

## EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

*AusCheck Act 2007*

### ***AusCheck (Major National Event— FIFA Women’s World Cup Australia & New Zealand 2023) Declaration 2021***

- 1 The *AusCheck Act 2007* (the AusCheck Act) establishes a background checking function within the Department of Home Affairs (the Department). The purpose of the AusCheck Act is to provide a regulatory framework for coordinating and conducting centralised criminal, security and other background and identity checking and for related purposes. These functions may be exercised by the Department in relation to major national events.
- 2 An event is a major national event for the purposes of the AusCheck Act when the Minister for Home Affairs makes a declaration under subsection 5A(1) that a specified event is a major national event. The Minister cannot make such a declaration unless the Minister is satisfied that it is in the national interest that the Commonwealth be involved in the conduct and coordination of background checks in connection with the accreditation of individuals in relation to the event (see subsection 5A(2)). Under subsection 5A(3), the Minister may also have regard to the significance of the event, the risk assessment relating to the event and the potential impact of any security incident relating to the event on Australia’s reputation when making a declaration.
- 3 The instrument declares that the Fédération Internationale de Football Association Women’s World Cup Australia & New Zealand 2023 is a major national event under subsection 5A(1) of the AusCheck Act.
- 4 The Fédération Internationale de Football Association Women’s World Cup Australia & New Zealand 2023 is a major sporting event that will take place in Australia & New Zealand in 2023. This instrument enables AusCheck to conduct and coordinate background checks in connection with the accreditation of individuals who are working or volunteering at the Fédération Internationale de Football Association Women’s World Cup Australia & New Zealand 2023.
- 5 The instrument commences the day after registration on the Federal Register of Legislation, and is a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

#### ***Consultation***

- 6 Consultation on the instrument has been undertaken with the following stakeholders, who were all supportive of the instrument being made:
  - Immigration and Visa Services Division and Emergency Management Australia Division within the Department
  - Office of Sport, Department of Health
  - Australian Security Intelligence Organisation
  - Australian Federal Police, and
  - Australian Criminal Intelligence Commission.

- 7 The Office of Best Practice Regulation (OBPR) was also consulted and advised that a regulatory impact statement is not required for declarations under subsection 5A(1) of the AusCheck Act where the event meets certain criteria. The event in this instrument meets those criteria. The OBPR reference number is 25680.

*Parliamentary scrutiny etc.*

- 8 The instrument is subject to disallowance under section 42 of the Legislation Act. A Statement of Compatibility with Human Rights has been prepared in relation to the instrument, and provides that to the extent that the instrument impacts human rights, the impact is reasonable and proportional. The Statement is included at **Attachment A** to this explanatory statement.
- 9 The instrument was made by the Minister for Home Affairs, in accordance with the section 5A of the AusCheck Act.

**Statement of Compatibility with Human Rights**

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

***AusCheck (Major National Event— FIFA Women’s World Cup Australia & New Zealand 2023)  
Declaration 2021***

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

**Overview of Disallowable Legislative Instrument**

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

This Disallowable Legislative Instrument operates to declare, for the purposes of subsection 5A(1) of the AusCheck Act, the FIFA Women’s World Cup Australia & New Zealand 2023 (FIFA WWC 2023) to be an MNE. The effect of the declaration is to allow AusCheck to coordinate and conduct background checks in connection with the accreditation of individuals in relation to the FIFA WWC 2023.

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

The declaration of FIFA WWC 2023 as an MNE will enliven relevant provisions in the AusCheck Regulations. For the purposes of FIFA WWC 2023, the section 21F notifiable instrument will specify that a background check will include an assessment of:

- the individual’s criminal history, if the individual is aged over 18 years of age
- matters relevant to a security assessment, and
- an electronic identity verification check.

**Human rights implications**

This Disallowable Legislative Instrument engages the following rights:

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

### ***Right to equality and non-discrimination***

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

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

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

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

### ***Right to an effective remedy***

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

To the extent that the declaration of an MNE enlivens the background check provisions in the AusCheck Regulations, the rights to effective remedy will be engaged. Section 26 of the AusCheck Regulations provides a right of review by the Administrative Appeals Tribunal (AAT) for an applicant who is refused an exemption under subsection 21K(7) of the AusCheck Regulations in relation to identity verification requirements, or receives an unfavourable criminal history decision. The definition of 'unfavourable criminal history' in section 6 of the AusCheck Regulations includes an 'MNE criminal record'. 'MNE criminal record' is defined in section 4 to be where there is a conviction of an MNE level 1 disqualifying offence, or conviction and imprisonment for an MNE level 2 or 3 offence.

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

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

### ***Right to privacy***

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

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

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

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

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

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

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

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

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

Appropriate safeguards exist to ensure that use of an individual's personal information is reasonable and proportionate. Personal information is provided voluntarily by an individual with their consent, or the consent of their parent or guardian if the individual is less than 16 years of age, to be used for a background check. An individual will be provided with a privacy notice by the Department detailing how their information will be utilised to ensure informed consent. The Department will update the privacy notice to capture the amendments in this instrument. Section 29 of the AusCheck Regulations allows the Secretary of the Department to issue guidelines about the use and disclosure of information in the AusCheck database. The guidelines are currently publically available on the Department's website. All Departmental staff members are required to comply with the guidelines. Section 15 of the AusCheck Act also provides an offence provision for Departmental staff members who unlawfully disclose AusCheck scheme personal information.

### ***Right to work***

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

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

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

be automatically disqualifying. The amendments in this instrument are aimed at ensuring that persons who work or volunteer at an MNE do not pose a risk to national security or public order.

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

## **Conclusion**

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