



AusCheck Amendment Bill 2009

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AusCheck Amendment Bill 2009

Date introduced: 12 March 2009

House: House of Representatives

Portfolio: Attorney-General

Commencement: The day of Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill would amend the *AusCheck Act 2007* for two purposes:

- to expand the range of background checks that AusCheck is able to undertake to include national security background checks
- to manage the use and disclosure of personal biometric information for completion of AusCheck background checks.

Background

AusCheck—the Australian Background Checking Service—is responsible for coordinating the background criminal and security checks on applicants for Aviation Security Identification Cards (ASIC) and Maritime Security Identification Cards (MSIC).

In 2005, the then Australian Government agreed to establish AusCheck, a new division in the Attorney-General's Department, to coordinate checks on people who are required to have an ASIC or MSIC. The decision to set up AusCheck followed a recommendation by Sir John Wheeler in his report, *An Independent Review of Airport Security and Policing for the Government of Australia*.¹

1. Senate Standing Committee on Legal and Constitutional Affairs, *AusCheck Bill 2006 [Provisions]: Report*, March 2007, (Senate Committee report), p. 2, quoting the Explanatory Memorandum for the AusCheck Bill 2006.

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AusCheck commenced operation in September 2007. It maintains a comprehensive database of all applicants and cardholders for the aviation and maritime industries and operates on a cost recovery basis.²

The legislative basis for AusCheck is the *AusCheck Act 2007*. The passage of that legislation through the Parliament is of some interest in the context of the 2009 Bill.

The AusCheck Bill 2006 was introduced into the Parliament on 7 December and referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by 14 March 2007 ('the 2007 Senate Committee report').

In its report, the Senate Committee acknowledged the general in-principle support for the Bill expressed by the majority of submissions and witnesses. However the Senate Committee also expressed concerns about the breadth of the Bill's regulation-making power, privacy issues relating to the functions described in the Bill, and the lack of accountability mechanisms set out in the Bill.³ A number of Committee recommendations were accepted by the Government and incorporated in amendments which were subsequently passed by the Parliament.⁴

Regulation making power to set up background checking schemes—The 2007 Senate Committee report

The recommendations in the 2007 Senate Committee report relating to the broad regulation making power are of interest in the context of the 2009 Bill.

The original 2006 Bill would have allowed the Government to implement by way of regulations alone, a wide range of background checking schemes – related to any activities within a constitutional head of power – without the authorisation of any other primary legislation. The Senate Committee and many submissions to the inquiry did not consider this appropriate. The Committee was of the view that the particulars of any schemes beyond the ASIC and MSIC schemes should ideally be set out in primary legislation.⁵ On

2. Attorney-General's Department. *AusCheck*: created on 11 July 2006 and last modified on 12 February 2009. Available at:

http://www.ag.gov.au/www/agd/agd.nsf/Page/Organisational_StructureNational_Security_and_Criminal_JusticeAusCheck

Accessed on 18 March 2007.

3. Senate Committee Report, *op. cit.*, paragraph 3.93.

4. The *AusCheck Act 2007* received Royal Assent on 12 April 2007 and commenced operation the following day.

5. The Committee therefore recommended that subclause 5(d), paragraph 8(1)(c) and clause 10 of the 2006 Bill be removed. Report, paragraph 3.93.

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the basis of this recommendation, the Bill was subsequently amended so that the scope for the AusCheck scheme was limited to background checking for the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Act 2003*. The addition of any further background checking functions to the AusCheck scheme could therefore only be done through amendment to the AusCheck Act.

Given this background, it is of interest that the main purpose of the 2009 AusCheck Bill is to allow by way of regulations, expansion of the range of background checks that AusCheck is able to undertake to include national security background checks.⁶ Arguably the relevant provisions in the Bill have been drafted quite broadly to give a wide scope to this power. The relevant sections are described below.

Financial implications

The Explanatory Memorandum states that the Bill will have negligible financial implications.⁷

Main provisions

The amendments proposed in the Bill fall into two categories corresponding to the two main purposes of the Bill, namely national security background checks and use and disclosure of biometric information. The Digest deals with the amendments according to these two categories rather than in item number sequence.

National security background checks

Under section 8 of the AusCheck Act the regulations may provide for the establishment of background checking schemes. The scope for the AusCheck scheme is currently limited to background checking for the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Act 2003*. **Item 7** is the central amendment. It would amend section 8 to broaden the range of background checking schemes to include national security background checking schemes. Under **proposed paragraph 8(c)** regulations could provide for the establishment of background checking schemes for purposes related to:

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6. The Explanatory Memorandum at p. 1 states that a national security background check could be used to implement background checking policy in a number of areas where there is a perceived national security risk. 'For example, the Council of Australian Governments review of Hazardous Materials has identified access to security sensitive biological materials as an area where activities need to be regulated to address national security risks.'
 7. Explanatory Memorandum, p. 2.

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- Australia's national security
- the defence of Australia
- a national emergency
- the prevention of conduct to which Part 5.3 of Chapter 5 of the *Criminal Code* applies (i.e. terrorism offences)
- the executive power of the Commonwealth, or
- matters incidental to the execution of any of the legislative powers of the Parliament or the executive power of the Commonwealth.

The new definition of '*national security background check*' in relation to an individual means a background check performed for one of these six purposes (**item 2**, inserted into subsection 4(1)).

Comment

Arguably paragraph 8(c) has been drafted broadly, particularly in relation to the phrase 'matters incidental to the execution of any of the legislative powers of the Parliament or the executive power of the Commonwealth'. The Explanatory Memorandum and Minister's Second Reading Speech to the Bill do not explain the need for such a broad Constitutional coverage. Given the concern about the 2006 Bill and its broad regulation making power, Parliament may wish to ask why this provision needs to be drafted so broadly.

Section 9 of the AusCheck Act allows regulations to provide for the details of the AusCheck scheme of background checking. In particular paragraph 9(1)(i) provides that the scheme can deal with matters relating to the establishment and provision of an online verification service. The online verification service is currently restricted to verifying aviation security identification cards and maritime security identification cards. **Item 8** would amend the description of the online verification service so that it could include verification that an individual has undergone a national security background check (**paragraphs 9(1)(iii) and (iv)**).

Paragraph 13(c) deals amongst other things with the establishment of an online verification service. **Item 12** is a consequential amendment resulting from the inclusion of the national security background check capacity. It would amend paragraph 13(c) allowing that the online verification service could be used in relation to verification of a national security background check.

Item 9 makes an amendment to section 9 clarifying the meaning of 'consent' in the context of background checks. An individual is taken to have given consent to another person making an application for a background check if the individual has applied for a particular card, licence, permit or authorisation and before making the application has

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been advised that a background check was a precondition to the issuing of the card, licence, permit or authorisation.⁸

Biometric data ('Identity verification information')—Collection, use and disclosure

The Bill sets up a new regime for use and disclosure of biometric data, or, as it is called '*identity verification information*'.

Item 1 inserts a definition of '*identity verification information*' to mean AusCheck scheme personal information consisting of the individual's fingerprints or other biometric data about the individual, but does not include a photograph of the individual. The rationale for the exclusion of photographs is that it is necessary for the operation of the online verification service. The Explanatory Memorandum states:

For example, an authorised user may need to use the online verification service in order to visually compare the photograph of an individual recorded on the databases as holding an ASIC and the individual who is presenting that ASIC.⁹

Biometric data is not defined in the Bill and will therefore take on its ordinary meaning.¹⁰

Section 13 of the Act 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 section 13 is for purposes:

- directly 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 for updating information about that person, and
- of providing online verification services.

Item 13 would add a **new subsection 13(2)** providing that the collection, use and disclosure of *identity verification information* is authorised for the purposes of the Privacy Act if:

8. The way a person may be considered to have been advised may be set out in regulations.

9. Explanatory Memorandum, p. 3.

10. Major biometric technologies include finger scanning, facial recognition, iris and retinal scanning, finger geometry, voice recognition and dynamic signature verification. For an explanation of biometric technologies see Australian Law Reform Commission, 'Review of Australian privacy law', Discussion paper 72, September 2007, pp. 330-332 at:

<http://www.austlii.edu.au/au/other/alrc/publications/dp/72/>

Accessed on 18 March 2009.

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- it is directly necessary for the purpose of verifying the identity of an individual who is undergoing a background check under the AusCheck scheme, and
- where the information is only used or disclosed to the extent necessary for this purpose.

Items 14 to 19 amend section 14. This section allows AusCheck to establish and maintain a database of information relating to background checks and also sets out the purposes for which information in the database may be used or disclosed. The amendments in **items 14 to 19** would provide two separate use and disclosure regimes— one for ‘identity verification information’ and one for all other personal information. The amendments provide that ‘identity verification information’ (i.e. finger prints and other biometric data) is given a different and enhanced protection to other personal information. In short *identity verification information* may only be used or disclosed for the purpose of verifying the identity of an individual for a further background check under the AusCheck scheme (**item 17, proposed subsection 14(2AB)**). In contrast, AusCheck personal information *other than identity verification information* may be used for a wider range of purposes including responding to an incident that poses a threat to national security or the collection, correlation analysis or dissemination of criminal intelligence by the Commonwealth, or by a law enforcement or national security Commonwealth authority for law enforcement or national security purposes (**item 14, proposed subsections 14(2) and 14(2A)**). Note that these purposes are not new and exist in the current Act at existing paragraph 14(2)(b).¹¹

Subsection 14(3) authorises the use of de-identification of information derived from the AusCheck database for the purposes of research, government and/or industry planning. **Item 19** ensures that ‘identity verification information’ may not be de-identified for such purposes.

11. Since AusCheck commenced operations in September 2007, there have been 18 requests for information from the AusCheck database for national security and law enforcement purposes. Requesting agencies were the AFP (15 requests), the Australian Crime Commission (two requests) and the Australian Customs Service (one request). Attorney-General’s Department, Annual report 2007–2008, p. 163. Available at:

http://www.ag.gov.au/www/agd/rwpattach.nsf/AG_AnnualReport_2007-08.pdf

Accessed on 17 March 2009.

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Concluding Comments

The Bill is short, although not necessarily insignificant. As indicated above, it is introducing a broader regulation making power in relation to setting up new background checking schemes. This particular power had previously caused some concern to the Senate Committee inquiring into the original AusCheck Bill of 2006 and resulted in quite significant amendment to that Bill. While the current 2009 Bill and its explanatory materials suggest that this regulation making power is to be extended only to national security background checks, Parliament may wish to ask for further explanation on the broad drafting of the new provision.

In relation to the authority to collect, use and disclose biometric data, that too is a significant change. The Bill does provide a separate regime regarding protection of biometric data and Parliament should ensure that this protection is adequate. The Australian Law Reform, in a discussion paper on privacy, recently quoted the Council of Europe who has cautioned that biometric systems should not be implemented for the mere sake of convenience. The Council has recommended that before introducing a biometric system

The controller should balance the possible advantages and disadvantages for the data subject's private life on the one hand and the envisaged purposes on the other hand, and consider possible alternatives that are less intrusive for private life.¹²

12. Australian Law Reform Commission, *op. cit.*, p. 332.

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