

23 February 2006

Committee Secretary
Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

Dear Ms Morris,

Re: Inquiry into the AusCheck Bill 2006

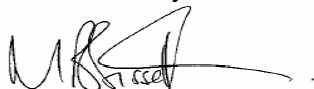
The ACTU provides the attached comments for consideration by the Committee inquiring into the AusCheck Bill 2006.

In summary the ACTU does not oppose those matters that are clearly specified in the Bill. Rather, our concerns go to the potential breadth afforded to the Bill that will not be subject to the full force of parliamentary scrutiny through the incorporation of regulation making provisions in the Bill.

In this respect it is the ACTU's view that the Bill be amended by:

- 1) deleting paragraph (d) of clause 5 – which deals with the capacity of regulations to further prescribe matters to be included for the purposes of defining a background check;
- 2) deleting paragraph (c) of subclause 8(1) of the Bill which provides for regulations to specify further purposes for the AusCheck scheme.

Yours sincerely



Michelle Bissett
Industrial Officer

Inquiry into the AusCheck Bill 2006

Introduction

1. The ACTU, subject to the comments below, does not object to the AusCheck Bill. This view however is tempered with a concern about the growth of the use of regulation making powers, as seen in this Bill.
2. In this respect the ACTU believes the Bill should be amended to remove those provisions relating to the making of regulations that extend beyond facilitating implementation of the legislation but do, in effect, extend the ambit of the legislation.

The use of regulation making powers in legislation

3. The ACTU is concerned at the apparent growth in the general use of regulation making powers as a mechanism to extend the operation of Acts of Parliament.
4. Whilst finding that the regulation powers in the Workchoices Act 2005 were constitutional, the majority of the High Court in *New South Wales & Others v Commonwealth*¹ (Workchoices Case) found the technique an *undesirable one that ought to be discouraged*².
5. The purpose of regulations should be to give effect to the substantive legislation. To enable the scope of the legislation to be extended through regulation is not, in our view, an appropriate use of the regulation making powers.

¹ [2006] HCA 52

² *Workchoices Case* per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ at 399.

6. Whilst it may be argued that regulations made pursuant to legislation are subject to scrutiny, that process is different process to the level and detail of scrutiny of a Bill before the parliament. It is our view that a Bill before the parliament provides greater opportunities for the public to forensically examine, dissect and publicly debate the contents of a Bill.
7. The AusCheck Bill continues the growing trend of establishing a legislative base and then using the regulation making powers to expand that base. To the extent that the regulation making powers of the Bill expand on the operation of the Bill, the ACTU believes these provisions should be removed from the Bill.

The provisions of Clause 5

8. Clause 5 of the AusCheck Bill goes to that information that may, in relation to an individual, be assessed for the purpose of a background check.
9. In so far as the clause specifically identifies those matters subject to checking, the ACTU makes no comment.
10. The ACTU is concerned however at the additional breadth given to the provision by the inclusion of the capacity of regulations to add to those matters that may be assessed as part of the background check.
11. The breadth of the regulation making power in an area of such sensitivity is unwarranted. The use of regulation making powers in this way provides an ambit for what falls within those things to be assessed for a background checking purpose that is no longer discernable from the legislation.
12. It is the ACTU submission that the parliament, with all of its processes and scrutiny, should properly determine those matters to be included in the background checking system.

13. The ACTU recommends that the paragraph providing for the extension of background checking matters be deleted.

The provisions of Clause 8

14. The concerns of the ACTU with clause 8 of the Bill fall within the same territory as those of Clause 5 above.
15. The ACTU has no objection to the AusCheck scheme operating with respect to the *Aviation Transport Security Act 2004* or the *Maritime Transport and Offshore Facilities Act 2003*.
16. It is worthy of note that both of these pieces of legislation came about following the scrutiny of the parliamentary processes. The *Maritime Transport and Offshore Facilities Act 2003* in particular came about following extensive consultation and a Senate Inquiry thus ensuring that issues of concern about the operation of the Act could be ventilated and debated. A process we believe is a critical component to the making of good laws.
17. The ACTU does object to the capacity for the scheme to be extended to cover industries and situations not stipulated in the legislation.
18. There is nothing in the legislation to indicate what these areas may be. In so far as subclause 2 purports to specify the purposes, this provision is so wide as to offer no certainty at all. It is the ACTU's view that, in an area as sensitive in the public arena as security checking, and given the capacity of the parliament to, in much more detail examine and dissect propositions placed before the parliament in the form of legislation, it is right and proper that any extension of the security checking should proceed not by regulation making but through legislation.

19. For this reason the ACTU recommends that this paragraph, allowing for an extension of the scheme, be deleted from the Bill.

The making of guidelines (Clause 18)

20. The ACTU notes that the provisions of Clause 18 provide for regulations to be made providing for the development of guidelines about matters relating to background checking.

21. To the extent these regulation making powers do facilitate the implementation of the Bill, the ACTU does not have a concern with them.

22. The ACTU believes that any such guidelines should be developed following consultation with all stakeholders in the relevant industries. Whilst this view does not necessitate any amendments to the Bill it is a matter that is worthy of consideration and comment by the Committee.

Conclusion

23. The ACTU believes that the Bill will be enhanced with the amendments suggested in paragraphs 13 and 19 above.