



AusCheck Bill 2006

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AusCheck Bill 2006

Date introduced: 7 December 2006

House: House of Representatives

Portfolio: Attorney-General

Commencement: Day after receiving the Royal Assent

Purpose

The Bill establishes the AusCheck scheme which will be the Australian background checking service for people who work in the Australian maritime and aviation industries.

On 5 December 2005, the Australian Government announced plans to establish a centralised government vetting agency (AusCheck) as part of the Attorney-General's National Security and Criminal Justice Group. AusCheck will also be responsible for notifying the relevant issuing authority of the outcome of the background checks.¹

Objects of the Bill²

To provide a regulatory framework for establishment of a centralised background checking service by the Attorney-General's Department, for the purposes of coordinating and conducting certain criminal, security and other background checking.

To give the Attorney-General's Department the authority to coordinate background criminal and security assessments for the applicants for the Aviation Security Identity Card (ASIC) and the Maritime Security Identification Card (MSIC) and any subsequent schemes. The bill also gives to and confirms the authority of the Attorney-General's Department:

- to maintain a database of applicants and cardholders
- to collect, use and disclose information; and
- to recover costs for conducting background checks.

However, AusCheck's initial role will be limited to background checks for the ASIC and MSIC schemes. The bill includes general provisions which will allow AusCheck to expand its role in the future for other background checking schemes. The government argues that this will minimise duplication for people who need to apply for background checks for different purposes.³

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Background

Basis of policy commitment

Since the events of 11 September 2001, the Australian government has initiated a systematic and comprehensive review of security threats and measures relating to terrorism.⁴ Significantly, there has been an extensive review of transport security in Australia. One of the major reviews in this area was the 2005 review of airport security and policing headed by Sir John Wheeler ([the Wheeler Report](#)). The results of that review have contributed to the development of a panoply of tailored and strategic counter-terrorism policies and measures.

Aviation Security Identity Cards (ASIC) and Maritime Security Identity Cards (MSIC)

An ASIC is required if a person needs to work in an airside area or a landside security zone—collectively the ‘secure area’—at a security controlled airport that has regular public transport services.

Implemented on 1 January 2007, a MSIC is required if a person needs to work unescorted or unmonitored in a maritime security zone. The MSIC scheme covers waterfront workers, seafarers on Australian regulated ships, customs brokers and shipping agents, contractors, service providers and maintenance workers, truck drivers, train operators and anyone who works onboard an offshore oil or gas facility.

The ASIC or MSIC indicates that the holder has been background-checked and that the check revealed that they are of suitable character to be in a secure area. The identity of the person seeking the card is verified, then a background check is conducted including: a criminal history check by CrimTrac, a security assessment by the Australian Security Intelligence Organisation (ASIO) and where required, an Authority to Work in Australia check by the Department of Immigration and Citizenship.

The ASIC is valid for two years, while the MSIC is valid for five years. Upon expiry of the card—and assuming there is still a valid reason to access security designated area(s)—a full background check is again conducted of the person’s proof of identity, criminal convictions, and, if necessary, authority to work in Australia. The security assessment by ASIO remains ‘active’ after the person obtains their initial ASIC or MSIC.⁵

The AusCheck Scheme

Following a recommendation of the Wheeler Report,⁶ AusCheck was established to:

- enhance national security by establishing greater and conspicuous control by Government of security arrangements at air and sea ports

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- maintain a database of up-to-date information on persons who apply for and are ultimately issued with an ASIC and/ or MSIC
- mitigate the risk of ASIC and MSIC cards going to ineligible persons, by preventing the use of fraudulent proof of identity documents to support the issue of an ASIC or MSIC
- reduce duplication and improve the consistency and response time of background checking in the aviation and maritime industries, and
- provide capacity to be used for other background checking purposes.⁷

AusCheck will operate on a cost recovery basis and maintain a comprehensive database of all applicants and cardholders for the aviation and maritime industries.

AusCheck will help the aviation and maritime industries to identify individuals who should not be eligible for an ASIC or MSIC, by applying a consistent interpretation of the statutory requirements and providing a recommendation to the relevant issuing body.

Report of Joint Committee of Public Accounts and Audit

In December 2006, the Joint Committee of Public Accounts and Audit recommended that AusCheck's role be expanded to include issuing ASICs and MSICs. The Committee had received evidence from aviation industry groups that there were significant delays in the issuing of some cards (currently undertaken by 188 registered airports and airlines).⁸ The government has yet to respond to this recommendation.

Financial implications

The 2006-07 Budget provided \$22.3 million for the establishment of AusCheck.⁹ The Explanatory Memorandum states that the estimated annual cost of operating AusCheck service delivery is \$8-9 million. However, it is anticipated that this will be cost recovered from the aviation and maritime industries.¹⁰

Main provisions

Part 1— Preliminary

Clause 4 – Several items are defined in this clause. The most noteworthy is 'AusCheck scheme'. It means the scheme prescribed for the purposes of **clause 8** of the bill. The regulations may provide for the establishment of the 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 that Act and

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- the *Maritime Transport and Offshore Facilities Security Act* or regulations under that Act, and
- for such other purposes as are prescribed by the regulations.

The reach of the AusCheck scheme

The ‘other such purposes’ referred to above are notably very broad in terms of their scope and reach. They include purposes related to:¹¹

- external affairs
- the prevention of terrorist activities to which [Part 5.3 of Chapter 5 of the Criminal Code applies](#) or
- Australia’s national security or defence or to a national emergency
- money expenditure of money by the Commonwealth, including the granting of financial assistance to a State
- the executive power of the Commonwealth
- the collection of statistics
- a Territory or to a Commonwealth place
- overseas or interstate/territory trade and commerce
- the provision of a background checking service to a constitutional corporation, where:
 - the service involves conducting a background check in respect of one or more employees of the constitutional corporation
 - the background check is relevant to the relationship between the constitutional corporation and the employee or employees
- a postal, telegraphic, telephonic or other like service
- the provision of allowances, pensions, child endowment, benefits or services referred to in paragraph 51(xxiiiA) of the Constitution
- providing a service to the Commonwealth; or a Commonwealth authority
- matters incidental to the execution of any of the legislative powers of the Parliament or the executive power of the Commonwealth
- using the spare capacity of AusCheck staff or maintaining or improving the specialised skills of AusCheck staff through providing a service, or
- any other matter that the Parliament has the power to make laws about.

In the bill the term ‘personal information’ has the same meaning as it does in the [Privacy Act 1988](#). Under the *Privacy Act* “personal information” means

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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.

Definition of *background check*

The Explanatory Memorandum points out that the term ‘background check’ is the linchpin of the description of the function established by the bill.¹² A background check involves 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:¹³

- the person’s criminal history
- information 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 as are prescribed by the regulations.

The wording of **paragraph 5 (d)** provides an apparently generous allowance for information collection.

The process of background checks

The process by which personal information is acquired and assessed for a background check is set out in **Part 2** – Establishment of the AusCheck scheme and in **clause 18**, the regulation making power.

Part 2— Establishment of AusCheck scheme

Part 2, Clause 9 - Matters covered by AusCheck scheme

This clause enables regulations to be made which will provide the necessary detail for the AusCheck scheme of background checking.

Sub-clause 9(1) enumerates a variety 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
- by another person (for example, an employer), but with the consent of the person about whom the background check is being made.

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The regulations may specify the information that is to be included in an application for a background check, as well as the form of advice that is to be given to the applicant and the person to whom the background check relates. The regulations may also set the form of advice to be given to other persons about the results of the background check.

Assessing background information and reaching a conclusion

The criteria used to judge the information gathered by the background check, and the decisions that can be made based on the results of the background check can also be defined in the regulations. However, certain specific classes of background checks will not require such criteria to be set out in regulations under the AusCheck scheme if they are already set out in other legislation (subclause 9(3)). This is the case in relation to background checks for ASICs and MSICs – the criteria and decision making powers in relation to these are already provided for in regulations under the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*.

Sub-clauses (2) and (3) permit regulations for background checks to be relevantly tailored 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

The AusCheck scheme may require a person to apply for and pass a background check before they are permitted to:

- gain access to certain information, place or thing
- have a certain power or function under a law exercised in relation to the individual (for example, the granting of a licence or permit), or
- hold certain jobs or positions.

The Explanatory Memorandum states that it is envisaged that the use of such a provision would be confined to situations where a certain class of background checks was required to implement policy that had not been provided for by other legislation. It is expected that future background checking schemes will be constructed under the provisions of an Act under the relevant portfolio which provides the appropriate policy framework.¹⁴

Right of appeal

The Joint Committee of Public Accounts and Audit recommended that AusCheck decisions should be subject to appeal through the Administrative Appeals Tribunal (AAT).¹⁵ On the face of it, this would seem a good idea given that AusCheck's role may be dramatically extended via regulation, as outlined in **clauses 4 (c) and 5 (d)**.

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Decisions regarding ASICs and MSICs are already appellable to the AAT under the existing regulations. Similarly, adverse or qualified ASIO security assessments may be appealed, under the *Australian Security Intelligence Organisation Act 1979*. While the Explanatory Memorandum states that it is expected that future background checking schemes would be constructed under specific Acts, it may be prudent to insert a general provision for appeal to the Administrative Appeals Tribunal, in the event that this is not provided for in specific legislation.

Clause 11 – Secretary may give directions under AusCheck scheme

This clause gives power to the Secretary of the Department to give directions to a person who has applied for a background check, or who is required or allowed to take action in matters related to a background check. Subclause (2) states that this power may include – but not be confined to – instructing a person to notify the Secretary as to whether or not a licence, permit or other authorisation has been issued to a person in respect of whom a background check has been performed.

A penalty may be imposed by regulations for failure to comply with a direction by the Secretary.¹⁶

Clause 12 – Delegation by Secretary

This clause enables the Secretary of the Department to delegate their powers or functions under the AusCheck scheme to:

- an SES employee or acting SES employee, or
- to an APS employee who holds or is acting in an Executive Level 2 or equivalent position in the Department.

A person to whom such a delegation is made is obliged to exercise those powers or functions in compliance with any directions given by the Secretary.

Part 3— Information management

Division 1 – Collection, use and disclosure

Clause 13 – Authorisation of information collection, use and disclosure

This confirms that the collection, use and disclosure of personal information must be for purposes related to giving effect to the operation of the AusCheck scheme. This is consistent with the principles of the *Privacy Act 1988*.

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Clause 14 – Authorisation of retention and subsequent use of information

This clause permits the Secretary to establish and maintain a database of information, including AusCheck scheme personal information about an individual that relates to the AusCheck scheme.

However, the uses of this information are explicitly confined, to be used for:

- carrying out another background check in relation to that individual under the AusCheck scheme
- responding to a national security threat, or
- collecting, correlating and analysing data for intelligence purposes.

Subclause (3) authorises the use of de-identified information drawn from the database for the purposes of research, government and/or industry planning.

Clause 15 – Protection of information

Given the breadth, depth and sensitivity of personal information that is expected to be collected by such a scheme, effective protection of such information and penalties for unauthorised use and disclosure are essential.

This clause seeks to offer further protection of information gathered by AusCheck as part of conducting a background check. It makes it an offence for a current or past employee of AusCheck to make unauthorised use or disclosure of information obtained in relation to background checking. The maximum penalty is imprisonment for 2 years.

Disclosure of information is not permitted unless:

- it is for the purposes 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 Australian Federal Police for the purpose of the AusCheck scheme.

The defendant has the burden of showing that their disclosure of information fell into one of the exceptions listed above. The reason for having a reverse onus of proof is the premium placed on privacy, and also because a person working for AusCheck would be familiar with the rules of disclosure and the operation of exceptions. Hence, it would be much easier for the defendant to prove that the disclosure fell within an exception than for the prosecution to prove that it did not.¹⁷

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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

The Explanatory Memorandum sets out the Privacy Act in relation to the AusCheck scheme.¹⁸

Part 5— Other matters

Clause 18 – Regulations

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
- the imposition of penalties of up to 50 penalty units
- guidelines for background checking, and
- reviewing the AusCheck scheme.¹⁹

Concluding comments

The centralisation of background checks for aviation and maritime security cards has been recommended by a number of transport security reviews. AusCheck will be responsible for ASIC and MSIC background checks. This will be a significant task given that there are more than 120,000 ASICs and 60,000 MSICs currently in operation.²⁰ Any expansion of AusCheck's role to other background checks should continue to be monitored by the Parliament.

Endnotes

1. Until AusCheck commences its operations, the assessment of an application for a MSIC or ASIC is to be conducted by the Department of Transport and Regional Services.
2. *Explanatory Memorandum, AusCheck Bill 2006*, 7 December 2006, p. 1
3. Hon. Philip Ruddock MP, Attorney-General, 'Second Reading Speech: AusCheck Bill 2006', House of Representatives, *Debates*, 7 December 2006.

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4. Prime Minister John Howard, '[Getting the Big Things Right](#)' *Government Report Card, National Security*, 8 July 2004.
5. Attorney-General's Department, *Draft AusCheck Cost Recovery Impact Statement April 2007*, available at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(4341200FE1255EFC59DB7A1770C1D0A5\)~auscheck-cris.pdf/\\$file/auscheck-cris.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(4341200FE1255EFC59DB7A1770C1D0A5)~auscheck-cris.pdf/$file/auscheck-cris.pdf), accessed 5 February 2007.
6. See [An Independent Review of Airport Security and Policing for the Government of Australia \(the Wheeler Report\)](#) pp 67–73.
7. See: http://www.ag.gov.au/www/agd/agd.nsf/Page/Organisational_StructureNational_Security_and_Criminal_JusticeAusCheck
8. Joint Committee of Public Accounts and Audit, *Inquiry into developments in aviation security since the Committee's June 2004 Report 400: Review of Aviation Security in Australia*, Parliament of Australia, December 2006, p. 51.
9. Attorney-General's Department, *Security Environment Update*, available at: <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/9EDD156E9DA7C75FCA25716F000C9401?OpenDocument>, accessed 5 February 2007.
10. Explanatory Memorandum, p. 2.
11. Part 2, Clause 8, Subclause (2) AusCheck Bill 2006
12. Explanatory Memorandum, p. 4.
13. Explanatory Memorandum, p. 4.
14. *ibid*, p. 7
15. Joint Committee of Public Accounts and Audit, *op.cit*, p. 52.
16. Explanatory Memorandum, p. 7.
17. Explanatory Memorandum, p. 9.
18. Explanatory Memorandum, p. 10.
19. For more information on AusCheck cost recovery, refer to the [Draft AusCheck Cost Recovery Impact Statement, April 2007](#), AusCheck, Attorney-General's Department.
20. Department of Transport and Regional Services, *Submission to the Joint Committee of Public Accounts and Audit Inquiry into developments in aviation security since June 2004*, p. 19. Hon. Mark Vaile MP, Minister for Transport, 'MSIC Implementation 1 January 2007', Press Release, 19 December 2006.

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