

# CHAPTER 2

## OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill.

### **Part 1 – preliminary**

#### *Clause 4 – definitions*

2.2 Clause 4 of the Bill defines several terms, including 'AusCheck database', 'AusCheck staff member', 'AusCheck scheme', and 'AusCheck scheme personal information'.

2.3 The term 'AusCheck database' is defined as the database kept by AusCheck as required by clause 14 of the Bill. The EM states that the database is made up of information collected from applications for background checks and can only be used for limited purposes connected with carrying out background checks, national security or criminal intelligence. However, statistical information derived from the database that cannot be used to identify anyone may be used for research, and industry and government planning.<sup>1</sup>

2.4 'AusCheck staff member' is defined so as to include any Australian Public Service (APS) employee who performs functions relating to, or for the purposes of AusCheck background checking. The EM explains that this includes APS employees who are not members of the AusCheck division within the Department. It also includes individuals that are not members of the APS but who have been contracted to perform functions relating to AusCheck background checking.<sup>2</sup>

2.5 'AusCheck scheme' means the scheme of background checking prescribed for the purposes of clause 8 of the Bill.

2.6 'AusCheck scheme personal information' is defined as personal information that is either obtained about a person through a background check coordinated by AusCheck or personal information that relates to the administrative processes supporting the AusCheck scheme. The Department advised the committee that the latter refers to personal information that is generated through the administration of the AusCheck scheme which would include information that is generated about a person (that is, personal information that is an outcome of the AusCheck scheme, such as an assessment by AusCheck that the person has an adverse criminal record). The definition expands on the definition of 'personal information' in the Privacy Act. By employing this expanded definition, the Bill will ensure that the protections it gives in

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1 p. 3.

2 p. 3.

clause 15 to information relating to background checks coordinated by AusCheck are extended as far as possible.<sup>3</sup>

2.7 The term 'personal information' is given the same meaning as in the *Privacy Act 1988* (Privacy Act). In section 6 of the Privacy Act, 'personal information' is defined as 'information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

#### ***Clause 5 – definition of 'background check'***

2.8 Clause 5 of the Bill defines the term 'background check' as an assessment of particular types of information relating to an individual person. It includes an assessment of one or more of the following types of information:

- the person's criminal history (through CrimTrac) (subclause 5(a));
- information about the security assessment that the Australian Security Intelligence Organisation (ASIO) makes in relation to the person (subclause 5(b));
- information about the person's migration status if the person is not an Australian citizen (through the Department of Immigration and Citizenship (DIAC)) (subclause 5(c)); and
- other types of information about the person that may be prescribed in regulations (subclause 5(d)).

2.9 The Department advised the committee that whenever a screening program is established by government it will set out the checks that will need to be performed as part of that program. Since the checks may not be the same for different kinds of screening programs (although it is likely that a criminal history check will be part of most programs), subclause 5(d) leaves it open to AusCheck to provide coordination services where the background check required for a screening program includes checks other than those set out in subclauses 5(a), (b) and (c).<sup>4</sup>

2.10 The Department stated that, without the capacity to specify other kinds of checks by regulation, AusCheck would be confined to coordinating background checks for schemes that only required criminal history, security and migration status checks. In addition, without legislative amendment, AusCheck could not coordinate background checks including new checks that are not yet available, such as the proposed National Document Verification Service (DVS), which is being developed

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3 *Submission 15C*, p. 3.

4 *Submission 15*, p. 6.

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by Commonwealth, state and territory governments to electronically verify the detail on key proof-of-identity documents.<sup>5</sup>

2.11 The Department's submission stated that providing AusCheck with the ability to add new 'checking elements' by regulation will give AusCheck the flexibility to incorporate those additional checking elements with maximum efficiency.<sup>6</sup>

## **Part 2 – establishment of AusCheck**

### *Clause 8 – establishment of AusCheck scheme*

2.12 Under clause 8 of the Bill, the regulations may provide for the establishment of a background checking scheme relating to the conduct and coordination of background checks of individuals for the purposes of:

- the *Aviation Transport Security Act 2004* or regulations under the Aviation Transport Security Act (paragraph 8(1)(a)); and
- the *Maritime Transport and Offshore Facilities Security Act 2003* or regulations under the Maritime Transport and Offshore Facilities Security Act (paragraph 8(1)(b)); and
- for such other purposes as are prescribed by the regulations (paragraph 8(1)(c)).

2.13 The EM states that the intention is that the background checking scheme will comprise of 'specified classes of background checks that will be conducted by AusCheck in a way that is fast, fair and reliable'.<sup>7</sup>

2.14 According to the EM, AusCheck will initially conduct background checks in relation to people who have applied for an ASIC or a MSIC. The establishment of the AusCheck scheme is intended to streamline and improve consistency in current background checking requirements. Criteria against which the results of the background checks are measured, and decision-making powers in relation to the use of the background checks, are contained in regulations under the Aviation Transport Security Act or the Maritime Transport and Offshore Facilities Security Act. The EM explains that, as a result, regulations made under the provisions of the Bill, to establish a specific class of background checks for ASIC and MSIC applicants, will contain mainly administrative requirements which authorise the use of the electronic information flows and AusCheck's checking coordination service.<sup>8</sup>

2.15 Clause 8 allows for other specified classes of background checks to be established in the future. The EM states that such specified classes of background

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5 *Submission 15*, pp 6-7.

6 *Submission 15*, p. 7.

7 p. 5.

8 p. 5.

checks would comprise coordination of relevant background checks relating to a particular industry or area of activity and gives the example of the transport of dangerous goods.<sup>9</sup> In the Second Reading debate, the Attorney-General noted that the AusCheck scheme might be applied in other sectors where there is a strong community interest in background checking, for example, matters involving children and the elderly.<sup>10</sup>

2.16 The Department advised the committee that:

One of the responsibilities of the AusCheck implementation team is to research new and proposed background checking schemes to examine their effectiveness and to incorporate the experience of these schemes into the development of the AusCheck system.<sup>11</sup>

2.17 The EM notes that the substance of a regulatory scheme that required coordinated background checks would be contained in regulations under a relevant Act.<sup>12</sup> The Department advised the committee that, where AusCheck is to provide coordination services for a background check required under a scheme other than the ASIC or MSIC schemes, regulations made in accordance with clause 8 would identify the scheme by reference to its legal basis (in the way that the ASIC and MSIC schemes are identified by reference to the Aviation Transport Security Act and the Maritime Transport and Offshore Facilities Security Act).<sup>13</sup>

2.18 In the Second Reading debate, the Attorney-General suggested that AusCheck should not be limited to background checking regimes in the national security context:

... there is no reason that the expertise [of AusCheck] should be limited solely to background checking schemes that are related to national security. To cater for the range of possibilities, the scope and purpose for which the AusCheck background checking scheme may be established has been described by reference to Commonwealth fields of operation set out in the Constitution.<sup>14</sup>

2.19 Subclause 8(2) describes the purposes for which a specified class of background checks can be established under the provisions of the Bill. They include:

- matters relating to external affairs, such as giving effect to an international agreement or dealing with matters of international concern;

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9 p. 5.

10 *House of Representatives Hansard*, 8 February 2007, p. 28. The Department advised the committee that an officer from AusCheck has spoken to officers from the Department of Health and Ageing (DHA) regarding the announcement by DHA of the planned introduction of a background checking scheme for aged care workers: *Submission 15A*, p. 4.

11 *Submission 15A*, p. 4.

12 p. 5.

13 *Submission 15*, p. 7.

14 *House of Representatives Hansard*, 8 February 2007, p. 28.

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- prevention of terrorist acts to which Part 5.3 of Chapter 5 of the Criminal Code applies;
  - purposes relating to Australia's national security or defence;
  - dealing with a national emergency;
  - purposes related to the expenditure of money by the Commonwealth, including granting financial assistance to a state;
  - exercising the executive power of the Commonwealth;
  - purposes related to a territory or to a Commonwealth place;
  - trade and commerce between Australia and another place or between the states and territories;
  - providing a service to a constitutional corporation that relates to the relationship between the corporation and its employees;
  - matters relating to postal, telegraphic, telephonic or similar services;
  - purposes relating to the provision of Commonwealth allowances, pensions, child endowment, benefits or services;
  - providing a service to the Commonwealth or a Commonwealth authority;
  - utilising the spare capacity of AusCheck staff or maintaining or improving the specialised skills of AusCheck staff through providing a service; and
  - any other matter that the Parliament has the power to make laws about.

### ***Clause 9 – matters covered by AusCheck scheme***

2.20 Clause 9 allows regulations to provide for the details of the AusCheck scheme of background checking.

2.21 Subclause 9(1) sets out a range of matters that may be provided for by the regulations. The regulations may provide for an application for a background check to be made by:

- the person to whom the background check will relate; or
- another person (for example, an employer), with the consent of the person about whom the background check is being made.

2.22 The regulations may specify the information that is to be included in an application for a background check, as well as the form of the advice to be given to the applicant and the person to whom the background check relates when the check is completed.

2.23 The criteria against which the information produced by the background check is to be assessed, and the decisions that can be made based on the results of the background check, can also be set out in the regulations. However, the EM notes that it will not be necessary for such criteria to be contained in the regulations about a specified class of background checks if they are already contained in other legislation.

This is the case in relation to background checks for ASICs and MSICs: the criteria and decision-making powers are already provided for in regulations under the Aviation Transport Security Act and the Maritime Transport and Offshore Facilities Security Act.<sup>15</sup>

2.24 Subclauses 9(2) and 9(3) allow the regulations to set out differing requirements for particular types of background checks so that specified classes of background checks can be appropriately designed for different industry or activity requirements.

***Clause 10 – AusCheck scheme may require an individual to apply for a background check in relation to certain matters***

2.25 Clause 10 provides the capacity for regulations to establish a specific class of background checks as a requirement for people to do particular things or enter particular places. As part of such a specified class of background checks, a person would be required to apply for a background check and a favourable decision based on the outcome of that check would be a condition of that person holding certain jobs or being given access to certain information or places. The EM explains that such a specified class of background checks would be similar in nature to the existing background checking provisions under the Aviation Transport Security Act and the Maritime Transport and Offshore Facilities Security Act, which require a person to undergo a background check and meet specified criteria in order to be permitted to enter security zones.<sup>16</sup>

2.26 It is expected that any future background checking schemes will be designed under the provisions of an Act providing a relevant policy framework and that substantive aspects of such a background checking scheme would be established by the portfolio with relevant policy responsibility. However, the EM states that clause 10 would be used if a specified class of background checks was required to implement policy that has not been provided for by other legislation.<sup>17</sup> The Department advised the committee that, as the Bill is within the Attorney-General's portfolio, regulations made under this provision would be expected to deal with matters within that portfolio.<sup>18</sup>

***Clause 11 – Secretary may give directions under AusCheck scheme***

2.27 Clause 11 gives the Secretary of the Department the power to give directions to a person who has applied for a background check, or to a person who is able to or required to take action in relation to a background check. Subclause 11(2) specifies

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15 p. 6. These regulations are the Aviation Transport Security Regulations 2005 and the Maritime Transport and Offshore Facilities Security Regulations 2003.

16 p. 7.

17 p. 7.

18 *Submission 15*, p. 9.

that this power includes, but is not confined to, the capacity to direct a person to advise the Secretary as to whether or not a licence, a permit or other authorisation has been issued to a person in respect of whom a background check has been carried out.

2.28 The EM states that, in relation to background checks for ASICs and MSICs, subclause 11(2) would allow the Secretary to direct issuing bodies to advise whether an ASIC or an MSIC has been issued to a person who applied for one. According to the EM, the purpose of subclause 11(2) is to allow AusCheck to keep an accurate database of ASIC and MSIC card holders as part of its function of improving national security.<sup>19</sup>

2.29 A penalty may be imposed by the regulations for failure to comply with a direction by the Secretary (paragraph 18(2)(c)).

### ***Clause 12 – delegation by Secretary***

2.30 Clause 12 enables the Secretary of the Department to delegate the Secretary's powers or functions under the AusCheck scheme to:

- an Senior Executive Service (SES) employee or acting SES employee of the Department; or
- an APS employee who holds or is acting in an Executive Level 2 or equivalent position in the Department.

2.31 A person to whom those powers or functions are delegated must exercise them consistently with any directions given by the Secretary.

## **Part 3 – information management**

### ***Division 1 – collection, use and disclosure of information***

#### ***Clause 13 – authorisation of information collection, use and disclosure***

2.32 Clause 13 authorises, for the purposes of the Privacy Act, the collection, use and disclosure of personal information for specified purposes related to the operation of the AusCheck scheme. The use of personal information that is authorised by clause 13 is for purposes related to conducting a background check, or advising on the outcome of a background check in relation to the person to whom the personal information applies, and updating information about that person.

#### ***Clause 14 – authorisation of retention and subsequent use of information***

2.33 Clause 14 allows AusCheck to establish and maintain a database of information relating to background checks. It also deals with the purposes for which information in the database may be used or disclosed. The EM explains that one of the

purposes for which the AusCheck background checking function is being established is to ensure that an accurate database of ASIC and MSIC security card holders is available for use in a security incident involving aviation or maritime infrastructure. According to the EM, subclause 14(2) supports that purpose by providing for the database to be maintained and accessed in response to security incidents. It can also be used to streamline processing of applications for re-issue of security cards by allowing existing information about a person to be considered.<sup>20</sup>

2.34 The EM also notes that, although ASIO and the Australian Federal Police (AFP) have broad powers to collect and use information, clause 14 clarifies that the information in the database can be used for the purposes of security and criminal intelligence.<sup>21</sup>

2.35 Subclause 14(3) authorises the use of de-identified information derived from the database for the purposes of research, government and/or industry planning. This allows the use of statistical information obtained from the database.

## ***Division 2 – protection of personal information***

### *Clause 15 – protection of information*

2.36 Clause 15 provides additional protection for information obtained by AusCheck for the purposes of providing a background checking service. Under clause 15, it is an offence for a person currently or formerly employed in relation to AusCheck background checking to make unauthorised use or disclosure of information acquired in relation to background checking unless:

- it is for the purpose of the AusCheck scheme;
- the person disclosing the information has the consent of the person to whom the AusCheck scheme personal information relates;
- the disclosure is to the individual to whom the AusCheck scheme personal information relates; or
- the information is being given to the AFP for the purposes of the AusCheck scheme.

2.37 The onus of showing that a disclosure of information falls within one of the exceptions will rest on a defendant. The EM explains that, although such a reversal of the normal onus of proof requirements is contrary to general criminal law policy, it is considered to be justified in this situation both because of the importance of protecting the privacy of people the subject of AusCheck background checks, and because a person working for AusCheck would be familiar with the rules of disclosure and the operation of the exceptions. Therefore, it would be significantly more costly and

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20 p. 8.

21 p. 8.



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difficult for the prosecution to establish that a disclosure was not covered by the exceptions than for the defendant to establish that it was.<sup>22</sup>

2.38 Subclause 15(4) provides that a person currently or formerly employed by the Department is not required to disclose information obtained by AusCheck in relation to providing a background checking service to a court except:

- if it is necessary to give effect to provisions of the Bill or to the AusCheck scheme; or
- if it is necessary for criminal proceedings before a court or tribunal for an offence under the Bill or under the AusCheck regulations.

#### **Part 4 – transitional provision in relation to information collected before commencement**

##### *Clause 16 – authorisation of use and disclosure of personal information collected for specified purposes*

2.39 Clause 16 provides for the transfer to AusCheck of information held by the AFP and the Department of Transport and Regional Services (DOTARS) and other government agencies in relation to background checks about applicants for ASIC and MSIC cards. The EM states that, without clause 16, the AusCheck database would not have a complete set of information about persons currently holding ASICs and MSICs until all current cards are due for renewal. In the case of MSICs, this would not be for up to five years since the current cards are valid for a five-year period. The EM explains that the justification for this is the Australian Government's objective to have an up-to-date database of ASIC and MSIC cardholders to be used in any security incident involving aviation or maritime sites.<sup>23</sup>

2.40 The EM notes that clause 16 has some retrospective effect since it authorises, for the purposes of the Privacy Act, a handover of personal information to AusCheck from other government agencies involved in background checking for ASIC and MSIC cards and the future use of that information by AusCheck. The EM argues that the benefits to the community generally from having a complete database of ASIC and MSIC security cardholders is considered sufficient to justify that retrospective effect.<sup>24</sup>

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22 p. 9.

23 p. 10.

24 p. 10.

**Part 5 – other matters***Clause 18 – regulations*

2.41 Clause 18 provides that the Governor-General may make regulations in relation to:

- charges to be made by AusCheck on a cost recovery basis;
- the review of decisions made under regulations establishing a specific class of background checks;<sup>25</sup>
- the imposition of penalties of up to 50 penalty units;
- guidelines for background checking; and
- reviewing the AusCheck scheme.

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25 Decisions regarding ASICs and MSICs are already appellable to the Administrative Appeals Tribunal (AAT) under the relevant existing regulations; adverse or qualified ASIO security assessments may also be appealed under the *Australian Security Intelligence Organisation Act 1979*. See further, Department of Parliamentary Services, AusCheck Bill 2006, Bills Digest No 80, 2006-07, pp 6-7.