

EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs

Crimes Act 1914

Crimes (Major Airports—Cairns Airport) Determination 2022

The *Crimes Legislation Amendment (Police Powers at Airports) Act 2019* (Police Powers at Airports Act), which commenced on 28 April 2020, amended Division 3B of Part IAA of the *Crimes Act 1914* (Crimes Act) to enhance police powers at Australia's major airports. These amendments introduced new powers enabling Australian Federal Police (AFP) *constables* and *protective service officers (PSOs)* at a major airport, and in relevant circumstances, to:

- direct a person to produce evidence of their identity ('identity check direction') (section 3UP)
- direct a person, in writing, to leave the airport, and not enter that airport, or any other specified major airport, and/or not take a specified flight, or any flight, to or from the airport, for up to 24 hours ('move-on direction') (section 3UQ), and
- direct a person to stop or do anything else reasonably necessary to facilitate an identity check direction or move-on direction ('ancillary direction') (section 3US).

The term 'major airport' is defined in section 3UM of the Crimes Act, as amended by the Police Powers at Airports Act.

The list of *major airports* in section 3UM currently includes all capital city airports, as well as Alice Springs, Gold Coast, Launceston, and Townsville airports. The list of airports in section 3UM was selected on the basis of operational advice, taking into account the risk profile of these airports and the prevailing threat environment, and includes all airports at which the AFP has a permanent policing presence.

Subsection 3UO(1) enables the Minister for Home Affairs to determine additional airports to be *major airports* for the purposes of section 3UM, allowing the powers in Division 3B to be exercised at these airports. A determination under subsection 3UO(1) must include a description of land in relation to the airport, for the purposes of paragraph 3UM(2)(b). The relevant powers under sections 3UP, 3UQ and 3US may be exercised by AFP *constables* and *PSOs* anywhere within the determined airport's boundaries, as described in the determination, including car parks, hangars and terminals.

Subsection 3UO(4) provides that Division 3B may apply in relation to an airport determined by the Minister under subsection 3UO(1), even if the airport is also used for a purpose other than a purpose identified in subsection 3UO(3). This ensures that, where an airport is used for the purpose of flights that start or end in a Territory, but is also used for intrastate flights, the airport may still be treated as a *major airport*, as determined under subsection 3UO(1).

Operational advice indicates there is a need for Cairns Airport to be determined a *major airport*, due to the large number of passengers that transit through the airport annually, and its international operations. Determining Cairns Airport as a *major airport* enables *constables* and *PSOs* to exercise the powers under Division 3B of the Crimes Act at Cairns Airport, to

address a potential vulnerability to criminal activity, and to safeguard the public order and operation of the airport.

The purpose of the *Crimes (Major Airports—Cairns Airport) Determination 2022* (the Instrument) is to determine Cairns Airport as a *major airport* for the purposes of Division 3B of the Crimes Act.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*, and is disallowable under section 42 of that Act.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that this instrument is compatible with human rights. A copy of the Statement is provided at **Attachment A**.

Details of the Instrument

Section 1 of the Instrument provides that this instrument is the *Crimes (Major Airports—Cairns Airport) Determination 2022*.

Section 2 of the Instrument provides that the whole of the instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 provides that the Instrument is made under subsection 3UO(1) of the Crimes Act.

Section 4 is the main operative provision of the Instrument. Subsection 4(1) provides that Cairns Airport is determined by the Minister as an airport for the purposes of paragraph 3UM(1)(m) of the Crimes Act, meaning that Cairns Airport is determined to be a *major airport*.

Subsection 4(2) provides that, for the purposes of paragraph 3UM(2)(b) of the Crimes Act, the land in relation to Cairns Airport is described by the aerial photographic map in Schedule 1 as:

- (a) the land, including land beneath an area of water, within the boundary of each area indicated by a continuous red line on the map, as far as the edge of the land indicated by the outer edge of the line (including, for example, the land on which the HIAL (High Intensity Approach Lighting - HIAL) compound identified by the map is situated); and
- (b) the land over which the HIAL bridge identified by the map is situated, including the riverbed underneath the bridge and the land on or under the approaches to the bridge, and consisting of the relevant land indicated by red lines on the map.

The purpose of Note 1 is to assist identifying the HIAL bridge as the bridge that spans the Barron River. Note 2 clarifies that the land described in subsection 4(2) includes any building, structure, installation or equipment situated on the land (with a cross-reference to paragraph 3UM(2)(c) of the Crimes Act). The purpose of Note 2 is to clarify that this land includes the HIAL Compound mentioned in paragraph 4(2)(a) and the HIAL bridge mentioned in paragraph 4(2)(b).

Schedule 1 to the Instrument provides a map of the land in relation to Cairns Airport to which section 4 of the Instrument refers.

Consultation

Extensive consultation with the AFP was undertaken in the preparation of the Instrument.

The Office of Best Practice Regulation (OBPR) has confirmed that a Regulatory Impact Statement is not required. The OBPR reference number is 25890.

Statement of Compatibility with Human Rights

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

Crimes (Major Airports – Cairns Airport) Determination 2022

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

Overview of the Disallowable Legislative Instrument

1. Following amendments to Division 3B of Part IAA of the *Crimes Act 1914* (Crimes Act) by the *Crimes Legislation Amendment (Police Powers at Airports) Act 2019* (Police Powers at Airports Act), which commenced on 28 April 2020, *constables* and *protective service officers (PSOs)* have the power to issue specific directions at a *major airport*, as defined in subsection 3UM(1) of the Crimes Act, in relevant circumstances.
2. Section 3UO of the Crimes Act empowers the Minister to determine an airport for the purposes of the definition of *major airport* in section 3UM.
3. The Crimes (Major Airports – Cairns Airport) Determination 2022 (the Instrument) determines Cairns Airport as a *major airport*, which will allow *constables* and *PSOs* to issue the following directions at Cairns Airport:
 - direct a person to produce evidence of their identity (‘identity check direction’),
 - direct a person, in writing in accordance with the approved form, to leave the airport, and not enter that airport, or any other specified major airport, and/or not take a specified flight, or any flight, to or from the airports, for up to 24 hours (‘move-on direction’), and
 - direct a person to stop or do anything else reasonably necessary to facilitate an identity check direction or move-on direction.
4. These powers are designed to keep the Australian public safe by ensuring that law enforcement have appropriate powers to address security, safety and criminal threats that may arise in the aviation environment.
5. Currently, *constables* and *PSOs* do not have adequate powers to engage with persons at Cairns Airport to assess and mitigate a potential risk or threat at the earliest opportunity.
6. Operational advice indicates there is a need for Cairns Airport to be determined as a major airport due to its international exposure and the large number of passengers that transit through the airport annually. Determining Cairns Airport as a major airport would enable *constables* and *PSOs* to exercise the powers under Division 3B at Cairns Airport to address criminal activity and safeguard the public order and operation of the airport.

Human rights implications

7. This Disallowable Legislative Instrument engages the following human rights:
- the right to equality and non-discrimination in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the Convention on the Rights of the Child (CRC)
 - the right to security of persons and freedom from arbitrary detention in Article 9 of the ICCPR and Article 37 of the CRC
 - the right to freedom of movement in Article 12 of the ICCPR and Article 10 of the CRC
 - the right to freedom from interference with privacy in Article 17 of the ICCPR and Article 16 of the CRC, and
 - the rights to freedom of assembly and association in Articles 21 and 22 of the ICCPR and Article 15 of the CRC.

Equality and non-discrimination

8. Article 2(1) of the ICCPR requires Australia to respect and ensure individuals the rights set out in the ICCPR without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 2 of the CRC provides similar protections in relation to minors. Article 26 further provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

9. The measures in this Instrument do not limit a person's right to equality and non-discrimination in accordance with Articles 2(1) and 26 of the ICCPR and Article 2 of the CRC, as the circumstances in which a *constable* or *PSO* may lawfully exercise the proposed identity check, move-on and ancillary directions do not differ on the basis of a person's age, gender, ethnicity, religious background or any other status.

10. A *constable* or *PSO* issuing these directions will not be permitted to do so in a discriminatory fashion. As prescribed in sections 3UP, 3UQ and 3US of the Crimes Act, to issue a direction a *constable* or *PSO* must have reasonable grounds for doing so which are linked to criminal activity or the *public order and safe operation* of a *major airport*.

11. This 'reasonable grounds' requirement ensures that the proposed directions are only issued on the basis of objectively substantiated observations on actionable intelligence relevant to the *public order and safe operation* of a *major airport* or to criminal conduct. A direction cannot be issued in the absence of such grounds, ensuring that the powers will only be exercised in accordance with a *constable* or *PSO's* perception of a security or safety risk or to preclude the commission of a crime. This requirement prevents a *constable* or *PSO* from issuing a direction solely on the basis of a person's age, ethnicity or religious background.

12. Commonwealth officers exercising these powers are also bound by Commonwealth anti-discrimination legislation including the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. State and territory officers are also bound by similar legislation within their own jurisdictions. Broadly, anti-discrimination legislation prohibits officers from engaging in behaviour that constitutes discrimination and provides that all persons are to be equal before the law. These obligations ensure that a person's right to equality before the law and to non-discrimination are not limited in a manner that is directly or indirectly discriminatory.

13. Police officers are also bound by professional standards that preclude them from using their powers in a discriminatory fashion. The AFP Code of Conduct, for example, requires all AFP appointees to act without discrimination or harassment in the course of AFP duties. Officers that exercise the powers proposed in this Instrument to target minority communities will be acting unlawfully and will be subject to the AFP's professional standards regime, which may result in disciplinary action, including termination.

14. *Constables* and *PSOs* also receive specialist training to identify potential threats in a non-discriminatory manner. Members of the AFP, for example, are appropriately trained in Behavioural Assessment and Security Questioning to identify known behavioural traits displayed by people who are about to commit a criminal act, and to ask targeted questions of persons of interest, without prejudice or discrimination.

15. Accordingly, the measures in this Instrument do not limit a person's right to equality and non-discrimination under the ICCPR or the CRC.

Right to Security of the Person and Freedom from Arbitrary Detention

16. Article 9(1) of the ICCPR provides that every person 'has the right to liberty and security of person' and that no person 'shall be subjected to arbitrary arrest or detention.' Article 37(b) of the CRC provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily.

17. The ancillary direction powers set out in section 3US engage a person's right to security and freedom from arbitrary detention under Article 9(1) of the ICCPR or Article 37 of the CRC, as a *constable* or *PSO* may stop a person under an ancillary direction, to facilitate an identity-check direction or a move-on direction.

18. An ancillary direction will only be issued by *constables* or *PSOs* where the officer considers on reasonable grounds that the exercise of these powers are necessary to facilitate an identity check direction or a move-on direction (see paragraphs 3US(1)(b) and (2)(b)). This ensures that a *constable* or *PSO* must choose the least intrusive means to ensure that these directions are facilitated, as a more intrusive option is unlikely to be found to be necessary on reasonable grounds.

19. Identity check directions, for example, only compel a person to produce documentation or their name, address and date of birth (see subsection 3UP(2)), which would typically occur within seconds. Move-on directions, on the other hand, require a person to not take a specified flight, or leave and not re-enter a *major airport*, for a specified period of time (see subsection 3UQ(3)). In a move-on direction, persons are stopped only for the length of time it takes to issue the direction.

20. These directions are focused on moving a person on from a particular area, and do not enable ongoing detention of a person, which would be disproportionate, unnecessary and often counterproductive. In addition, detention of a person would not be permitted under the ancillary powers as it would not be reasonably necessary to ensure compliance with these directions.

21. The measures in the Instrument are compatible with the right to security and freedom from arbitrary detention under Article 9 of the ICCPR and Article 37 of the CRC. They are compatible to the extent that the measures are reasonable, necessary, and proportionate to achieving the legitimate objectives of protecting national security, public order and the rights and freedoms of others at Cairns Airport who may be affected by the behaviour of a person subject to a direction or at risk from criminal or terrorist activity. The rights of others at Cairns Airport being protected include the inherent right to life, the right to liberty and security of person and right to liberty of movement, both within the airport precinct and for persons departing from and arriving into Cairns Airport.

Right to Freedom of Movement

22. Article 12(1) of the ICCPR provides that ‘everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence’. Article 12(2) of the ICCPR states that ‘everyone shall be free to leave any country, including his own’.

23. Pursuant to Article 12(3), these rights can be restricted by laws consistent with other rights in the ICCPR where it is necessary to protect national security, public order, public health or morals, and or the rights and freedoms of others at Cairns Airport who may be affected by the behaviour of a person subject to a direction or at risk from criminal or terrorist activity. The rights of others at Cairns Airport being protected include the inherent right to life, the right to liberty and security of person and right to liberty of movement, both within the airport precinct and for persons departing from and arriving into Cairns Airport.

24. Article 10(2) of the CRC relevantly provides that ‘State parties shall respect the right of the child and his or her parent to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention’.

25. The right to freedom of movement is engaged by the move-on and corresponding ancillary directions, which are capable of limiting the movement of a person in and out of *major airports* (including via flight). However, it is necessary to limit this right at Cairns Airport, to ensure that *constables* and *PSOs* have adequate powers to engage with persons to assess a potential risk or threat at the earliest opportunity. Operational advice indicates there is a need for Cairns Airport to be determined as a major airport to address criminal activity and safeguard the public order and operation of the airport.

26. The limitations are prescribed by law, as they are authorised by the Crimes Act, and are rationally connected to achieving the legitimate objective of protecting national security, public order and the rights and freedoms of others at Cairns Airport who may be affected by the behaviour of a person subject to a direction or at risk from criminal or terrorist activity.

27. The National Terrorism Threat Level has remained at ‘Probable’ since September 2014, based on credible intelligence assessed by Australia’s security agencies that individuals or groups continue to have the intent and capability to conduct a terrorist attack in Australia. With this threat environment, airports and the aviation sector are an attractive high-profile and high-impact target for criminals and terrorists.

28. The move-on and ancillary directions (sections 3UQ and 3US) achieve the legitimate objective of protecting national security by preventing terrorist acts and upholding public order by providing *constables* and *PSOs* with a mechanism to disrupt criminal activity and conduct that may pose a danger to others at Cairns Airport. These directions also protect the rights and freedoms of other persons at Cairns Airport who may be affected by the behaviour of a person subject to a direction or at risk from criminal or terrorist activity.

29. The move-on and ancillary directions not only serve permissible purposes under the ICCPR, but are also necessary, reasonable and proportionate in achieving these legitimate objectives.

Move-on directions

30. Pursuant to section 3UQ of the Crimes Act, move-on directions can only be issued at Cairns Airport where a *constable* or *PSO*:

- considers on reasonable grounds that a person has contravened an ancillary direction or an identity check direction and the *constable* or *PSO* is not reasonably satisfied of the person’s identity, or
- suspects on reasonable grounds that it is necessary to give the direction to disrupt or prevent *relevant criminal activity* occurring at Cairns Airport or in relation to a flight to or from Cairns Airport, or
- considers on reasonable grounds that it is necessary to give the direction to safeguard the *public order and safe operation* of Cairns Airport or flights to and from Cairns Airport, or the safety of any persons at that airport or on flights to and from Cairns Airport.

31. The move-on directions enable *constables* and *PSOs* to take the least rights restrictive approach, as the powers have been formulated to ensure that a *constable* or *PSO* must tailor their direction so that it is most appropriate in the circumstances and proportionate to the threat situation identified. Permitting a *constable* or *PSO* to issue the direction for up to 24 hours also allows the direction to be catered to only the necessary time period in which the threat may arise.

32. Move-on directions that are reasonably necessary to disrupt or prevent *relevant criminal activity* are also necessary to protect national security, public order and the rights and freedoms of others who may be subject to this criminal behaviour. Move-on directions which are reasonably necessary to safeguard the *public order and safe operation* of Cairns Airport, would also be necessary to safeguard national security, and protect ‘public order’ under the ICCPR and CRC, a concept which broadly includes ‘not only the absence of disorder but also... public safety and the prevention of crime’.¹

¹ Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st ed, 1993), p.212.

33. The fact that a *constable* or *PSO* must suspect or consider on reasonable grounds that these directions are necessary to achieve a permissible purpose also ensures that these directions will be used proportionally.

34. For example, if a *constable* or *PSO* is aware that there is a considerable risk that person 1, who is currently at Cairns Airport, will engage in abusive or violent conduct towards person 2, who is arriving on an incoming flight, it may be reasonably necessary for the officer to issue a move-on direction to person 1 to ensure that they are not present at the airport around person 2's time of arrival.

35. A *constable* or *PSO* may also issue a move-on direction where they are not satisfied of a person's identity and have reasonable grounds to consider that this person has contravened an identity check or ancillary direction. Allowing move-on directions to be issued in these instances is necessary to ensure that the central purpose of these orders, namely to facilitate early detection of dangerous or illegal activity, cannot be frustrated by a person simply refusing to abide by a direction.

36. If a *constable* or *PSO* is not permitted to issue a move-on direction in these circumstances, a person who refuses to abide by the identity check or ancillary direction will be permitted to remain within Cairns Airport or take a flight to or from these airports, causing a potentially considerable risk to the *public order and safe operation* of Cairns Airport.

37. In this context, it is pertinent to note that an identity check direction can only be issued where a reasonable link can be established between the giving of the direction and safeguarding the *public order and safe operation* of a *major airport*, or the commission of an offence (see paragraph 3UP(1)(b)). Similarly, an ancillary direction can only be given where there are reasonable grounds that it is necessary to facilitate an identity check or move-on direction (see paragraph 3US(1)(b)). Where these grounds exist, and a person nevertheless refuses to abide by a direction, it is necessary and proportionate to issue a move-on direction to ensure that the *public order and safe operation* of Cairns Airport is preserved.

Ancillary directions

38. As noted above, ancillary directions can be issued where a *constable* or *PSO* considers on reasonable grounds that it is necessary to give this direction to facilitate an identity check or move-on direction. While this order may impede a person's freedom of movement, it remains necessary and proportionate as a *constable* or *PSO* must have reasonable grounds that the direction is necessary before it can be issued.

39. This phrase 'reasonable grounds' gives rise to the fact that, in issuing ancillary directions, a *constable* or *PSO* must choose the least intrusive means to ensure that an identity check or move-on direction can be facilitated, as a more intrusive option is unlikely to be found to be necessary on reasonable grounds.

40. Ancillary directions do not permit a *constable* or *PSO* to detain a person for the purpose of exercising their power, or undertake any search and seizure of the person's property. The intention of an ancillary direction is purely to enable an officer to direct a person to undertake reasonable and necessary steps to facilitate the exercise of an identity check or move-on direction – for example, an officer could direct a person to step to the side of a public walkway while conducting an identity check to ensure they are not disrupting others' use of the airport.

41. Identity check and move-on directions can only be issued where a link to criminal conduct or aviation security can be established. Ancillary orders that facilitate identity check and move-on directions are therefore aligned with the underlying purposes of these orders and the ICCPR more generally, being necessary to protect national security, the public order and the rights and freedoms of others.

42. Further, the proposed move-on and ancillary powers may also protect the rights and freedoms of others present at an airport premises if, for example, a person's behaviour is affecting others' use of the airport.

43. The measures in the Instrument are compatible with the right to freedom of movement under Article 12 of the ICCPR and Article 10(2) of the CRC as, to the extent that the Disallowable Legislative Instrument limits this right, it does so in a manner which is reasonable, necessary and proportionate to achieving the legitimate objectives of protecting national security, public order and the rights and freedoms of others.

Prohibition on Arbitrary or Unlawful Interference with Privacy

44. Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. Lawful interferences are permissible so long as they are authorised by law and are not arbitrary. Article 16 of the CRC provides for similar protections in relation to minors.

45. The United Nations Human Rights Committee (UNHRC) has expressed the view that, with respect to Article 17(1) of the ICCPR, 'the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under this Covenant'.²

46. The term 'unlawful' in Article 17 means no interference can take place except in cases authorised by law. What is 'arbitrary' will be determined by the circumstances of each case. In order for an interference not to be arbitrary, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in particular circumstances. The UNHRC has interpreted reasonableness in this context to imply that any interference with privacy must be proportionate to the end sought and be necessary in the circumstances of any given case.

47. The power to issue an identity check direction under section 3UP interacts with the prohibition on arbitrary or unlawful interference with privacy as it requires a person to produce evidence of identity if a *constable* or *PSO*:

- suspects on reasonable grounds that a person has committed, is committing or intends to commit an offence against the law of the Commonwealth, or a law of a State having a federal aspect, punishable by imprisonment for 12 months or more, or
- considers on reasonable grounds that it is necessary to give the direction to safeguard the *public order and safe operation* of Cairns Airport or flights to and from *Cairns Airport*, or the safety of any persons at the airport or on flights to and from the airport.

² UNHRC, General Comment No. 16: Article 17 (Right to privacy), (32nd session, 1998) at [7].

48. Similarly, the power to issue an ancillary direction under section 3US engages the prohibition on arbitrary or unlawful interference with privacy insofar as it facilitates the exercise of an identity check direction.

49. While identity checks and corresponding ancillary directions limit a person's privacy, this limitation is not unlawful or arbitrary.

50. These directions are lawful in the sense that they are authorised provisions of the Crimes Act.

51. The purpose of these directions is to enhance safety and security at Cairns Airport in a context where aviation remains a high-profile, high-impact target for terrorists. Airports are also a focal point for gang-related activities such as illicit drug trafficking, as well as other serious and organised crime. In light of these threats, and the fact that identity check directions can only be issued where there is a reasonable link between the direction and addressing criminal behaviour or safety and/or security concerns (ancillary orders are similarly confined), these directions are issued for the legitimate purpose of preserving national security, public order and the rights and freedoms of others.

52. The identity check and ancillary directions are also reasonable, necessary and proportionate in achieving these legitimate objectives.

53. Identity check directions have a minimal impact on a person's privacy, merely requiring a person to produce a *government photographic identity document* or, failing this, up to two other *identity documents* or, failing this, to provide their name, address and date of birth (subsection 3UP(2)).

54. The ability to satisfy an identity check in a range of ways protects people who may not be carrying government issued photographic identification or other identity documents from committing an offence under subsection 3UU(1) and ensures the provision is not a de-facto requirement to carry identification at airports. No further conduct can be compelled under section 3UP. This limitation on a person's privacy is proportionate to the stated objective of the direction, namely to enhance safety and security in airports, and preserve national security, public order and the rights and freedoms of others.

55. An identity check direction can be issued by a *constable* or *PSO* where they consider on reasonable grounds that it is necessary to give the direction to safeguard the *public order and safe operation* of a *major airport*. In these instances, the terms 'reasonable' and 'necessary' will ensure that the direction will be appropriate and proportionate to the activity it is seeking to prevent or disrupt, and will be implemented based on information available to police or an objective fact.

56. Identity checks directions can also be issued where a *constable* or *PSO* suspects on reasonable grounds that a person has committed, is committing or intends to commit an offence against the law of the Commonwealth or a Territory, or a *law of a State having a federal aspect*, punishable by 12 months imprisonment or more (see subparagraph 3UP(1)(b)(i)).

57. AFP officers are trained in Behavioural Assessment and Security Questioning to identify known behavioural traits displayed by people who are about to commit a crime or terrorist activity, and to ask targeted questions of persons of interest.

58. Subparagraphs 3UP(1)(b)(i) and (ii) enable a *constable* or *PSO* to approach a person displaying known behavioural traits to request proof of identity to determine whether they pose a serious criminal risk, or a threat to the *public order* or *safe operation* of a *major airport*.

59. It is also pertinent to note that the handling of any information provided through an identity check and corresponding ancillary direction will be handled in accordance with applicable legislation. For example, the AFP handles information in accordance with its obligations under the *Privacy Act 1988*.

60. A *constable* or *PSO* is also required to inform a person that it may be an offence not to comply with an identity check direction or to provide false or misleading information, and will be required to identify themselves, if requested by the person subject to the direction, or if the officer is not in uniform (section 3UT). This provision ensures that a person understands the nature of an identity check direction, reinforcing the proportionate and reasonable nature of these checks.

61. The ancillary power at paragraph 3US(2)(b) only enables the *constable* or *PSO* to require a person to stop or ‘or ‘do anything else’ that they consider on reasonable grounds to be necessary to facilitate the exercise of a power under section 3UP (identity check directions). Since section 3UP(2) limits the ways in which a person can satisfy the identity direction, the ancillary powers at section 3US(2)(b) can only be used to facilitate one of those means of evidencing identity.

62. These constraints ensure that the ancillary direction power is rationally connected to the identity check direction and the underlying objectives of this direction. It also ensures that this direction is proportionate, as a *constable* or *PSO* must choose the least intrusive means to ensure that an identity check is facilitated, as a more intrusive option is unlikely to be found to be necessary on reasonable grounds.

63. To the extent that the power to issue identity check and ancillary directions limits privacy, any limitation is not unlawful or arbitrary, and is reasonable, necessary and proportionate to achieving the legitimate objectives of preserving national security, public order and the rights and freedoms of others.

Right to Freedom of Assembly and Freedom of Association

64. Article 21 of the ICCPR provides that the right for persons to engage in peaceful assembly, including peaceful protest, shall be recognised. Article 22 of the ICCPR provides that each person has the right to freedom of association, including the right to partake in trade unions for the protection of that person’s interests. Article 15 of the CRC provides that children have the right to freedom of association and peaceful assembly.

65. The rights to freedom of assembly and freedom of association may be limited for the purposes of national security or public safety, public order, and the protections of the rights and freedoms of others.

66. The measures in this Instrument limit the freedom of assembly and freedom of association to the extent that the measures allow for *constables* and *PSOs* to move-on groups of people and effectively disperse them. However, these measures are reasonable and proportionate as subsection 3UN(2) provides that a person’s right to lawfully engage in

advocacy, protest, dissent or industrial action will not, by itself, be regarded as prejudicial to the *public order and safe operation of a major airport*.

67. The inclusion of this safeguard ensures that *constables* and *PSOs* will not be permitted to exercise the identity check, move-on and ancillary directions for the purposes of disrupting or quelling a peaceful protest or other form of peaceful assembly or association that is occurring at Cairns Airport.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights. To the extent that these measures may limit human rights, such limitations are reasonable, necessary and proportionate in achieving the legitimate objectives of preserving national security, public order and the rights and freedoms of others.