



Australian Government

Attorney-General's Department

AusCheck

**Submission to the Senate Legal and
Constitutional Affairs Committee**

Inquiry into AusCheck Bill (2006)

ATTORNEY GENERAL'S DEPARTMENT

AUSCHECK

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Why the Bill was Introduced

Background

Background Checking in Australia

The checking of information provided by applicants for employment has been an accepted part of the process of engaging staff for many years. There are a number of companies in Australia which specialise in employee screening. Typically these companies will check employment history, employment references, and educational qualifications amongst other elements. In addition, a number of employers request potential employees to provide information relating to their criminal history and other personal information relevant to the position being applied for.

The profusion of employer requests for criminal history information led the Human Rights and Equal Opportunity Commission (HREOC) to release a report into the use of criminal history checks in employment in November 2005: *On The Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record*. The HREOC guidelines are not specifically aimed at legislative background checking schemes but the principles espoused in the HREOC report influence the way in which legislative schemes are constructed by governments in Australia.

There are a range of instances in Commonwealth, State and Territory legislation of eligibility for employment in specific areas being regulated by the use of a 'fit and proper person' assessment. These schemes require an individual to consent to relevant personal information being assessed to determine whether the individual is an appropriate person to be conducting the employment function in question. The type of information to be assessed will vary depending upon the purpose of the scheme and the specific elements that are relevant to the function in question.

Legislative schemes have been developed in the States and Territories to govern the employment of teachers, gaming and racing employees, nurses, police, child care workers, security officers, taxi drivers, correctional service officers, the legal profession, second-hand dealers and pawnbrokers. The Commonwealth has also introduced legislative schemes to address issues relevant to its particular responsibilities and to create consistency between State schemes where there is a basis for Commonwealth legislation.

The ASIC and MSIC Programs

Following the tragic events of 11 September 2001, the Australian Government put in place a number of reforms to counter the threat of international terrorism. The Aviation and Maritime Security Identification Card schemes (ASIC and MSIC) are part of the Government's policy of increasing security at air and sea ports. They require the background checking of approximately 200,000 persons involved in the aviation and maritime industries to:

- establish their identity;
- establish their need to access a secure area of an air or sea port;

- establish that they do not have an adverse criminal history;
- establish that they do not have an adverse security assessment; and
- establish that they are not illegal non-citizens (ASIC) or that their visa conditions do not prohibit them from working in Australia (MSIC).

ASIC

An ASIC is an identification medium that indicates that the holder has met the necessary threshold assessment requirements to attain an ASIC and is permitted to be in a secure area of a security controlled airport in the course of their duties.

An ASIC enables an airport operator to provide the ASIC holder with the ability to obtain unescorted access to a secure area. The holding of an ASIC does not in itself give a right of access to a particular secure area of an airport. That capacity remains entirely in the control of the airport operator. The intent of an ASIC is to ensure that a person who has access to the secure areas of an airport has been background checked and is not considered to be a risk of unlawful interference with aviation.

The authorisation for the ASIC scheme comes from the *Aviation Transport Security Act 2004*. All of the details relating to the scheme including the types of information to be checked and what constitutes an adverse criminal record, are contained in the *Aviation Transport Security Regulations 2005*.

MSIC

An MSIC is a nationally recognised security identification card. It shows that a person is cleared to enter and work in the secure areas (or maritime security zones) of sea ports, ships, and offshore oil and gas facilities. MSICs will reduce the risk that someone planning to unlawfully interfere with maritime infrastructure will gain access to facilities.

MSICs are issued after background checks and screening have been done and must be worn by all unescorted or unmonitored persons within a maritime security zone. Having an MSIC does not entitle the holder to automatic entry to any or all security zones. Access to particular secure areas remains a matter for each maritime industry participant to decide.

The authorisation for the MSIC scheme comes from the *Maritime Transport and Offshore Facilities Security Act 2003*. All of the details relating to the scheme including the types of information to be checked and what constitutes an adverse criminal record are contained in the *Maritime Transport and Offshore Facilities Security Regulations 2003*.

The Wheeler Report

The Independent Review of Airport Security and Policing for the Government of Australia, September 2005 by the Right Honourable Sir John Wheeler DL (the Wheeler Report) was an investigation into the security and policing at Australian airports. Recommendation 10 of the Wheeler Report states:

“It is recommended that the background checking process required to obtain and hold an Aviation Security Identification Card be further tightened and

centralised in the Attorney-General's Department and that this should be harmonised with maritime cards."

The Wheeler Report did not directly address maritime security or general background checking matters as they lay outside the terms of reference. Nonetheless, in relation to recommendation 10, the Wheeler Report did note that background checking in the new centralised authority should extend to the maritime industry and 'other background checking'.

The Report suggested that:

"The process of checking an application against the [ASIC] applicant's background should be centralised and performed by a single agency with immediate access to continuously updated lists of ASIC applicants (including those denied an ASIC for any reason).

The agency to perform this checking and maintain that data base should come under the Attorney-General's portfolio, desirably entailing an expansion of the capability of the Australian Security Vetting Service (ASVS) in a new Division within the Attorney-General's Department with ready access to information on criminal records and politically motivated violence enabling the exercise of a 'fit and proper person' test based not only on convictions but also broader patterns of criminal behaviour and substantiated significant criminal intelligence.

The new central authorising body should also have ready access to DIMIA's databases. Existing ASVS checking should be integrated with the ASIC role to minimise duplication (ie public servants, police and ADF checking should be recognised and not unnecessarily repeated)..... Once available it [AusCheck] should also handle maritime industry (ie MSIC) and other background checking." (The Wheeler Report p.69-70)

The Wheeler Report did not attempt to define what other background checks the new background checking organisation could address. To do so would have taken his report well beyond its terms of reference. In response to the Wheeler Report the Government initiated the establishment of AusCheck. AusCheck is to be the centralised background checking body with responsibility for coordinating the background checks in the ASIC and MSIC schemes and for other background checks.

What the Bill is intended to do

General Purpose

The purpose of the AusCheck Bill 2006 is to provide a regulatory framework for the conduct of a centralised background checking service by the Attorney-General's Department.

The Bill provides authority for the Department to coordinate the background criminal and security assessment for applicants for security identification cards under the ASIC

and the MSIC programs and for any subsequent programs. It also provides authority for AusCheck to maintain a database of applicants and cardholders; to collect, use and disclose information; and to recover costs for conducting background checks.

Specific Objectives

To authorise AusCheck to perform required checks

The AusCheck Bill does not create a requirement that individuals obtain background checks. AusCheck is being established as a service agency and it is not intended at this point in time that AusCheck will require background checks under its own legislation. Rather, it is intended that AusCheck would act as a service provider in providing background checking coordination services.

The first objective of the Bill is to authorise AusCheck to perform background checks. There are different ways in which AusCheck could be authorised to perform this function. It is possible that AusCheck could be authorised administratively to provide more limited background checking services to various government agencies. Alternatively, AusCheck could be authorised legislatively to provide these services for government. The latter option was chosen as a more transparent means of providing the relevant authorisation for AusCheck's operation.

Initially, the Bill authorises AusCheck to coordinate background checks for the ASIC and MSIC screening programs. The requirement for an individual to be background checked is established by the *Aviation Transport Security Regulations 2005* and the *Maritime Transport and Offshore Facilities Security Regulations 2003* respectively. The intention of the Bill is to authorise AusCheck to do the checks for the purposes of those regulations. An alternative way of providing legislative authorisation for AusCheck would be to simply amend the *Aviation Transport Security Regulations 2005* and the *Maritime Transport and Offshore Facilities Security Regulations 2003* to define the required background check under those Regulations as being a background check conducted by AusCheck. The approach taken in the AusCheck Bill is a preferred approach as it is a better reflection of the intention to establish AusCheck as a centralised background checking service available across government.

To authorise AusCheck to cost recover

The second objective of the Bill is to authorise AusCheck to collect fees in relation to its services in accordance with the decision of Government that AusCheck should be a cost recovery organisation. The power to set fees is restricted to cost recovery.

To authorise the AusCheck database

The third objective of the Bill is to authorise AusCheck to construct a database of all ASIC and MSIC applicants and cardholders. The Bill seeks to authorise the collection and retention of this information. While the information in the database could still be collected, and used and disclosed in more limited circumstances in accordance with the *Privacy Act 1988* and in accordance with standard record keeping requirements without this specific legislative authorisation, the specific legislative authorisation is included to reinforce and provide a set of clear and transparent parameters for the construction and use of the database.

To protect private information

The final objective of the Bill is to protect private information. The collection and retention of personal information requires that the Bill provide legislative safeguards to minimise the possibility of any misuse of this information.

The AusCheck Bill (2006)

Part 1 - Preliminary

Clauses 1 to 7

Clauses 1 to 4 and 6 to 7 are procedural.

Clause 5 – Definition of *background check*

Clause 5 defines the term ‘background check’ for the purpose of the Bill. The term ‘background check’ is central to the description of the function established by the Bill. In the Bill ‘background check’ is an assessment of particular types of information relating to an individual person. It includes assessment of information about the person’s criminal history; information about the security assessment that ASIO makes in relation to the person; information about the person’s migration status if the person is not an Australian citizen; and other types of information about the person that may be described in regulations.

Not all elements of the definition of background check will apply to each class of background check undertaken by AusCheck. The particular assessments that AusCheck undertakes will vary according to the particular screening program that establishes the requirement for an individual to undertake the background check. For example, the elements of the background check that are required under the ASIC screening program in the *Aviation Transport Security Regulations 2005* are different to the elements of the background check that are required under the MSIC screening program in the *Maritime Transport and Offshore Facilities Security Regulations 2003*. Within paragraph 5(c) of the definition of background check, the ASIC program is concerned only with whether a person either is a citizen or is not an unlawful non-citizen, whereas the MSIC program also requires that the person not be prohibited from working by conditions on their visa. In this sense, the definition of background check in the AusCheck Bill is a menu of possible background checks which AusCheck is legislatively authorised to undertake. A background check for a particular screening program will be a selection from that menu depending on the specific needs of the scheme.

Whenever a screening program is established by government it will set out the checks that will need to be performed as part of the program. 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. Paragraph 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 described in paragraphs 5 (a), (b) and (c).

Without the capacity to specify by regulation other kinds of checks, 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 by Commonwealth, State and Territory governments to electronically verify the detail on key proof-of-identity documents.

While the definition of background check in section 5 is central to the way the Bill establishes the function of background checking coordination, it does not, of itself, provide AusCheck with the basis for requiring checks of the kinds described. Its effect is to permit AusCheck to coordinate those kinds of checks where it is providing services in relation to a screening program that includes checks of those kinds.

The provision giving AusCheck the ability to add new checking elements by regulation was included in the Bill to give AusCheck the flexibility to incorporate additional checking elements with maximum efficiency.

The addition of new checking elements does not mean that those elements will apply to all background checks undertaken by AusCheck. It will simply mean that there are additional ‘menu’ items from which elements may be selected depending on the specific needs of the screening program that requires the background check.

Part 2 – Establishment of AusCheck Scheme

Clauses 8 to 12

Clause 8 – Establishment of AusCheck scheme

Clause 8 provides the authority for AusCheck to execute the function of coordinating background checks of particular kinds. Subclause 8(1) sets out the kinds of background check that AusCheck can conduct and coordinate. They include the background checks that are necessary before a person can be issued with an ASIC or an MSIC. Paragraph 8(1)(c) allows the regulations to authorise AusCheck to coordinate background checks for other purposes. This is to allow AusCheck to offer coordination services in relation to background checks required under other screening programs.

Where AusCheck is to provide coordination services for a background check required under a different scheme, regulations made in relation to clause 8 would identify the scheme by reference to its legal basis, in a similar way to the way that the ASIC and MSIC schemes are identified by reference to the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*

These additional schemes may already be in existence or they may be schemes that will be introduced in the future. AusCheck is not presently involved in discussions about coordination of any new checks but may in the future offer efficiencies to an administering department through the use of its automated system and expertise. An example of a different background checking program is the new screening requirements for people employed in aged care facilities, which are contained in legislation administered within the portfolio of the Minister for Ageing. Whenever

AusCheck provides background checking coordination services, it is intended that its activities will be supported by regulations made under the AusCheck Bill.

Subclause 8(2) restricts the purposes for which regulations can authorise AusCheck to coordinate background checks. As a Commonwealth agency, AusCheck is not able to provide any service that would be outside the power of the Commonwealth parliament under the Constitution. This clause sets out the heads of power that may be relevant but as no clause of this sort can have effect to either increase or decrease the legislative power of the Commonwealth, the provision serves as an indicator only of possible future service areas.

Clause 9 – Matters covered by AusCheck scheme

Clause 9 allows regulations to provide for the administrative details in relation to coordination by AusCheck of a background checking program. For example, the regulations can provide for an application for a background check to be made by the person to whom the background check will relate. Alternatively the regulations can provide for the application to be made by another person (for example, an employer) with the consent of the person to whom the background check will relate. The regulations can set out what information must be included in an application and 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.

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 outcome of a background check can also be set out in the regulations. However, it will not be necessary for those substantive matters to be contained in the regulations about a specified class of background checks if they are contained in other legislation. Such will be the case in relation to the specified class of background checks in relation to ASICs and MSICs, where the criteria and the decision making powers are contained in regulations under the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*.

The provisions in clause 9 are designed to allow AusCheck regulations to ‘mesh’ the AusCheck system with a background checking program that is established separately.

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

Clause 10 provides the capacity for regulations to establish a specific class of background check as a requirement for people to do particular things or enter particular places. Such a background checking program might require a person 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. This reflects the existing background checking provisions under the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*, which require a person to undergo a background check and meet specified criteria in order to be permitted to enter security zones.

It is likely that any future background checking programs with this type of requirement will be designed under the provisions of an Act providing a relevant

policy framework. Substantive aspects of such a background checking program would be established by the portfolio with relevant policy responsibility. This provision would be used if a specified class of background checks was required to implement policy that was not dealt with by other legislation. 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.

Clauses 11 and 12 facilitate the administration of the AusCheck scheme.

Part 3 - Information Management

Clauses 13 to 15

Clause 13 – Authorisation of information collection, use and disclosure

This clause authorises, for the purposes of the *Privacy Act 1988*, 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 this provision is for purposes related to conducting a background check, or advising on the outcome of a background check, in relation to the person whose personal information it is and updating information about that person.

Clause 14 – Authorisation of retention and subsequent use of information

The Wheeler Report recommended:

“The process of checking an application against the applicant’s background should be centralised and performed by a single agency with immediate access to continuously updated lists of ASIC applicants (including those denied an ASIC for any reason). The agency to perform this checking and maintain that data base should come under the Attorney-General’s portfolio”
(Wheeler Report p.68-69)

In accordance with the Wheeler Report, this clause allows AusCheck to establish and maintain a database of information relating to applications for ASICs and MSICs. It also restricts the use of the information in the database. One of the purposes for which the AusCheck background checking function is being established is to streamline processing of applications for reissue of security cards by allowing existing information about the person to be considered. The database also can be used 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.

The information that AusCheck retains in its database would be of significance to an organisation investigating security or criminality matters involving ASIC or MSIC applicants in an aviation or maritime security environment. This clause clarifies that the information in the database can be used for the purposes of security and criminal intelligence which will permit AusCheck to react swiftly to any request for information for these purposes.

It should be noted that Australia’s law enforcement and national security agencies are empowered to acquire information under their own legislation. These organisations could more quickly acquire up-to-date personal information about specific individuals

by accessing their own databases and databases specifically constructed for law enforcement purposes.

Subclause 14 (3) authorises the use of de-identified information derived from the database for research and industry and government planning. This allows the use of statistical information obtained from the database. This provision does not add anything that cannot already be achieved under the *Privacy Act 1988* but is included for completeness and transparency.

Clause 15 – Protection of information

This provision provides additional protection for information obtained by AusCheck for the purposes of providing a background checking service. It makes it an offence for a person currently or formerly employed in relation to AusCheck background checking to disclose information acquired in relation to background checking unless it is:

- for the purpose of the AusCheck scheme;
- with the consent of the person whose personal information is disclosed;
- giving the information to the person whose personal information it is, or
- giving information to the Australian Federal Police for the purpose of the AusCheck scheme.

Part 4 – Transitional Provisions

Clause 16

Clause 16 – Authorisation of use and disclosure of personal information collected for specified purposes

This clause provides for the transfer to AusCheck of information held by the AFP and the Department of Transport and Regional Services and other government agencies in relation to background checks about applicants for ASIC and MSIC cards. Without this provision, 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 will not be for up to five years as the current cards are valid for a five year period. As a result the Government’s objective of having an up to date database of ASIC and MSIC card holders that could be used in a security incident involving aviation or maritime sites could not be met without provision for transfer of existing information.

Clause 17

This clause provides for the use of the name ‘AusCheck’.

Clause 18

This clause provides the regulation making power.

Specific Issues

A framework Bill

Administrators of any new or existing background checking schemes may request AusCheck’s services to increase efficiency and to avoid duplication.

Once a new screening program is established, AusCheck may be requested to coordinate the background checking elements. It is intended that AusCheck regulations will authorise it to provide services for each new class of background check. The alternatives would be either a Bill giving AusCheck very broad powers capable of catering to every possible future background checking purpose or a Bill that restricts AusCheck to coordinating only the existing ASIC and MSIC schemes. The present Bill offers flexibility to take on new background checking services for government but will allow Parliamentary scrutiny of regulations authorising new areas of AusCheck activity.

Appeals

The regulation making power in clause 18 of the Bill provides that the regulations may provide for the review of decisions under the regulations and it is intended that the regulations will provide that if AusCheck makes an adverse finding about a person they will have the right to appeal to the Administrative Appeals Tribunal.

If an individual is found to be not eligible for an ASIC or MSIC they may apply to the Secretary of the Department of Transport and Regional Services to exercise a discretion to allow them to have a card despite an adverse criminal record or other adverse finding. In addition there are avenues of appeal under the relevant aviation and maritime security regulations.

Appeal provisions will be set out in the regulations about how AusCheck coordinates each individual kind of background check, since the particular decisions to be reviewed may be different in each case. Any rights of appeal or review in relation to AusCheck actions will be in addition to rights of appeal in relation to policy-based discretions included in the relevant regulatory scheme.