

**AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION**



**SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL AFFAIRS  
COMMITTEE**

**INQUIRY INTO THE AUSCHECK BILL 2006**

**FEBRUARY 2007**

## INTRODUCTION

1. In recent years, both Government and employers have been implementing new and novel ways of monitoring and controlling workers. This is so whether it is inside or outside the workplace. Examples include psychometric testing, more intense and frequent medical testing, drug and alcohol testing and workplace surveillance.<sup>1</sup>
2. The Auscheck Bill 2006 (the “Bill”) joins those examples by facilitating a process of checking the background of current and/or aspiring employees.
3. Members of the Australian Rail, Tram and Bus Industry Union (RTBU) have not been excluded from these methods.
4. The RTBU is a federally registered Union of employees. As the name of the Union states, our membership can be found in employers involved in or in connection with the rail industry, the tramway industry and certain public sector bus employers. Membership of the RTBU in the railways and tramways is not constrained by whether the employer is in the private or public sector. Membership can also be found in all states and territories. At present the RTBU has some 35,000 members.
5. Techniques such as background checking of employees – or others – are a clear intrusion into the privacy of those employees or other persons.
6. Whether such intrusion has a valid purpose or is an unacceptable and overbearing interference with the private concerns of employees or other persons is an important matter of public policy. Simultaneously, it is a matter of controversy. Regardless of the position taken, it seems to us that it is generally considered that such intrusion should be done sparingly and only after due public consideration of its rationale and approach.
7. It is not the intention of the RTBU in this submission to open up the important issues concerning the grounds for such surveillance and monitoring of employees in/out of the workplace. In our view this would unnecessarily extend the focus on this Bill. However, the notion of “Big Brother” is alive and well and the community has a right to be concerned and to be vigilant. In that regard, the RTBU is concerned about the unnecessary and unacceptable intrusion by government and employers into the private concerns of employees.<sup>2</sup>

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<sup>1</sup> On these and other issues of privacy in the workplace, see Victorian Law Reform Commission, *WORKPLACE PRIVACY: FINAL REPORT*, Victorian Law Reform Commission, Melbourne, 2005.

<sup>2</sup> For example, on the use of employee records see Australian Rail, Tram and Bus Industry Union, *SUBMISSION TO THE FEDERAL GOVERNMENT INQUIRY INTO PRIVACY AND EMPLOYEE RECORDS*, Australian Rail, Tram and Bus Industry Union, Redfern, 2004

- 8.** Members of the RTBU employed as train drivers by certain rail freight companies are required to drive trains onto the maritime ports in certain cities eg. Melbourne and Sydney.
- 9.** These members are required to hold a Maritime Security Identification Card (MSIC).
- 10.** The Bill directly addresses the undertaking of background checks by the Federal Government for the purposes of the entitlement to an MSIC. Accordingly, the Bill will have an immediate and direct impact on certain members of the RTBU.
- 11.** Simultaneously, the Bill permits the Federal Government to expand background checking to other parts of the workforce and the broader community. Accordingly, the Bill has the potential to have a much greater impact on our members, both a employees and as citizens.
- 12.** For the purposes of this submission, the RTBU will focus on our experience with the introduction of the MSIC and how that experience impacts upon our view of the contents of this Bill. We will, in addition, address other concerns with parts of the Bill – concerns that do not have their basis in our experience with the MSIC.
- 13.** The next part of this submission presents a brief outline of the Bill as we see it. We focus in particular on those parts of the Bill that are of concern.
- 14.** Following an outline of the Bill, the submission moves to a critique phase. As will be seen there are aspects of the Bill that we believe ought to be amended in order to ensure the proper protection of the community and workforce from unnecessary and unacceptable intrusion by government and employers.
- 15.** Finally, we set out a summary and conclusion to the submission.

## THE BILL

16. The Bill describes itself as “A Bill for an Act to provide a regulatory framework for coordinating and conducting centralised criminal, security and other background checking, and for related purposes.”
17. The application of the Bill has the potential to be all-pervasive. The Bills Digest supports this position where it states<sup>3</sup>:

“The bill includes general provision which will allow AusCheck to expand its role in the future for other background checking schemes.”

Section 8 of the Bill provides for the conduct of background checking of employees who require a MSIC and an Aviation Security Identification Card (ASIC). These cards are already in operation. But then section 8 adds the catchall subsection – subsection 8(1)(c) – that permits the conduct of background checks for “such other purposes as are prescribed in the regulations”.

Section 8(2) provides a list of purposes that may be covered by the regulations made under the Bill. A reading of those “purposes” reminds one of the heads of power under section 51 of the Constitution. The explanatory memorandum which identifies that the regulations can be used to cover any activity that “the Constitution allows the Commonwealth to manage” reinforces this point<sup>4</sup>.

Of particular interest to the RTBU is subclause 8(2)(k). This subclause in essence, applies the use of regulations to the “corporations” power under the Constitution. Given the recent High Court decision in the Work Choices Case, it is not unreasonable to conclude that the capacity of the Federal Government in this context will be very wide.<sup>5</sup>

18. The breadth of the application of the Bill is matched by the contents of any background check. And it uses the same drafting tool to permit such breadth of coverage.

Section 5 defines a “background check”. In addition to an individual’s criminal history, a security check and an individual’s citizenship/residence status, a background check may cover “such other matters as are prescribed by the regulations”.<sup>6</sup>

In a note of understatement the Bills Digest states:

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<sup>3</sup> Department of Parliamentary Services, *BILLS DIGEST – AUSCHECK BILL 2006*, Parliamentary Library, Parliament of Australia, Canberra, February 2007, p. 1. See also House of Representatives, *AUSCHECK BILL 2006 – EXPLANATORY MEMORANDUM*, Parliament of Australia, Canberra, 2006, p. 1.

<sup>4</sup> Explanatory Memorandum, *Ibid.*, p.1

<sup>5</sup> *NSW v Commonwealth* (2006) 156 IR 1

<sup>6</sup> Subsection 5(d)

“The wording of **paragraph 5 (d)** provides an apparently generous allowance for information collection.”<sup>7</sup>

The explanatory memorandum refers to “other types of information about the person that may be prescribed in regulations”<sup>8</sup>. This is a statement that, in our submission, is only limited by one’s imagination.

19. AusCheck will undertake the conduct of background checks. Auscheck is an agency within the Attorney General’s Department. AusCheck, on the other hand, may utilise its own employees for this purpose or use “consultants” or “contractors” for the purpose.<sup>9</sup>

This can be read as providing for the use of employees of labour hire or employment agencies or even for the contracting out of the background checking process.

20. The Bill also provides a broad scope for who may apply for a background check. This includes the person to whom the background check concerns and by other persons.<sup>10</sup>

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<sup>7</sup> Bills Digest, op. cit. p.5 (bold in original)

<sup>8</sup> Explanatory Memorandum, op. cit. p. 4

<sup>9</sup> See definition of Auscheck Staff in section 4.

<sup>10</sup> Section 9.

## A CRITIQUE OF THE BILL

21. An important concern held by the RTBU with the Bill can be found in our experience with the introduction of the MSIC.
22. In a joint submission by the RTBU, the Maritime Union of Australia (MUA) and the Australian Manufacturing Workers Union (AMWU) to a Senate Inquiry into The Maritime Security Amendment Act 2005 and Regulations (the legislation that introduced the MSIC), the following was said:

*“No representative from either union [RTBU or AMWU] was briefed about the development or introduction of MSIC and the impact it would have on workers in these sectors of the transport industry. The RTBU’s first experience with the ID card was at a meeting on 20<sup>th</sup> April 2005 where the program was effectively presented by DOTARS as a fait au complet (sic). When concern were raised at that meeting about the lack of consultation of the rail industry, the DOTARS representative explained that ‘transport’ had been represented by the Victorian Transport Association. The VTA is an employer association which primarily represents road transport and cannot, in any way, be taken to represent the interests of rail workers.”<sup>11</sup>*

The submission goes on to outline a number of other examples of weaknesses in the consultation process.<sup>12</sup>

23. The report of the Senate Committee also made a number of criticisms if the consultation process undertaken by the Department of Transport and Regional Services (DOTARS).<sup>13</sup>
24. On the other hand, at least there was consultation on the introduction of the MSIC, its inadequacy notwithstanding. We understand that with respect to the Aviation Security Identification Card, the federal government did not consult with the relevant unions. The RTBU experience emphasises the need for unions and other community groups to be ever vigilant and to prosecute the interests of their members with vigour.
25. The point here is that a combination of factors including the absence of any legislative base and the novelty of the scheme caused the federal government to undertake a consultative process. And an important part of the process was the holding of a Senate Committee.

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<sup>11</sup> Maritime Union of Australia, Rail, Tram and Bus Union and Australian Manufacturing Workers Union, UNION SUBMISSION TO SENATE RURAL AND REGIONAL AFFAIRS AND TRANSPORT LEGISLATION COMMITTEE INQUIRY INTO THE MARITIME TRANSPORT SECURITY AMENDMENT ACT 2005 AND REGULATIONS, July 2005, p.7 (italics added)

<sup>12</sup> loc cit

<sup>13</sup> Senate Rural and Regional Affairs and Transport Legislation Committee, REPORT INTO THE REGULATORY FRAMEWORK UNDER THE MARITIME TRANSPORT SECURITY AMENDMENT ACT 2005, Australian Government, Canberra, August 2005,p.8, 10.

- 26.** If this Bill is to become legislation, the incentive on the part of the federal government to consult relevant parties in the introduction of some form of background checking scheme is removed or at least significantly diminished.. By a process of enacting regulations and thereby circumventing the legislation making process, the critical role of consultation can be effectively avoided. This, in our submission can only increase the potential for an unfair and potentially unnecessary background-checking scheme.
- 27.** In addition to the circumvention of consultation, the Bill in its current form allows for background checking to be introduced for any group or class or indeed, individual that the federal government so determines. And it may be that the group/class/ individual lacks the necessary institutions or organizations to represent their interests. For example, the more vulnerable groups of workers in the less unionised areas are likely to be left to the whim of government. And the use of the regulation making process makes them even more vulnerable as it makes the preparation and presentation of a reasoned defence all the more difficult to get across to the decision makers.
- 28.** The RTBU experience with the MSIC shows that the production of the card is not an inexpensive exercise. Information provided by Auscheck shows that, on a cost recovery basis, the cost of each MSIC is \$90.<sup>14</sup> The federal government has resolved to recover that cost.
- 29.** The RTBU position is that the cost of any background check must not be borne by the employee. The creation of that cost is a consequence of a decision by government not the employee. Alternatively, it is a cost to the employer of undertaking its business in the maritime industry. Thus the cost must be borne by either the federal government or the employer. With respect to the MSIC the RTBU notes that the employers are picking up the tab. But we are concerned that this may not be the position in other cases in the future, particularly in the scenario where the employer or government can easily pass on the cost to the employee. In circumstances where an applicant for an MSIC is not currently employed but requires a card, the cost should be borne by the employer.
- 30.** The Bill makes no reference about who pays the cost of the background check. We believe that the legislation should make sure that the cost is not borne by the employee.
- 31.** We also note that the Bill gives the Federal Government the capacity to utilise a number of forms of employment of persons who will undertake the background check. This includes the use of employees from labour hire agencies and the contracting out of the work to a private company. The RTBU believes that the performance of the background checks by other than employees of the federal

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<sup>14</sup> AusCheck, AUSCHECK COST RECOVERY IMPACT STATEMENT (CRIS), Attorney General's Department, Australian Government, Canberra, 2007

government increases the risk of a breakdown in the security arrangements and, inadvertently or otherwise, the leak of private information into the public domain.

- 32.** Finally, the role of AusCheck remains somewhat confused. In a recent document prepared by AusCheck it states that it will conduct the background check and make a recommendation to the issuing body as to whether an MSIC should or should not be issued.<sup>15</sup> This position is reinforced in the Bills Digest where it states:<sup>16</sup>

“AusCheck will help the aviation and maritime industries to identify individuals who should not be eligible for an ASIC or MSIC, by applying a consistent interpretation of the statutory requirements and providing a recommendation to the relevant issuing body.”

However, at a recent seminar conducted by AusCheck, the participants were told emphatically that Auscheck would make the final determination on eligibility for an MSIC.

In our submission this important point needs to be cleared up.

It is our view that the issuing bodies are not the appropriate bodies to be making decisions about eligibility to hold a MSIC. Further, employers should not be in receipt of the sort of information that a background check looks at and considers. And, to our knowledge, the employers have made it clear that they do not wish to see such information.

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<sup>15</sup> Ibid. p. 6

<sup>16</sup> Bills Digest op. cit. p.3



## SUMMARY AND CONCLUSION

- 33.** It is the submission of the RTBU that if the federal government desires to expand background checks beyond those already undertaken as part of the application process for an ASIC or MSIC card, it should start from square one. It should not be permitted to use this Bill simply to expand the use of background checks via regulation.
- 34.** It is critical in our submission that persons who may be affected by any proposal to expand the use of background checking are fully consulted and involved in the process. This would include an initial consideration about whether such background checks should be a necessary part of the qualifications necessary to undertake certain work or to be admitted to certain locations.
- 35.** The Bill in its current form is deficient in a number of respects.
- 36.** The RTBU calls upon the Senate to amend the Bill in the following respects:
- Delete sub clause (b) in the definitions clause – clause 4 - of an *Auscheck staff member*. This will ensure that all employee involved in any background checking process are employees of the Commonwealth.
  - Delete sub clause 5 (d) so as to confine a background check to the issues contained in sub clauses (5) (a)(b) and (c). This would also require a consequent amendment to clause 5 – Objects of the Act.
  - Delete sub clause 8(1) (c) and (2), so as to confine the regulations to the existing ASIC and MSIC.
  - Insert a provision to ensure the cost is borne by the government or employer.
- 37.** In other words, the legislation should only provide for the Auscheck process to be applied to the ASIC and MSIC and only for the purposes of checking whether the person has a criminal background, is a security risk or is not an Australian citizen or a resident of Australia. It should also be subject to any other restrictions that may apply through associated legislation<sup>17</sup>.
- 38.** In the absence of these amendments, a legitimate degree of skepticism will linger about exactly what is the intent of the federal government by seeking this legislation. The concerns about “Big Brother” will be further realised with the introduction of one more form of intrusion into a workers’ privacy in the workplace and elsewhere.

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<sup>17</sup> The Maritime Transport and Offshore Facilities Security Regulations 2003 contain a list of the types of offences that would have an impact on whether a person would be granted a MSIC. See Regulation 6.07C

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