

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Justice

AusCheck Act 2007

AusCheck Regulations 2017

AusCheck Amendment (System Functionality) Regulations 2017

Introduction

The *AusCheck Amendment (System Functionality) Regulations 2017* are made under section 18 of the *AusCheck Act 2007*.

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

Outline

The *AusCheck Act 2007* (the Act) establishes a background checking function within the department administering the Act (the department). The purpose of the Act is to enhance 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 Act also aims to assist law enforcement and national security agencies respond to security incidents and perform their functions.

The background checking function is performed by a branch within the department called AusCheck. Section 8 of the Act states that the regulations may provide for the establishment of the AusCheck scheme which relates to the conduct and coordination of background checks for the purposes of the *Aviation Transport Security Act 2004*, the *Maritime Transport and Offshore Facilities Security Act 2003*, and any other Act that expressly requires or permits a background check to be conducted under the AusCheck scheme.

The key amendments in the instrument have been introduced to allow for electronic verification of identification documents in the AusCheck system using the Document Verification Service (DVS) and to replace the current manual visa checking process with the new automated process using Visa Entitlements Verification Online (VEVO). Recent amendments to the *Aviation Transport Security Regulations 2005* (ATSR) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (MTOFSR) have enhanced identity verification requirements for the aviation security identification card (ASIC) and maritime security identification card (MSIC) schemes. The background check requirement for electronic verification of identification documents supports these enhancements.

This instrument has been introduced to amend the *AusCheck Regulations 2017* to provide for a new process of verifying identification documents as part of the AusCheck background checking process and would facilitate the use of VEVO for the right to work check. The background checking function and data is held on the AusCheck system. The department is undertaking the AusCheck System Replacement (ASR) Project because the current AusCheck system is unsustainable. The ASR project aims to improve identity verification processes, address and resolve technology barriers, enhance database recordkeeping and provide a technical environment for future developments.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation on the content of this instrument occurred within the department, and with the Immigration Department and Border Protection (DIBP) the Department of Infrastructure and Regional Development and with Issuing Bodies.

Regulatory Impact Statement

The Office of Best Practice Regulation was consulted about the regulations and a Regulatory Impact Statement exemption was received on 6 October 2017.

Commencement

The instrument commences on a single day to be fixed by the Minister by notifiable instrument. However, if the provisions do not commence within the period of 18 months beginning on the day after this instrument is registered, they commence on the day after the end of that period. The 18 month period is considered appropriate to provide flexibility to the development of the AusCheck system, and ensure adequate time is allowed for user testing and stability of the system.

Statement of Compatibility with Human Rights

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

AusCheck Amendment (System Functionality) Regulations 2017

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*

Human rights implications

This disallowable legislative instrument engages the following rights:

- Right to privacy – Article 17(1) of the ICCPR

Right to privacy

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

The instrument's limit on the right to privacy is legitimately authorised by section 13 of the *AusCheck Act 2007*. 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, such as their criminal record, to identify and disclose whether they would constitute a threat to particular national facilities. The collection and storage of personal information also assists law enforcement agencies 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.

Express consent will be required from individuals for use of the identification document verification process. Individuals who have a required identification document which cannot be electronically verified will be able to apply for an exemption from the process for the purpose of the background check. The exemption decision will be appealable to the Administrative Appeals Tribunal.

Appropriate safeguards exist to ensure that use of an individual's personal information is reasonable and proportionate. Section 29 allows the Secretary of the department to issue guidelines about the use and disclosure of information on the AusCheck database. The guidelines were established under the *AusCheck Regulations 2007* and are currently publically available on the department's website. All AusCheck staff members are required to comply with the guidelines. Section 15 of the *AusCheck Act 2007* also provides an offence provision for AusCheck staff members who unlawfully disclose AusCheck scheme personal information.

Details of the *AusCheck Amendment (System Functionality) Regulations 2017*

Section 1

This clause provides that the title of the instrument is the *AusCheck Amendment (System Functionality) Regulations 2017*.

Section 2

This clause provides that the whole instrument commences on a single day to be fixed by the Minister by notifiable instrument. However, if the provisions do not commence within the period of 18 months beginning on the day after this instrument is registered, they commence on the day after the end of that period.

A period of 18 months for the commencement of the instrument was chosen due to the uncertain nature of the IT development and to provide certainty that there is adequate time to complete the project and have a stable replacement system in place. The amendments in this instrument are necessary to allow the functionality of the AusCheck System Replacement (ASR) to be implemented.

Section 3

This clause outlines that the authority to make the instrument is the *AusCheck Act 2007* (the Act).

Section 4

This clause provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1

Item 1

Item 1 amends section 4 of the *AusCheck Regulations 2017* (the regulations) to insert definitions for Category A identification document; Category B identification document; Category C identification document; and Immigration Department. The Category A, B and C identification document definitions are taken from the *Aviation Transport Security Regulations 2005* (ATSR) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (MTOFSR).

Category A identification document is defined as an Australian birth certificate or a valid document that provides evidence of the start of the person's identity in Australia.

Category B identification document is defined as a current and valid document issued to the person by a Commonwealth, State or Territory Department or agency, or by a government of a foreign country or an agency of a government of a foreign country, that provides photographic proof of the person's identity and includes the person's signature.

Category C identification document is defined as a current and valid document that provides evidence of the person's use of identity while operating in the community (which may be a community outside Australia).

Immigration Department is defined as being the department administered by the Minister administering *Migration Act 1958*.

Item 2

Item 2 amends subparagraph 5(1)(i) to insert a clause which allows a person who does not have, or cannot use or obtain a passport in their country of origin to instead supply the number of any document which has been issued to the individual by the Immigration Department. This is to ensure flexibility in the operation of the provision where an individual may not have a passport. For example: where an individual is a refugee or humanitarian entrant to Australia.

Item 3

Item 3 amends subparagraph 5(1)(ii) to insert the words “in any case-” before the words “the number” this is to make it clear that all applicants must provide the period of stay information of any visa which has been granted to the individual enabling the individual to travel to and enter, or remain in, Australia whether they have used passport or a document issued by the Immigration Department. This provides for the additional information required to carry out an automated visa check using Visa Entitlement Verification Online (VEVO).

Item 4

Item 4 amends section 5 to insert subsection 5(m) which provides that an individual who makes an application for an aviation security identification card (ASIC) or maritime security identification card (MSIC) under subparagraph 8(1)(a) must indicate to AusCheck that the express consent of the individual whose identity is being verified has been obtained. Subsection 5(m) also requires the details of the Category A identification document to be verified, or any alternative identity verification requirements, including details of any other identification documents required by the alternative requirements, have been approved by the Secretary of the Department responsible for the administration of the ATSR and MTOFSR.

The intention of this clause is to provide that the details of the individual’s identification document will be electronically verified by the official record holder through the AusCheck system using the Document Verification Service (DVS).

Express consent for an individual’s identification documents to be verified with the official record holder is collected by the Issuing Body (IB), which is then required to be indicated within the AusCheck System.

Item 5

Item 5 inserts section 5A and section 5B after section 5.

Section 5A

The purpose of section 5A is to provide that an issuing body may apply, in writing, for an exemption from the requirement to provide details of a required identification document for the purpose of the background check where that document cannot be verified electronically. For example there may be circumstances where the DVS will be unable to verify an identification document due to limitations on the electronic data holdings of the official record holder, for example Norfolk Island birth certificates.

This clause will enable an IB to apply for an exemption where the individual does not have access to an electronically verifiable Category A identification document and where the individual is required to provide an electronically verifiable Category B or C identification document. The requirement to provide an electronically verifiable Category B or C identification document may arise under

alternative identification requirements approved under the ATSR and MTOFSR or as a condition of an exemption approved under this provision.

These amendments do not impact the existing identification requirements under the ATSR and MTOFSR. Subsection (m) recognises that the Secretary of the department responsible for the administration of the ATSR and MTOFSR will continue to determine the identity verification requirements for ASIC and MSIC applicants and holders, including approving alternative requirements for verifying identity, which may require Category B and C identification documents to be electronically verified.

Issuing bodies will receive a notification from the DVS system when an identification document cannot be verified. Guidance will also be made available to issuing bodies regarding DVS requirements.

The process for applying for an exemption under section 5A is a written application to the Secretary of the department administering the Act (the Secretary) which includes a statement that the individual has an identification document that AusCheck cannot use to verify electronically the individual's identity for the purposes of the background check, if the individual has another identification document - the details of that document, and any information that may assist the Secretary in making a decision about whether to grant an exemption. This is intended to be a broad provision, allowing for the provision of any other information which could be considered relevant, and provide an individual with flexibility to reflect their particular circumstances.

Section 5A also imposes a timeframe of 30 days for a decision to be made. The Secretary can request further information from an individual which will extend the timeframe to 30 days from when the information is received. The Secretary will have the ability to grant an exemption for the purposes of the background check with or without conditions, including a condition that Category B and C identification documents need to be electronically verified. Deemed refusal will occur in circumstances where a decision has not been made within the statutory timeframe.

Section 5B

The purpose of section 5B is to provide that AusCheck can cease a background check where AusCheck cannot verify an individual's required identification document using DVS. This provision would not apply where details of an identification document are not required either through the alternative verification process approved under the ATSR and MTOSFR or through an exemption under section 5A.

Section 5B preserves the integrity of the remainder of the background checking process, such as the criminal history and national security checks, as the ability to verify the identity of the individual is integral to the reliability of the results of these checks.

Background check outcomes will have a higher degree of reliability and accuracy when the identity of individuals has first been established by reference to documents verified as accurate under these processes. This provision is also intended to provide certainty and allow background checks to be ceased rather than held indefinitely in abeyance.

Item 6

Item 6 inserts subsection 13(8) to the end of section 13. The purpose of this clause is to create a mechanism to notify of the final result of an identity assessment to: the issuing body and the

individual when the individual's identity cannot be electronically verified for the purpose of the AusCheck scheme.

Item 7

Item 7 repeals the existing section 26 and substitutes it with a clause which allows an individual to apply to the Administrative Appeals Tribunal for review of decisions which refuse to grant an exemption under subsection 5A(6); or grant an exemption in relation to an individual under subsection 5A(6) subject to one or more conditions. This provision consolidates the review provisions in the regulations into one section.

Item 8

Item 8 inserts, before section 31, the title 'Division 1 – AusCheck Regulations 2017'.

Item 9

Item 9, at the end of Part 5, inserts 'Division 2 – AusCheck Amendment (System Functionality) Regulations 2017'. The purpose of this clause is to provide that the above amendments are not retrospective and will only apply to applications for background checks which are made after the instrument commences.