

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 150

Issued by the Authority of the Attorney-General

Subject - *AusCheck Act 2007*

AusCheck Amendment Regulations 2010 (No. 1)

Subsection 18(1) of the *AusCheck Act 2007* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 8 of the Act provides that the AusCheck Regulations may provide for the establishment of a scheme relating to the conduct and coordination of background checking of individuals. There is an existing scheme relating to the *Aviation Transport Security Act 2004* and regulations and the *Maritime Transport and Offshore Facilities Security Act 2003* and regulations.

Paragraph 8(1)(a) allows the scheme to extend to background checks required or permitted under another Act. Section 9 defines the matters in relation to which the AusCheck scheme may make provisions.

The Regulations provide for the expansion of the AusCheck scheme to address the introduction of a new background checking scheme, the National Health Security (NHS) check scheme. The Minister for Health and Ageing (the Minister) may determine standards relating to security-sensitive biological agents under section 35, Division 3 of Part 3 of the *National Health Security Act 2007*. The National Health Security check scheme will be a component of the Security-Sensitive Biological Agents (SSBA) Regulatory Scheme being introduced by the Minister by amendment to the SSBA Standards on 14 July 2010.

The SSBA Regulatory Scheme provides for the mandatory background checking of unsupervised individuals handling or accessing sensitive information about biological agents of the highest security concern (Tier 1 SSBA). Background checking will also be available on request for those individuals handling or accessing sensitive information about biological agents of moderate security concern (Tier 2 SSBA).

The Regulation will also make a range of other minor changes to the *AusCheck Regulations 2007* to overcome gaps and anomalies identified since those Regulations were made.

The office of Best Practice Regulation has advised that no regulatory impact statement is needed.

Consultation has been undertaken with the Department of Health and Ageing, the Department of Infrastructure, Transport, Regional Development and Local Government, the Department of Prime Minister and Cabinet and the Office of the Privacy Commissioner. The *AusCheck*

Amendment Regulations 2010 (No. 1) reflect the background checking arrangements established under the *Security-Sensitive Biological Agent Standards*, on which the Department of Health and Ageing has undertaken consultation with industry.

Amendments to the *AusCheck Regulations 2007* affecting the ASIC and MSIC schemes are largely mechanical and technical in nature with minimal impact on relevant industries and individuals.

The Regulations are a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

The Regulations commence on 14 July 2010.

Pursuant to section 17 of the *Legislative Instruments Act 2003*, consultation has been undertaken with the Laboratory Capacity Section of the Health and Emergency Branch, Office of Health Protection, Department of Health and Ageing.

Details of the Amendment Regulations are set out below.

Regulation 1 – Name of Regulations

This regulation provides for the title of the Regulations the *AusCheck Amendment Regulations 2010 (No. 1)*.

Regulation 2 – Commencement

This regulation provides for the commencement of the Regulations on 14 July 2010.

Regulation 3 – Amendment of *AusCheck Regulations 2007*

This regulation provides for Schedule 1 of the Regulations to amend the *AusCheck Regulations 2007* (the Principal Regulations).

Schedule 1– Amendments

Items [1] and [2] – Regulation 3, definition of adverse criminal record paragraph (b)

These items insert a third type of ‘adverse criminal record’ into the existing definition. This category of ‘adverse criminal record’ is intended to allow the operation of the NHS check scheme by defining what renders an individual ineligible as a result of an NHS check. The definition of ‘adverse criminal record’ is located in the *Security-Sensitive Biological Agent Standards*.

Item [3] – Regulation 3, after definition of convicted of a disqualifying offence

This item inserts a definition of ‘criminal history information’ to mean information about the disposition of a criminal matter by court. Insertion of this definition acts as a due process safeguard, by making clear the limited category of matters that AusCheck can take into account in assessing criminal history.

Items [4] and [5] – Regulation 3, definition of issuing body, paragraph (b)

This item incorporates a further category of ‘issuing body’ into the Principal Regulations to include entities under the *National Health Security Act 2007* as issuing bodies for the purposes of the NHS check scheme. This definition supports new subregulations 5(1) and 5(4), and is needed to ensure the application of the Principal Regulations to the NHS check scheme.

Item [6] – Regulation 3, after definition of issuing body

This item inserts a definition of ‘national health security check’ as a consequential change to support the substantive amendments for the introduction of NHS checks.

Item [7] – Regulation 3, definition of qualified criminal record

This item expands the definition of ‘qualified criminal record’ to incorporate the NHS check result of ‘qualified’. A NHS check finding of qualified will limit the validity of the check to 12 months. AusCheck will give the issuing body an extract of the health-security-relevant offences to ensure that they are fully informed in their decision to allow access to a secure area (see Part 1 of the SSBA Standards).

Item [8] – Regulation 3, after definition of security identification card

This item inserts a definition of ‘Transport Secretary’ given the change in title of the relevant Department (now DITRDLG) and to employ a general label so that the Principal Regulations will not become out of date if the title of that Department changes in future. The key fact that determines the relevant Secretary is administration of the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*.

Item [9] – Paragraph 5(1)(a)

This item expands the background checks for which an issuing body can apply to include an NHS check. This is to ensure the applicability of the Principal Regulations to the NHS check scheme.

Item [10] – After subregulation 5(2)

This item inserts a new subregulation 5(3) to allow an issuing body to request a new NHS check in circumstances where a person’s circumstances may have changed in a way that affects their eligibility status, e.g., they have been convicted of a potentially relevant offence.

A supplementary NHS check will be used to determine whether the individual should continue to be authorised to handle security sensitive biological agents.

Item [11] – Subregulation 6(1)

This item amends subregulation 6(1) to allow a supplementary background check under subregulation 5(3) to be initiated without the need for all of the information required for an initial background check, because the supplementary checking process will draw on information provided previously.

Item [12] – After paragraph 6(1)(a)

This item inserts a new paragraph (6)(1)(aa) to provide that an additional piece of information is required as part of the background check – ‘any other name previously used by the individual’. The provision of this information assists CrimTrac and Australian Security Intelligence Organisation (ASIO) to establish the identity of individuals subject to background checks under the *AusCheck Act 2007*.

Item [13] – After paragraph 6 (1) (b)

This item inserts a new paragraph 6(1) to provide that a further additional piece of information required as part of the background check – ‘any other residential address of the individual in the previous 10 years’. The provision of this information will assist CrimTrac and ASIO to establish the identity of individuals subject to background checks under the *AusCheck Act 2007*.

Item [14] – After subregulation 6(1)

This item inserts a new subregulation 6(1A). This allows AusCheck to establish a process for supplementary checks that rely on information already held by AusCheck being confirmed or updated.

In practice, this means an NHS issuing body will be able to require a check through this process without needing to resubmit information already held by AusCheck.

Item [15] – Regulation 7

This item renumbers existing regulation 7 as new subregulation 7(1) consequential to the changes in item 17.

Item [16] – Regulation 7, note

This item amends the existing note in regulation 7 to include changes made to the exclusions from the operation of spent convictions legislation detailed in Schedule 4 to the *Crimes Regulations 1990*. These changes allow AusCheck to take into consideration otherwise spent convictions for the purpose of conducting criminal history assessments as part of the NHS check scheme, and also allows the Secretary of DITRDLG to take into

consideration otherwise spent convictions for the purpose of assessing whether to make a discretionary decision to issue an ASIC or MSIC.

Item [17] – Regulation 7, after the note

This item inserts a new subregulation 7(2) to give AusCheck the ability, where appropriate, to assess overseas criminal history information as part of a background checking scheme where the scheme sets out the circumstances in which this is to be done and prescribes criteria to assess overseas criminal histories. This amendment only creates a framework against the possibility of future scheme changes. There is no provision or proposal for consideration of overseas criminal history under the ASIC, MSIC or NHS check schemes.

Item [18] – Subregulation 8(3)

This item amends subregulation 8(3) to limit the period for response to a potential adverse or qualified finding for a supplementary NHS check under subregulation 5(3) to 14 days. This is less than the 28-day period for responding to a potential adverse or qualified finding on an initial check, because in the case of a supplementary check, the person is already authorised to access the secure facility at the time of the check. AusCheck’s experience is that the vast majority of those who make representations on a potential finding do so within 14 days.

Item [19] – Subregulation 8(5)

This item amends subregulation 8(5) to make clear that if a person has provided any representations they wish and requested finalisation of the check, AusCheck need not delay finalisation of the check.

Item [20] – Regulation 9, heading

This item amends the heading of regulation 9 to reflect more accurately the substance of regulation 9, consequential to the changes in item 22.

Item [21] – Subregulation 9(2)

This item replaces the term ‘criminal history’ with ‘offences that are relevant to the kind of security check for which the issuing body applied’ in subregulation 9(2). This insertion provides individuals with additional privacy protection by restricting the criminal history information that AusCheck can provide an issuing body in connection with a qualified check outcome to security-relevant offences only.

Item [22] – After subregulation 9(2)

This item inserts new subregulations 9(3) and 9(4) into the Principal Regulations. New subregulation 9(3) allows the Secretary of the Attorney-General’s Department to give an issuing body advice of a background check conducted under the same background checking scheme for another issuing body. This is to allow issuing bodies to check the validity of a

background check already held by an individual that they are considering whether to give access to a secure area.

New subregulation 9(4) allows an issuing body to authorise an individual to handle security sensitive biological agents based on the remaining validity of an NHS check requested by another issuing body. The procedures are set out to ensure that this is done only where the NHS check is still valid, has not been cancelled or suspended and has an eligibility status of qualified or eligible. This reflects clause 3.6 of the SSBA Standards.

Item [23] – Regulation 10, heading

This item replaces the heading of regulation 10, consequential on item 8 by making reference to the ‘Transport Secretary’ rather than the out of date term ‘DOTARS Secretary’.

Item [24] – Subregulation 10(1)

This item inserts new subregulation 10(1A) regarding the issue of an ASIC or MSIC following a discretionary decision made by DITRDLG. The amendment makes clear that AusCheck is to give DITRDLG all information relevant to the background check that it holds.

Item [25] – Subregulation 10(2)

This item replaces all references to ‘DOTARS’ with ‘Transport’, consequential on item 8 which replaces the out of date term ‘DOTARS Secretary’ with ‘Transport Secretary’.

Item [26] – Subregulation 10(3)

This item amends existing subregulation 10(3) to ensure that if a subsequent background check by AusCheck reveals a conviction imposed while the person held an ASIC or MSIC, that AusCheck can draw this to the attention of the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government.

Item [27] –After regulation 10

This item inserts a new regulation 10A to allow AusCheck to modify, where appropriate, the eligibility status of an individual if the advice given to the issuing body by AusCheck is inaccurate or incomplete. The new provision is designed to make it clear that AusCheck can prospectively self-correct errors in its process.

Item [28] – Sub regulation 13

This item inserts a capital ‘C’ in ‘AusCheck’ in regulation 13 to correct a typing error in the Principal Regulations.

Item [29] – Subregulation 14(5)

This item replaces existing subregulation 14(5) with new subregulations 14(5) and subregulation 14(5A). New subregulation 14(5) requires issuing bodies to report the suspension of a security identification card, as well as the cancellation, loss, theft or destruction of the card within 48 hours.

New subregulation 14(5A) operates similarly with regards to the NHS check scheme. Issuing bodies would be required to inform the Secretary within 48 hours of the cancellation or suspension of an authorisation to handle security sensitive biological agents.