**EXPLANATORY MEMORANDUM**

Minute No. of 2017 – Minister for Justice

Subject - *AusCheck Act 2007*

*AusCheck Regulations 2017*

*AusCheck Amendment (System Functionality) Regulations 2017*

The *AusCheck Act 2007* (the Act) establishes a background checking function within the Attorney‑General’s Department (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.

Section 18 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Act.

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 proposed amendments in the instrument would allow for the electronic verification of identification documents in the AusCheck system using the Document Verification Service (DVS) and replace the current manual visa checking process with the new automated process using Visa Entitlement Verification Online (VEVO). This proposal would align with recent amendments to the *Aviation Transport Security Regulations 2005* (ATSR) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (MTOFSR) which require in person identity verification by Issuing Bodies in the Aviation Security Identification Card (ASIC) and Maritime Security Identification Card (MSIC) schemes.

This instrument would 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 use of VEVO for the right to work check. The proposed regulations aim to support a new AusCheck system that will strengthen identity verification processes, address and resolve technology barriers, enhance database recordkeeping and provide a technical environment for future developments.

Details of the proposed Regulations are set out in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

The proposed Regulations would be a legislative instrument for the purposes of the *Legislation Act 2003*.

The proposed Regulations would commence 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 would commence on the day after the end of that period.

The Minute recommends that the Regulations be made in the form proposed.

 Authority: Section 18 of the

 *Auscheck Act 2007*

**ATTACHMENT**

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

Section 1 – Name of Regulations

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

Section 2 - Commencement

This clause would provide 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, the instrument would provide that they commence on the day after the end of that period.

Section 3 – Authority

This clause would outline the authority to make the regulations which is the *AusCheck Act 2007*.

Section 4 - Schedule

This clause would specify that each instrument in the Schedule to this instrument is amended or repealed as set out in that Schedule.

Schedule 1 – Amendments

**Item 1**

Item 1 would amend 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 would be taken from the *Aviation Transport Security Regulations 2005* (ATSR) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (MTOFSR)*.*

Category A identification document would be 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 would be 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 would be 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 would be defined as being the Department administered by the Minister administering *Migration Act 1958*.

**Item 2**

Item 2 would amend subparagraph 5(l)(i) to insert a clause which would allow 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 would 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 would amend subparagraph 5(l)(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 a passport or a document issued by the Immigration Department. This would provide for the additional information required to carry out an automated visa check using Visa Entitlement Verification Online (VEVO).

**Item 4**

Item 4 would amend section 5 to insert subsection 5(m) which would provide that an individual who makes an application for an Aviation Security Identity Card (ASIC) or Maritime Security Identity 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) would also require the details of the Category A identification document to be verified or any alternative identity verification requirements, including details of other identification documents required by the alternative requirements, have been approved by the Secretary of the Department of Infrastructure under the ATSR and MTOFSR.

It is intended under this clause that the details of the individual’s identity document would be electronically verified by the official record holder through the AusCheck system using the Document Verification Service (DVS).

Express consent for an individual’s identity documents to be verified with the official record holder would be collected by the Issuing Body (IB) which would then captured in a selection within the AusCheck System which confirms that they have received consent from the individual.

**Item 5**

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

The purpose of section 5A would be to provide that an IB 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 would 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 would 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 would either arise under alternative identification requirements approved under the ATSR and MTOFSR or as a condition of an exemption approved under this provision.

These amendments would 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 would 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.

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

The proposed process for applying for an exemption under section 5A would be a written application to the Secretary of the department administering the Act (the Secretary) which would include 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 would 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 would impose a timeframe of 30 days for a decision to be made. The Secretary could request further information from an individual which would extend the timeframe to 30 days from when the information is received. The Secretary would 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 would occur in circumstances where a decision has not been made within the statutory timeframe.

*Section 5B*

The purpose of section 5B would be to provide that AusCheck could cease a background check where AusCheck cannot electronically verify an individual’s required identification document (i.e. using the 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 would preserve 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 would 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. It is intended that this provision would provide certainty and allow background checks to be ceased rather than held indefinitely in abeyance.

**Item 6**

Item 6 would insert subsection 13(8) to the end of section 13. The purpose of this clause would be 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 would repeal the existing section 26 and substitute it with a clause which allows an individual to apply to the Administrative Appeals Tribunal for review of decisions which refuse to grant an exception under subsection 5A(5); or grant an exemption in relation to an individual under subsection 5A(5) subject to one or more conditions. This provision would consolidate the review provisions in the regulations into one section.

**Item 8**

Item 8 would insert, before section 31, the title ‘Division 1 – AusCheck Regulations 2017’.

**Item 9**

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