the Deputy President and Chair of Committees of the Senate (the deputy presiding officers) are eligible for appointment to the PJC-ACLEI.

246. The PJC-ACLEI is established under Part 14 of the LEIC Act. The role of the PJC-ACLEI includes monitoring the performance of the Integrity Commissioner, trends in law enforcement and corruption, and reporting to Parliament accordingly.

247. The amendments contained in this Schedule will make membership eligibility for the PJC-ACLEI consistent with Parliamentary committees with similar functions, including the Parliamentary Joint Committee on Law Enforcement and the Parliamentary Joint Committee on Intelligence and Security.

Law Enforcement Integrity Commissioner Act 2006

Items 1 and 2 – paragraphs 214(3)(c) and 213(3)(d)

248. Subsection 213(3) of the LEIC Act provides that members of Parliament who hold the following offices are not eligible to be appointed as members of the PJC-ACLEI: Minister (paragraph 213(3)(a)), the President of the Senate (paragraph 213(3)(b)), Speaker of the House of Representatives (paragraph 213(3)(c)), and the Deputy President and Chair of Committees of the Senate and the Deputy Speaker of the House of Representatives (paragraph 213(3)(d)).

249. Item 1 will amend paragraph 213(3)(c) to replace the 'or' which currently appears at the end of the paragraph, with a full stop, as the list of office holders ineligible for appointment to the PJC-ACLEI will now end at this paragraph.

250. Item 2 will repeal paragraph 213(3)(d), which will remove the prohibition on the Deputy President and Chair of Committees of the Senate and the Deputy Speaker of the House of Representatives being appointed members of the Committee.

Item 3 – Savings provision

251. This item is a savings provision which will preserve the continuity of membership of the PJC-ACLEI for either of the deputy presiding officers.

252. The item also includes a note referring to section 33AB of the *Acts Interpretation Act 1901*, which provides that anything done by a person purporting to act under an appointment under an Act is not invalid merely because the appointment had ceased to have effect.

253. The effect of section 33AB of the Acts Interpretation Act is that any actions taken by the PJC-ACLEI following a member's appointment as Deputy Speaker or Deputy President, but where the member continued to sit on the PJC-ACLEI, are not invalid

merely because paragraph 213(4)(b) of the LEIC Act provides that their membership ceased upon appointment to either of those positions.