



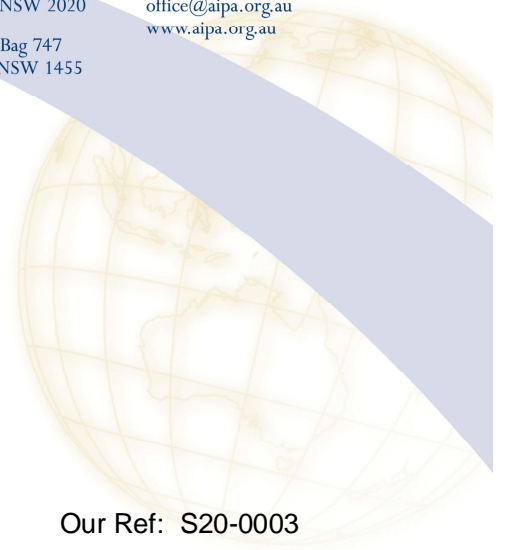
Advancing the interests of our members and the profession

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28 February 2007

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Email: legcon.sen@aph.gov.au

Our Ref: S20-0003

Dear Ms Morris,

Re: Inquiry into the AusCheck Bill 2006

Thank you for your letter dated 9 February 2007 inviting submission from the Australian and International Pilots Association (**AIPA**) to the inquiry into the AusCheck Bill 2007.

Please find enclosed AIPA's submission, which supports in principle the centralisation of ASIC *background checking* functions. Pilots do, however, hold concerns regarding key aspects of this Bill's provisions.

These concerns relate to the belief that the scope and purpose of ASIC *background checking* ought to be a matter for legislative rather than administrative oversight, especially when considering the sensitive nature of these provisions. Pilots are also concerned with the consultation mechanisms for developing *background checking* guidelines, decision review procedures and the determination of regulation contravention penalties.

Please contact me if AIPA can provide any further information, clarification or assistance to the Committee.

Yours sincerely,

Captain Ian Woods
President

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Encl. (1)

SUBMISSION

Overview

1. The Australian and International Pilots Association (“**AIPA**”) is the professional Association representing pilots and flight engineers employed by the Qantas Group in airline operations within Australia and around the world. AIPA represents over 2,300 professional airline transport category flight crew and is the largest professional pilot body in Australia.
2. AIPA agrees in principle with the concept of centralising ASIC *background checking* functions within a dedicated unit of the Attorney Generals Department. However, AIPA does hold concerns with respect to several other key aspects of the AusCheck Bill 2006.

Use of regulation making power to extend legislation

3. AIPA is concerned by the increasingly apparent trend of utilising regulation making powers to extent the scope and purpose of legislation. The Association does not believe it is appropriate for administrative action to gain primacy over direct legislative oversight and thereby effectively undermine the scrutiny of parliament.
4. AIPA has been monitoring the development of this issue since at least 2002. At that time the Association became aware of the Civil Aviation Safety Authority (“**CASA**”) seeking exemption by the Human Rights and Equal Opportunity Commission of Section 44 of the Sex Discrimination Act and Sections 19 and 29 of the Disability Discrimination Act¹.
5. In this particular case, CASA sought to expand their regulation making powers by drawing down components of the traditional legislative protections of these Acts into administrative control by aviation regulations. AIPA considered that this action weakened the Acts protections and undermined parliamentary responsibility. The Association has noted numerous other similar examples since this time and concludes that the trend of seeking to broaden regulation making power is accelerating.
6. AIPA notes that regulation making powers are exercised largely outside of the general public forum and are usually only reviewed in detail by specialist populations. The statutory 15 day period within which parliamentary disallowance may be applied, and public awareness developed, is not available when regulations subsume legislation.
7. The Association believes that it is fundamentally inappropriate for the scope of legislation to be expanded in this manner, particularly in relation to an area as sensitive as background security checking. Furthermore, it is not at all clear to AIPA that all potential provisions that may be subject to such administrative extensions of legislation would necessarily have parliamentary approval.
8. With respect to the AusCheck 2006 Bill specifically, AIPA therefore highlights to the Committee the inappropriateness of seeking to extend the scope and

¹ http://www.hreoc.gov.au/disability_rights/exemptions/casa/noi.htm

purpose of the Bill as specified within clause 5(d) - Definition of *Background Checks* and clause 8(1)(c) Establishment of AusCheck Scheme.

9. The inclusion of these clauses is therefore not acceptable to Australia's airline pilots. This is especially the case as the enabling regulations have not been provided for public review or, indeed, do not yet exist.
10. Expansion of the provisions referred to by clauses 5 and 8 within the current AusCheck Bill 2006 must be undertaken pursuant to more substantive legislative language within this Bill.
11. Should expansion of the *background checking* provisions of the AusCheck Bill 2006 be required in future, each specific instance must be referred to parliament for further detailed consideration and approval.

Development of *Background checking* guidelines, decision review and penalty provisions

12. The Explanatory Memorandum states that the Bill will allow for the development of *background checking* guidelines. AIPA submits that formal consultation with key stakeholders must be required within this development process.
13. Air crew are key stakeholders who are unable to perform their assigned duties without an ASIC. Any regulatory mechanism that may potentially disqualify an air crew member from holding an ASIC is therefore of critical concern to this Association.
14. AIPA therefore submits that pilots [and other key stakeholders] must be provided with the opportunity to contribute to the development of *background checking* guidelines and associated decision review and penalty provisions. It is the experience of AIPA that meaningful consultation is not always undertaken in relation to such matters. This reduces both the quality of regulatory provisions and their acceptance among target populations.

Recommendations

15. AIPA recommends that the AusCheck 2006 Bill be amended by deleting clause 5(d);
16. AIPA recommends that the AusCheck 2006 Bill be amended by deleting clause 8(1)(c);
17. AIPA recommends that any future expansion of the purpose or scope of the AusCheck background checking service be required to be referred to parliament for detailed examination and authorisation in each specific instance;
18. AIPA recommends that the government commit to formal consultation with stakeholders on the development of *background checking* guidelines, decision review procedures and the determination of regulation contravention penalties.

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