



Australian Government
Attorney-General's Department

AusCheck

**Written Submission to the
Standing Committee on Legal
and Constitutional Affairs**

Inquiry into AusCheck Amendment Bill (2009)

**ATTORNEY-GENERAL'S DEPARTMENT
AUSCHECK**

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Part 1 – Background

The Purpose of National Security Background Checks

Background checking is utilised worldwide in a variety of security situations as one element of a personnel security framework. For example, in Australia, the United States and the United Kingdom, all airport personnel must undergo background checks.

Background checking forms part of the broader ‘security culture’ of an organisation, which also includes staff awareness and understanding, ongoing security measures and checks, and the implementation of appropriate access controls for assets.

National security background checks allow the Government to scrutinise persons with access to security sensitive places, things, and substances. For example, the Council of Australian Governments (COAG) Review of Hazardous Materials identified access to security sensitive biological agents as a national security vulnerability that could be mitigated through the use of background checks for personnel. (<http://www.health.gov.au/internet/main/publishing.nsf/Content/ssba.htm#standards>).

Why AusCheck?

The Independent Review of Airport Security and Policing for the Government of Australia by Sir John Wheeler (the Wheeler Report) recommended a tightening and centralising of the existing background checking of aviation workers in order to increase security for the Australian public.

Recommendation 10 of the Wheeler Report noted that it would be beneficial to security to extend background checking to other industries. While the Wheeler Report did not list the other industries or sectors for which background checking would be appropriate, the Report made the following observations and recommendations at pages 69-70:

The process of checking an application against the [ASIC] applicant’s background should be centralised and performed by a single agency...

The agency to perform this checking and maintain that data base should come under the Attorney-General’s portfolio... in a new Division within the Attorney-General’s Department

The new central authorising body should also handle maritime industry (ie MSIC) and other background checking.

AusCheck was established in 2007 in response to that recommendation. There are significant efficiencies for AusCheck to expand its background checking capability to other national security related industries, such as the proposed check with regards to persons handling security sensitive biological agents (SSBAs). There are also benefits in terms of consistency and rigour in the decision-making process.

AusCheck currently conducts background checks for Aviation Security Identification Cards (ASIC) and Maritime Security Identification Cards (MSIC). AusCheck has developed policy and legal knowledge as well as practical knowledge of background

checking processes, security and privacy implications that will allow AusCheck to commence additional checks within a short period of time. Procedures, infrastructure and staff resources in place can be quickly modified to meet the needs of new background checks.

Part 2 – Limited Power or Scope of the Bill

The general purpose of the Bill is to amend the *AusCheck Act 2007* (the Act) to provide a capacity for AusCheck within the Attorney-General's Department to conduct background checks for national security purposes. Currently, the Act only allows AusCheck to conduct background checks for the purposes of the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*. Those checks incorporate an ASIO security assessment and an assessment of criminal history information against defined criteria designed to identify individuals who present a potential national security risk if allowed access to high-risk places, things, substances or positions.

The amendments will allow AusCheck to conduct background checks in support of other regulatory regimes for security sensitive industries, as agreed on a case-by-case basis by Government. New checks will be consistent with existing checking regimes.

Importantly, the Bill does not impose any requirement for any person to have a national security background check. Rather, the amendments will authorise AusCheck to conduct background checks that are required under the authority of another law or legislative instrument and in line with any Government decision to introduce new background checks.

Part 3 – Specific Proposed Amendments

Definition and scope of 'national security background check' –amendments to sections 4 and 8

Currently, neither the Act nor the *AusCheck Regulations 2007* (the AusCheck Regulations) provide a definition of 'national security'. This is because the legislation is limited in its scope to background checks conducted in relation to the aviation and maritime industries.

To ensure AusCheck can perform background checking services for a range of national security purposes beyond those industries, the Bill will insert a definition of 'national security background check' at section 4 of the Act.

The Bill would authorise AusCheck to undertake background checking services only for purposes related to Australia's national security, the defence of Australia, a national emergency, the prevention of conduct to which the terrorism provisions in Part 5.3 of the *Criminal Code Act 1995* applies. In addition, because the expression 'national security' does not have a precise legal or constitutional meaning, it was necessary to refer to constitutional heads of power that could support such checking. Accordingly, the Bill would also permit AusCheck to undertake background checking services for purposes related to the executive power of the Commonwealth, and matters incidental to the execution of any of the legislative powers of the Parliament or the executive power

of the Commonwealth. The drawing in of the executive and implied legislative and executive heads of power would be 'read down' to the national security context.

The purposes listed in proposed section 8 are broadly consistent with, but narrower than, the definition of 'national security' in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) which defines *national security* at section 8 to mean Australia's defence, security, international relations or law enforcement interests.

Definition and scope of 'online verification service' – amendments to sections 9 and 13

The Act authorises AusCheck, when conducting background checks, to obtain identity details of an individual so police services can distinguish between people with the same or similar names. The online verification service is currently restricted to verifying aviation security identification cards and maritime security identification cards.

The Bill will authorise AusCheck to provide a similar online verification service in relation to other background checking regimes when they commence.

Protection of information collected and stored by AusCheck

The Act currently contains criminal offences with penalties of up to 2 years imprisonment for unauthorised disclosure of information by anyone whose employment with the Attorney-General's Department involves access to information under the AusCheck scheme. The Act also limits disclosure of personal information to those involved in the background checking process for the purposes of conducting background checks.

Operationally, information held by AusCheck is protected and secured using approaches proven in e-commerce, especially internet banking and secure government systems. Information is secured when it is entered, processed, transferred and stored.

In addition, information collected and stored by AusCheck is protected in the following ways:

- **Authorisation**
Access is only granted to people who have been properly authorised to use the system. System access is granted to individuals, not entire organisations. Users must prove their need to access the system. All issuing body user access will be directly linked to the Department of Infrastructure, Transport, Regional Development and Local Transport accreditation and a port or airport security plan, and all government access will be linked directly to a legislative basis.
- **Authentication**
Access is only granted to people who can prove who they say they are. AusCheck implements "best practice" standards for userIDs and passwords, and requires digital certificates to access system-to-system connections.
- **Access Control**
System functions can only be accessed by authorised parties in authorised ways. The system limits access to different functions and information for different users.

Users are granted access only to particular data and functions necessary to do their job. All functions – whether they are available to users or only by internal system components – are secured by access control lists.

- **Confidentiality**

Only authorised parties can access the system and the information processed by it. When information is transferred with other government agencies, it is sent via special point-to-point closed networks that are not publicly accessible. All internet sessions run in secure sessions similar to those used for internet banking. When in transit, information is encrypted using DSD-approved methods.

- **Availability**

The system can only be accessed by authorised parties, so the system can be used for its intended purpose. The system uses substantial hacking and intrusion protection measures. The databases and servers are hosted in a secure Attorney-General Department environment. The environment has been reviewed and certified by DSD-accredited experts, and the system itself will also be reviewed when it is close to completion.

- **Audit and Logging**

The system maintains a non-repudiable record of activity to deter and detect unauthorised activity. All system activity is logged, and a pro-active audit plan has been established.

Definition and scope of ‘identity verification information’ – amendments to sections 4, 5, 13 and 14

The Act currently provides that a background check includes the verification of documents relating to the individual’s identity. The Act defines personal information as having the same meaning as under the *Privacy Act 1988*, namely information about an individual whose identity can be ascertained from that information. However, the Act does not currently provide a definition of ‘identity verification information’.

The Act authorises AusCheck to establish and provide an online verification service to verify that the ASIC or MSIC has been issued to a particular individual, the person possessing the ASIC or MSIC is the person to whom it was issued, and the ASIC or MSIC is valid.

The Act also provides explicit authority for AusCheck to collect, use and disclose personal information collected by AusCheck for the online verification service in accordance with the *Privacy Act 1988*.

The Bill will expand the range of information AusCheck may collect to establish a person’s identity.

A new definition of ‘identity verification information’ will authorise AusCheck to use biometric data to verify the identity of an individual if the person’s identity cannot be established through the standard name and date of birth date check.

The Bill will also allow AusCheck to verify an individual’s identity using electronic information, fingerprints or other relevant information and would give it the capacity to

use new technology as it becomes available to enhance the accuracy of background checking.

While ‘biometric’ information is not defined and would be given its ordinary meaning, it is given appropriate protections by the Bill. When AusCheck is required to facilitate the provision of biometric information to the relevant police jurisdiction for identification verification purposes, that information can not be used or disclosed for any purpose other than a further background check. Therefore, the information would not be available for purposes such as the collection and analysis of criminal intelligence or security intelligence information for law enforcement or national security purposes.

Part 4 – Possible future national security background checking regimes

The process of determining whether a background check is appropriate in a particular circumstance will be determined on a case-by-case basis. Because the imposition of a regulatory burden on a particular activity or industry would require the preparation of a regulatory impact statement, it is appropriate that any new proposed background checking regime be subject to Government scrutiny at the time.

The requirements and criteria in relation to any new national security background checks will be set out in the relevant regulatory scheme for that proposed new regime.

The Bill anticipates that the background checking component of any new system would be administered by AusCheck in a similar way to the current aviation and maritime regimes. In particular, AusCheck would process applications submitted by regulatory bodies, would obtain security assessments from ASIO and criminal history information from CrimTrac, and, if required, legal non-citizen and work rights information from the Department of Immigration and Citizenship. AusCheck would assess the information received against the disqualifying criteria for the particular regime as set out in the relevant legislative instrument or instruments to determine whether an individual meets the criteria, and would inform the regulatory body of that decision.

Security Sensitive Biological Agents Regulatory Scheme

The COAG *Review of Hazardous Materials* identified means of limiting opportunities for the illegal or unauthorised use of hazardous materials (biological, radiological, chemical and explosives precursors/ammonium nitrate) through improvements in Australia’s regulation, monitoring, control and education systems concerning such materials in order to assist counter-terrorism efforts. The COAG *Report on the Regulation and Control of Biological Agents* of November 2006 (the COAG Report) identified the handling of Security Sensitive Biological Agents (SSBAs) as an area of potential national security risk. The report recommended accreditation procedures for laboratories that handle SSBAs, including background checking of personnel with access to those agents to mitigate the potential national security risk. On 13 April 2007, COAG considered the recommendations of the COAG Report and agreed to the establishment of a national regulatory scheme for biological agents of security concern to be implemented by the Department of Health and Ageing (DoHA).

Part 3 of the *National Health Security Act 2007* (NHS Act) was established to provide a

legislative framework for the regulation of SSBA in Australia, and commenced on 31 January 2009. The *National Health Security Regulations 2008* (the Regulations) and the Security Sensitive Biological Agent Standards (SSBA Standards) are legislative instruments that support the NHS Act.

SSBAs are agents regarded as a potential risk to human health or the Australian economy if subject to deliberate misuse. There are 12 agents currently considered as SSBAs, including *Bacillus anthracis* (anthrax), *Variola virus* (smallpox), *Yersinia pestis* (plague) and SARS coronavirus. Under the NHS Act the Minister for Health and Ageing is responsible for determining whether an agent should be regarded as an SSBA.

As noted in the COAG Report, the rapidly expanding knowledge of biotechnology and the growth in numbers of people with experience in the biological sciences have increased the risk of a bioterrorist event in Australia. This includes the risk of a bioterrorist attack resulting in high morbidity or mortality rate or causing extensive damage to agricultural industries (eg *foot-and-mouth disease virus*). Significantly, the COAG Report notes the existence of intelligence that suggests some terrorist groups aspire to acquire a biological weapons development capability and are pursuing this through recruitment of scientists and materials.

Prior to the SSBA Regulatory Scheme there was no requirement for mandatory background checks for persons handling SSBAs.

AusCheck is liaising with DoHA to develop a proposal to undertake national security background checks for personnel handling SSBAs. It is proposed that background checking will commence later in 2009, subject to the passage of both the Bill and specific enabling legislative instruments, including amendments to the DoHA SSBA Standards, which would operate in conjunction with proposed amendments to the AusCheck Regulations. The SSBA Standards made under the NHS Act set out requirements for ensuring physical security around handling, storage, disposal and transport of SSBAs, as well as personnel and information security.

The background check will consist of an ASIO security assessment and the assessment of the individual's Australian criminal history information against the criteria outlined in the proposed amendments to the AusCheck Regulations. AusCheck will notify all persons returning a potentially unfavourable result before making a final decision, allowing the person adequate opportunity to provide further information to AusCheck. The AusCheck legislation will include provisions allowing individuals to discuss or dispute decisions.

If AusCheck makes a final decision that an individual has an adverse result, the person will not be eligible to obtain an AusCheck security clearance and will be unable to become an 'authorised person' as per the SSBA Standards, and therefore will not be able to handle SSBAs unsupervised. As employment decisions will continue to rest with the relevant laboratory, this decision will not preclude the individual from obtaining employment. However, the person will not be eligible to work in a laboratory in a position where the person could handle SSBAs unsupervised.

It is anticipated that approximately 700 applications for background checks will be processed in the first year of the operation of the scheme, with fewer applications being processed in subsequent years.

Other Possible Dangerous Substance Related Regimes

The COAG Review of Hazardous Materials process, the August 2008 Productivity Commission Research Report regarding Chemicals and Plastics Regulation, and the COAG Report on the Control of Chemicals of Security Concern may result in the commencement of additional new background checking regimes.

COAG also agreed to the recommendations from the Report on the Regulation and Control of Radiological Material. Recommendation 6 of that Report in relation to radioactive sources called on all jurisdictions to implement an agreed Code of Practice on the Security of Radioactive Sources. The Code of Practice for the Security of Radioactive Sources, which was published by the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) in 2007 following agreement by all jurisdictions and approval by the Radiation Health Committee, includes requirements for security background checking of personnel who have access to certain types of radioactive sources. All jurisdictions are currently discussing ways to undertake the required security background checking in a nationally consistent manner.

Part 5 – Previous Committee Recommendations

In proposing the Bill, the Government took account of the recommendations from the Senate Standing Committee on Legal and Constitutional Affairs (the Senate Committee) when it considered the AusCheck Bill 2006.

The AusCheck Bill 2006 provided the regulatory framework for a centralised background checking service by the Attorney-General's Department. When the AusCheck Bill 2006 was referred to the Senate Committee, concerns were expressed about:

- whether the scheme would allow AusCheck to conduct background checking independent of specific enabling legislation
- privacy issues, and
- the breadth of the proposed regulation-making power.

New Background Checking Regimes

Of particular concern to the Senate Committee were provisions in the AusCheck Bill 2006 that allowed for other specified classes of background checks to be established in the future enabling the Attorney-General's Department to implement background checks independently of any other legislation. The Senate Committee considered any new background checking regimes (beyond the ASIC and MSIC schemes contemplated by the AusCheck Bill 2006) should be set out in separate legislative instruments.

Consistent with those concerns, the AusCheck Bill 2006 was amended to restrict the AusCheck scheme to background checks for the purposes of the ASIC and MSIC schemes.

Also consistent with those concerns, the Bill differs from the AusCheck Bill 2006 by requiring in that the authority and requirement for any new background check must be

established by separate legislative instruments. The Bill does not authorise AusCheck to commence background checking in the absence of such specific authority. This is consistent with the concerns expressed by the Senate Committee as it provides a mere capacity for background checks that would need to be enlivened through another authority. Further, the Bill explicitly restricts the expansion of background checking regimes to ‘national security’ purposes.

Privacy Impact Assessment

When considering the AusCheck Bill 2006, the Senate Committee expressed concerns that the provisions dealing with the collection, use and disclosure of personal information were too broad and were likely to impact adversely on an individual’s right to privacy.

The Bill directly links the collection, use and disclosure of personal information by AusCheck to its function and purposes.

In addition, a Privacy Impact Assessment (PIA) was undertaken by an external consultant on behalf of the Attorney-General's Department to assess the privacy impacts posed by legislative, policy or technological initiatives and to provide reassurance that privacy issues have been given proper consideration.

The findings and recommendations of the PIA were utilised to refine and enhance the privacy protections contained in the Bill.

The PIA and commentary were tabled in Parliament on 18 March 2009 by the Attorney-General during the House of Representatives debate on the AusCheck Amendment Bill 2009. They are publicly available on the Attorney-General's Department's website.

Regulation-Making Power

When considering the AusCheck Bill 2006, some concerns were expressed that the Bill provided the ability for future broad expansion of the scheme to cover background checking authorised by regulations. This concern has been noted in the drafting of the AusCheck Bill 2009. As described above, any expansion of AusCheck’s background checking capacity requires authority from another piece of legislative authority and is thus subject to parliamentary scrutiny. AusCheck cannot initiate new background checking schemes through amendment of the AusCheck Regulations alone.

The exposure draft AusCheck Amendment Regulations were tabled in Parliament on 18 March 2009 by the Attorney-General during the House of Representatives debate on the Bill. They give an indication of the likely nature and scope of a national security background check. The actual form of regulations would be tailored to the particular circumstances in which the background check is required. The AusCheck Regulations will provide necessary procedural matters to support this as and when national security background checks are so enlivened.