

EXPLANATORY STATEMENT

Minute No. 20 of 2019 – Minister for Home Affairs

Subject — *AusCheck Act 2007*
Aviation Transport Security Act 2004
Maritime Transport and Offshore Facilities Security Act 2003

AusCheck Legislation Amendment (2019 Measures No. 1) Regulations 2019

The *AusCheck Act 2007* (AusCheck Act) establishes a background checking function within the Department of Home Affairs. The purpose of the AusCheck Act is to provide a regulatory framework for coordinating and conducting centralised criminal, security and other background checking and for related purposes. The AusCheck Act enhances national security by providing a consistent approach to background checking for individuals who require access to secure areas of airports, seaports and facilities that handle security sensitive biological agents. The AusCheck Act also aims to assist law enforcement and national security agencies to respond to security incidents and perform their functions.

The *Aviation Transport Security Act 2004* (the Aviation Act) and the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act) establish regulatory frameworks to safeguard against unlawful interference with civil aviation and maritime transport and offshore oil and gas facilities, respectively. To achieve this purpose, the Acts set out minimum security requirements for relevant industry by imposing obligations on persons engaged in civil aviation or maritime activities.

Section 18 of the AusCheck Act, subsection 133(1) of the Aviation Act, and subsection 209(1) of the Maritime Act provide that the Governor-General may make regulations prescribing matters required or permitted by the acts to be prescribed; or, necessary or convenient to be prescribed for carrying out or giving effect to the acts.

Section 8 of the AusCheck Act states that the regulations may provide for the establishment of the AusCheck scheme. Subsection 9(1) of the AusCheck Act provides that the AusCheck scheme may make provision for: the making of applications for background checks; the information that is to be contained in an application for a background check; and, the decision or decision(s) that may be made as a result of an application for a background check.

The *AusCheck Regulations 2017* (the AusCheck Regulations) establish the AusCheck scheme, which relates to the conduct and coordination of background checks by AusCheck, the background checking function of the Department of Home Affairs, for the purposes of the Aviation Act, the Maritime Act, the *National Health Security Act 2007*, and any other Act that expressly requires or permits a background check to be conducted under the AusCheck scheme. The AusCheck Regulations outline a range of administrative matters for the operation of the AusCheck scheme, in particular, the information which is required in an application for a background check.

A background check conducted under the AusCheck scheme is one of the prerequisites for issuing an aviation security identification card (ASIC) or maritime security identification card (MSIC). The *Aviation Transport Security Regulations 2005* (Aviation Regulations) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Maritime Regulations) establish the regulatory framework for the ASIC and MSIC schemes.

The *AusCheck Legislation Amendment (2019 Measures No. 1) Regulations 2019* amend the AusCheck Regulations, the Aviation Regulations and the Maritime Regulations to provide for more reliable and accurate outcomes from the AusCheck scheme, enhance efficiencies within the processes of the scheme and improve security outcomes by:

- authorising the Secretary to, by notifiable instrument, determine a class of documents the details of which AusCheck cannot use to verify electronically the identities of individuals, and if the individual has an identification document of a determined class, requiring the individual to provide details of alternative documents that can be used to verify electronically the identity of the individual;
- requiring applications for exemptions from the requirement to provide identification documents for electronic verification be made electronically;
- amending the period in which issuing bodies must provide information about holder or proposed holders of ASIC or MSIC cards to the Secretary from 30 days to 7 days;
- authorising issuing bodies to initiate a new background check if they believe on reasonable grounds that the previous application for a background check did not satisfy any of the requirements of the AusCheck Regulations and/or did not include all of the information required under the AusCheck Regulations; and
- authorising the Secretary to undertake a background check initiated by issuing bodies in the above circumstances.

The Australian Federal Police, Australian Criminal Intelligence Commission and Australian Security Intelligence Organisation and Department of Health have been consulted on the amending Regulations. All consultations were supportive of the amendments.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights because to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate. A copy of the Statement is at [Attachment A](#).

Details of the Regulations are set out in the [Attachment B](#).

The AusCheck, Aviation and Maritime Acts do not specify any conditions which need to be satisfied before the respective powers to make the amending Regulations can be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Sections 1 to 4 and Part 1, Schedule 1 of the Regulations are to commence the day after the instrument is registered. Part 2, Schedule 1 is to commence the day after the end of the period of 30 days, beginning on the day the instrument is registered. Part 3, Schedule 1 is to commence at the same time as item 2 of Schedule 1 to the *AusCheck Legislation Amendment (Required Information) Regulations 2019* commences. Schedule 2 of the instrument is to commence on 1 July 2019.

Authority:

Section 18 of the
AusCheck Act 2007

Subsection 133(1) of the
Aviation Transport Security Act 2004

Subsection 209(1) of the
Maritime Transport and Offshore Facilities Security Act 2003

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

AusCheck Legislation Amendment (2019 Measures No. 1) Regulations 2019

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

This Disallowable Legislative Instrument amends the *AusCheck Regulations 2017* (AusCheck Regulations), the *Aviation Transport Security Regulations 2005* (Aviation Regulations) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Maritime Regulations) to:

- authorise the Secretary to, by notifiable instrument, determine a class of documents the details of which AusCheck cannot use to verify electronically the identities of individuals, and if the individual has an identification document of a determined class, require the individual to provide details of alternative documents that can be used to verify electronically the identity of the individual;
- require that an application for an individual exemption from the requirement to provide details of an identification document be made electronically;
- shorten the period, from 30 days to 7 days after an aviation security identification card (ASIC) or a maritime security identification card (MSIC) is issued to an individual, in which an issuing body must give the Secretary certain information;
- authorise issuing bodies to initiate a new background check if they believe on reasonable grounds that the previous application for a background check did not satisfy any of the requirements of the AusCheck Regulations and/or did not include all of the information required under the AusCheck Regulations; and
- authorise the Secretary to undertake a background check initiated by issuing bodies in the above circumstances.

These amendments will strengthen background checking requirements and improve security outcomes by tightening potential loopholes in the AusCheck, ASIC and MSIC schemes and create efficiencies for AusCheck, applicants and individuals. This in turn ensures that a background check can most effectively support the national security outcomes of the ASIC and MSIC schemes

Since the introduction of the Document Verification Service (DVS) requirement specific classes of documents have been identified as being unable to be verified electronically. Currently when issuing bodies lodge applications for individuals who have identification documents that fall within these classes they are required to apply for exemptions on a case by case basis and AusCheck is required to consider the applications for exemption individually. Where an individual has alternative identity documents (the details of which can

be used to verify electronically the individual's identity) an exemption is granted on the basis the details of the identity documents are provided. AusCheck receives all applications (for background checks and for exemptions from the requirement to provide details of an identification document) electronically. The AusCheck Regulations require applications for background checks to be made electronically and applications for exemptions to be made in writing (currently they are made via email). These amendments will ensure the form of applications under the AusCheck scheme is uniform, will reduce any possible confusion that different requirements pose and will facilitate system lodgement of applications for exemption. This will create efficiencies for AusCheck, applicants and individuals who have been impacted by the introduction of the DVS requirement. This in turn ensures that a background check can most effectively support the national security outcomes of the ASIC and MSIC schemes.

The retention and subsequent use and disclosure of AusCheck scheme personal information authorised under the *AusCheck Act 2007* (the Act) aims to assist law enforcement and national security agencies to respond to security incidents and perform their functions. These amendments will help this aim by reducing the period, from 30 days to 7 days, in which an issuing body must give the Secretary certain information after an ASIC or MSIC is issued to an individual. In practice this will allow the AusCheck database to be updated more frequently, providing greater and more up to date access to information for law enforcement and national security agencies.

The AusCheck Regulations were made in July 2017 and their compatibility with human rights were considered by the Parliamentary Joint Committee on Human Rights within report 11 of 2017.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- Right to privacy – Article 17(1) of the *International Covenant on Civil and Political Rights* (ICCPR)
- Right to work – Article 6(1) of the *International Covenant on Economic Social and Cultural Rights* (ICESCR)

Right to privacy

Article 17(1) of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Parts 2 and 3 of the instrument engage the right to privacy by providing for the collection, use, storage and disclosure of personal information, particularly names.

The instrument's limit on the right to privacy is authorised by section 13 of the Act. The purpose of the authorisation in relation to the AusCheck scheme is to:

- determine whether a background check is required or permitted
- conduct or advise on the outcome of a background check
- update information on an individual who has undertaken a background check
- verify the identity of an individual, and
- provide an online card verification service.

The purpose of collecting, using, storing and disclosing information is reasonable and necessary to pursue the objective of national security. This is achieved by using an

individual's personal information, for example names, date of birth and address, to identify and disclose whether they would constitute a threat to particular national facilities. Therefore the additional privacy impact the Disallowable Legislative Instrument poses is minimal, however the improvement to national security outcomes could be significant. The collection and storage of personal information also assists law enforcement agencies to respond to security incidents by providing an up-to-date database of individuals with access to areas such as secure zones in airports and seaports.

Appropriate safeguards exist to ensure that use of an individual's personal information is reasonable and proportionate. Personal information is provided voluntarily by an individual with their consent to it being used for a background check. An individual is provided with a privacy notice by AusCheck detailing how their information will be utilised to ensure informed consent. AusCheck will update the privacy notice to capture the amendments in the Disallowable Legislative Instrument. Section 29 of the AusCheck Regulations allows the Secretary of the department to issue guidelines about the use and disclosure of information on the AusCheck database. The guidelines are currently publically available on the department's website. All AusCheck staff members are required to comply with the guidelines. Section 15 of the Act also provides an offence provision for AusCheck staff members who unlawfully disclose AusCheck scheme personal information.

Right to work

Article 6(1) of the ICESCR provides the right of everyone to work and have the opportunity to gain a living by work. The assessment by AusCheck of an individual's criminal history, or cancellation of a background check by AusCheck, may lead to a circumstance where an individual is ineligible to hold certain security cards such as ASICs and MSICs without additional approval or an additional finalised background check. Holding an ASIC or MSIC is an essential requirement for people who need to work unsupervised in secure zones in airports, seaports and offshore facilities, for example, baggage handlers, air stewards and dockworkers. It is also a pre-requisite for individuals carrying out certain security-relevant roles, such as screening officers at airports, and airport security guards. AusCheck's assessment, or cancellation of a background check, could limit the right to work of some individuals wishing to undertake security-relevant roles, or work in security sensitive areas at regulated airports, seaports and offshore facilities.

Article 4 of the ICESCR provides that countries may limit economic, social and cultural rights if those limits are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. The outcome of an unfavourable criminal history is an appealable decision. Under the ASIC and MSIC schemes a person with an adverse security record may apply under the Aviation Regulations or Maritime Regulations for discretionary approval to be issued an ASIC or MSIC on the basis that they are not a threat to aviation or maritime transport security, despite their criminal history. The limitation is considered to be reasonable and necessary to promote general welfare in a democratic society.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Details of the *AusCheck Legislation Amendment (2019 Measures No. 1) Regulations 2019*

Section 1 – Name

This section provides that the name of these Regulations is the *AusCheck Legislation Amendment (2019 Measures No. 1) Regulations 2019*.

Section 2 – Commencement

This section provides for the commencement of provisions of the instrument. Sections 1 to 4 and Part 1, Schedule 1 of the amending Regulations are to commence the day after the instrument is registered. Part 2, Schedule 1 is to commence the day after the end of the period of 30 days, beginning on the day this instrument is registered. Part 3, Schedule 1 is to commence at the same time as Item 2 of Schedule 1 to the *AusCheck Legislation Amendment (Required Information) Regulations 2019* commences. Schedule 2 of this instrument is to commence on 1 July 2019.

Section 3 – Authority

This section provides that these Regulations are made under the *AusCheck Act 2007*, the *Aviation Transport Security Act 2004*, and the *Maritime Transport and Offshore Facilities Security Act 2003*.

Section 4 – Schedules

This section provides that each instrument specified in a schedule to this instrument is amended or repealed as set out in this instrument and any other item in a schedule to this instrument has effect according to its terms.

Schedule 1 – Document Verification System

Part 1 – Amendments commencing day after registration

AusCheck Regulations 2017

Item 1 – Subparagraph 5(m)(i)

Item 1 repeals subparagraph 5(m)(i) and replace it with subparagraphs (i) and (ia). Subsection 5(m) provides the requirement that an individual must supply the details of an identification document, as part of a background check application, to be electronically verified.

New subparagraph 5(m)(i) would provide that an individual must supply details of the Category A document for the individual, unless the Category A identification document is determined under section 5AA. New subparagraph (ia) would provide for circumstances where the Category A identification document is determined under section 5AA. If that situation occurs, then the individual must provide details of one or more Category B or C identification documents which AusCheck can use to electronically verify the individual's identity for the purposes of a background check.

The purpose of these subparagraphs is to enhance efficiencies and provide clarity for individuals, by providing for alternative requirements where an individual's Category A

identification document is of a class determined under section 5AA and is known to be unable to be electronically verified..

Item 2 – After section 5

Item 2 inserts section 5AA into the AusCheck Regulations. The new section provides that, for the purposes of paragraph 5(m), the Secretary may determine a class of Category A identification documents, if AusCheck cannot use details of those documents to electronically verify individuals' identities. The new section provides that the Secretary may make such a determination by notifiable instrument.

The purpose of these amendments is to enhance efficiencies for AusCheck and those who use or rely upon the AusCheck system by authorising the Secretary to determine classes of documents which are unable to be used for electronic verification. These amendments have a deregulatory effect on issuing bodies and individuals.

It is a requirement under subsection 5(m) of the AusCheck Regulations that the individual provides details of an identification document for electronic verification of their identity. An essential part of this is allowing individuals to seek an exemption to this requirement because their documents are unable to be electronically verified. As classes of documents have been identified as unable to be verified electronically, individual exemption applications for these types of documents have become laborious for applicants and AusCheck. As such, the authority for the Secretary to determine classes of documents from the 5(m) requirement is necessary and convenient to AusCheck's ability to conduct such verification.

This provision provides that a determination made by the Secretary under section 5AA is made as a notifiable instrument. It is appropriate for these determinations to be made as a notifiable instrument to ensure the Secretary has flexibility to consider and address matters of practice and efficiency in the background checking process, which will enhance security outcomes.

Item 3 – Paragraph 5A(3)(a)

Item 3 repeals subparagraph 5A(3)(a) and substitutes it with new subparagraph 5A(3)(a). Subsection 5A(3) provides the requirements for the form and substance of an application for exemption from the requirement to provide details of an identification document.

This new subparagraph provides that these applications for exemptions must be made electronically. The purpose of this amendment is to ensure consistent language throughout the AusCheck Regulations and to ensure that all applications received under the AusCheck scheme are received in the same format. AusCheck currently receives all applications (for background checks and for exemptions from the requirement to provide details of an identification document) electronically.

Part 2 – Amendments commencing 30 days after registration

Item 4 – Subsection 22(5)

Item 4 replaces the definition of *notification period* relevant for section 22. Section 22 provides that an issuing body must give the Secretary certain information after a background check of an individual, within the notification period. The new definition provides that the *notification period* is the period ending 7 days after the ASIC or MSIC is issued to the individual.

The purpose of this amendment is to improve security outcomes and ensure an up-to-date database of ASIC and MSIC holders and proposed holders can be maintained. This is achieved by reducing the notification period for issuing bodies to give such information to the Secretary from 30 days to 7 days.

Item 5 – In the appropriate position in Part 5

Item 5 introduces new Division 4.

Division 4 – AusCheck Legislation Amendment (2019 Measures No. 1) Regulations 2019

Section 38 is the application provision for amendments made by Part 2 of Schedule 1 of this instrument.

Section 38 provides that the amendments of subsection 22 made by Part 2 of Schedule 1 of this instrument applies in relation to issuing an ASIC or MSIC on or after the commencement of this section.

Part 3 – Amendments commencing 1 July 2019

Item 6 – Section 5AA

Item 6 provides that from 1 July 2019, section 5AA should be amended to omit “paragraph 5(m)” and substitute with “paragraph 5(1)(m)”. This amendment gives effect to changes due to be made on 1 July 2019 through the *AusCheck Legislation Amendment (Required Information) Regulations 2019*.

Schedule 2 – Applications for additional background checks

AusCheck Regulations 2017

Item 1 – Paragraph 8(1)(a)

Item 1 repeals the current paragraph and substitutes new circumstances under which AusCheck can conduct a background check. Paragraph 8(1)(a) provides that the subparagraphs are circumstances under which AusCheck can conduct a background check.

Subparagraph 8(1)(a)(i) provides that AusCheck may conduct a background check under paragraph 6.27AA(1)(a) of the ATS Regulations or paragraph 6.08BA(a) of the MTOFS Regulations (which deal with applications by an issuing body relating to applicants for ASICs or MSICs).

Subparagraph (ii) provides that AusCheck may conduct a background check under paragraph 6.27AA(1)(b) of the ATS Regulations or paragraph 6.08BA(b) of the MTOFS Regulations (which deal with applications by an issuing body relating to holders of ASICs or MSICs if applications for earlier background checks of the holders were incomplete etc.).

The purpose of this paragraph is to improve the reliability and accuracy of background checks by authorising AusCheck to conduct a further background check where requested to do so by the issuing body because the initial application was incomplete or the application requirements were not met. This paragraph is consequential to the amendments which are made by Items 2 and 4 of Schedule 2 of this instrument.

Aviation Transport Security Regulations 2005

Item 2 – After paragraph 6.27AA(1)(a)

Item 2 inserts a new category of person on whom an issuing body can request a background check. Regulation 6.27AA(1) provides that an issuing body may apply to the Secretary AGD for a background check on certain individuals.

New paragraph (b) provides that an issuing body may apply for a background check on the holder of an ASIC if the issuing body considers on reasonable grounds that either or both of the circumstances outlined in the subparagraphs apply in relation to the last (*previous*) application for a background check on the holder.

Subparagraph (b)(i) provides the first circumstance being where any of the requirements of the AusCheck Regulations for the previous application were not satisfied. Subparagraph (b)(ii) provides the second circumstance being where the Secretary AGD did not have all of the required information for the individual when AusCheck undertook a background check in response to the previous application.

The purpose of the new subregulation is to improve the reliability and accuracy of background checks, by authorising an issuing body to request a new background check where the information provided in the previous application is found to be incomplete or the application requirements were not met.

Item 3 – In the appropriate position in Part 10

Item 3 introduces new Division 14.

Division 14 – Amendments made by the AusCheck Legislation Amendment (2019 Measures No. 1) Regulations 2019

Division 14 inserts regulation 10.35 which provides that for the purposes of paragraph 6.27AA(1)(b) as inserted by this instrument, it does not matter whether the previous application for a background check was made before, on or after 1 July 2019.

Maritime Transport and Offshore Facilities Security Regulations 2003

Item 4 – After paragraph 6.08BA(a)

Item 4 inserts a new category of person on whom the issuing body can request a background check. Regulation 6.08BA provides that an issuing body may apply to the Secretary AGD for a background check on certain individuals.

Paragraph (b) provides that an issuing body may apply for a background check on the holder of an MSIC if the issuing body considers on reasonable grounds that either or both of the circumstances outlined in the subparagraphs apply in relation to the last (*previous*) application for a background check on the holder.

Subparagraph (b)(i) provides the first circumstance being where any of the requirements of the AusCheck Regulations for the previous application were not satisfied. Subparagraph (b)(ii) provides that the second circumstance is where the Secretary AGD did not have all of the required information for the individual when AusCheck undertook a background check in response to the previous application.

The purpose of this new subregulation is to improve the reliability and accuracy of background checks by authorising an issuing body to request a new background check where the information provided in the previous application is found to be incomplete or the application requirements were not met.

Item 5 – In the appropriate position in Schedule 2

Item 5 inserts new Part 9.

Part 9 – Amendments made by the AusCheck Legislation Amendment (2019 Measures No. 1) Regulations 2019

Part 9 inserts new regulation 110 which provides that for the purposes of paragraph 6.08BA(1)(b) as inserted by this instrument, it does not matter whether the previous application for a background check was made before, on or after 1 July 2019.