



Draft Risk Management Program Rules

Submission by the Australian Council of Trade Unions to the
Home Affairs consultation on the *Security of Critical
Infrastructure Act* draft *Risk Management Program* rules

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About the ACTU

The ACTU is the peak body of trade unions in Australia, with 43 ACTU affiliated unions representing nearly 1.8 million members engaged across all industries and occupations in the public and private sector. Since its establishment in 1927, the ACTU has led all major campaigns to win improved workplace rights for Australian workers.

Introduction

The ACTU welcomes the opportunity to comment on the draft *Risk Management Program (RMP)* rules for the *Security of Critical Infrastructure Act (SOCI Act)*. In making this submission, the ACTU reiterates many of the concerns we outlined in our submissions and evidence given to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) inquiries into the Security of Critical Infrastructure Bills in 2021 and 2022. The ACTU also supports and reiterates the submission by the Electrical Trades Union of Australia (ETU) to this inquiry.

The ACTU remains concerned that the application of the SOCI Act through the draft RMP rules would unreasonably infringe on workers' rights to privacy, workers fundamental industrial rights, and potentially unreasonably exclude workers from their chosen jobs or even careers. The concerns that the ACTU and the union movement outlined when making previous submissions to the Bill largely stand in the draft rules, that:

- The rules could subject millions of workers to unreasonable, invasive and unwarranted background checks, violating their right to privacy,
- The rules could be leveraged and interpreted to deny workers their fundamental labour rights, including the right to a safe workplace, the right to organise, and the right to representation, and,
- That workers do not need to be consulted on the workplace implementation of these rules which could be inconsistently interpreted across industries.

The scope of the law, and scope of the application of the rules warrant more fundamental protection for workers in primary legislation and industry-based consultation of the application of the rules.

In this submission the ACTU will recommend the following changes to the draft RMP rules and the SOCI Act.

- Recommendation 1: Legislate clearer key definitions,
- Recommendation 2: Implement Industry-based Risk Management Program Guidelines
- Recommendation 3: *Introduce Consultation Obligations*
- Recommendation 4: Removing Accidents from Material Risk Considerations

- Recommendation 5: Modify the Criminal History Criteria
- Recommendation 7: Clarify AusCheck Eligibility
- Recommendation 6: Ensure the rules do not undermine investment in secure

Scope and application of background checks

In making its submissions to the Security of Critical Infrastructure Bill, the union movement highlighted that the ambiguity of key definitions made it impossible to determine the scope of the legislation and proposed rules' application. The rules apply to industries which contain the following assets:

- a critical broadcasting asset;
- a critical domain name system;
- a critical data storage or processing asset;
- a critical electricity asset;
- a critical energy market operator asset;
- a critical gas asset;
- a Part 2A critical hospital;
- a critical food and grocery asset;
- a critical freight infrastructure asset;
- a critical freight services asset;
- a critical liquid fuel asset;
- a critical financial market infrastructure asset that is a payment system; and
- a critical water asset.

Conservatively, more than 1.6 million workers are employed at workplaces like these and there are millions more users of these kind of assets. The Act defines those subject to background checks as:

Section 5 - Definitions

Critical Worker: *An employee, intern, contractor, or subcontractor of a responsible entity with access to, or control and management of, a critical component of the asset whose absence would prevent the proper functioning or cause significant damage to the asset.*

Critical Component: *a part of the asset where absence of, damage to, or compromise of the part would prevent proper function or cause significant damage to the asset.*

This tautologous definition in no way assists employers or workers determine who is and who is not a critical worker. Government has stated in evidence to the PJCIS and in industry consultations that this ambiguity is intentional and is intended to allow employers the flexibility to

target their interventions to only those parts of the assets most fundamentally critical. However, in further industry consultations, Home Affairs has stated that powerlines and power-poles would be considered *critical* by the Department. This sort of ambiguity has led to employers taking a maximalist interpretation of the legislation for fear of having an inadequate risk management program to comply with the Act. Employers could reasonably determine the garage door is a critical component for the grocery supply-chains distribution centre, that access to water mains is critical for the operation of the water asset, that access to the emergency department is critical for the operation of a hospital.

Therefore every worker with access to these critical assets: powerlines, water mains, the emergency department are critical and therefore should be subject to invasive background checks.

The union movement's position continues to be that primary legislation should be amended to have a more constrained definition of critical worker. This position should be supplemented by the creation of industry-based RMP rule guidance to ensure the approach is consistent. Industry-based RMP rules should be determined by a representative group of employers (or their representatives) and unions.

Industry based Risk Management Program guidelines

In attempting to create overarching risk management rules for the nation, inevitably gaps are forming. Creating a universal set of obligations and then requiring individual responses to those obligations will result in inconsistent application of the rules. This inconsistency creates regulatory and enforcement uncertainty, with individual employers rightfully wondering if their interpretation is ok. The only rational response to uncertain application of regulation is to assume it will be maximally enforced and creates the problems we have covered above.

The only appropriate solution to individual asset-based inconsistency is the creation of industry-based guidance for RMPs. This guidance should be co-developed by employers and unions representing workers in the industry in partnership with Government to ensure the rules for an industry are appropriate, proportionate, and effective. Industry-based rules will assist employers in taking a proportionate approach when complying with the rules and developing an RMP. It will also assist workers in understanding where they may be eligible to work based on the results of a background check.

Consultation obligations

When an entity is developing an RMP, they should be required to meaningfully consult with their workers and unions. Workplace-specific RMPs should, as the Department has stated it intends, be proportionate to the risk and the determination of critical workers, those potentially subject to background checks and what components are really critical. Workers are experts in their own workplace and are well placed to perceive risks and offer practical management of those risks. Consultation obligations should require meaningful consultation, with opportunities for input and codetermination of outcomes – not a platform to air decisions made.

Remove accidents from material risk considerations

The draft risk management program rules requires that entities include the risk of “accidental manipulation of a critical component of the asset” occurring in their consideration of material risks to an asset. The Union movement is concerned that this could be used to prevent employing apprentices and hiring local workers to work on complex parts of critical assets. The inclusion of true accidents as a national security risk, in a framework designed to deal with intentional harm, is inconsistent and creates further uncertainty as to what the risk management program is being designed for.

Ensure appropriate criminal history criteria

Many workers, including those in critical industries, have histories they are not proud of or have emerged from troubled backgrounds. In the expansive list of sectors described, there will be workers who have been convicted of a crime and have served time in jail for a criminal offence.

The introductions of these rule should not end the careers of workers who have not presented a risk to their workplace or whose previous conviction cannot be reasonably deemed a national security risk. Those who have been convicted of a crime and have been adequately reformed in the eyes of the justice system, generally, should not face a second punishment for that crime. As such the categorisation of certain offences should be reviewed to ensure they’re appropriately proportionate to the risk the RMP rules are trying to address.

The department should conduct a regulatory impact statement to determine how many workers it expects to be affected by the program. To date it has neglected to estimate the number of workers it expects to require a background check under these rules, and it has further neglected to estimate the cost to business by requiring them.

Clarifying AusCheck

It is unclear from the rules and guidance materials which assets will be required to undertake background checks to meet the expected standards under the risk management program, who

pays the costs of undertaking a background check, and how the information uncovered during a background check through AusCheck will be used. What standard workers who are subject to a background check are required to meet, and what discretion is available to employers for workers seeking employment is doubly unclear.

If left to the discretion of employers, the introduction or imposition of background checks has been used as a tool during enterprise bargaining or when responding to industrial action. The unilateral determination of whether a worker requires a background check or clears a background check by an employer creates enormous opportunities to use this as a tool for discrimination against protected attributes, the denial of workplace rights, or attempting to union bust.

Protect workers' rights

Workers have a fundamental expectation of privacy, under the Universal Declaration of Human Rights and the International Labour Organisations declaration of fundamental labour rights, workers have a right to collectively bargain, a right to organise and most recently a right to a safe workplace. The Act and these rules threaten to undermine those rights. The rules at least should make it clear that no application of the RMP would allow an employer to deny workers their rights to be represented at work, engage in industrial action, collectively bargain, and conduct inspections with their workplace's nominated health and safety representative to ensure a safe workplace. Right now, unscrupulous employers could engage in union busting by suggesting industrial action, site inspections, the right of entry, or measures to ensure a safe workplace would be in breach of their requirements under the Act. This is not hypothetical. Endeavour Energy cited their critical infrastructure asset status as justification for objecting to a proposed Protected Action Ballot Order in the Fair Work Commission in June 2021.¹

Workers cannot rely on the assurance of the Department that this is not the intention of the Act nor the rules, it must be spelled out.

¹ Endeavour Energy, 'Submissions in objection to the proposed Protected Action Ballot Order', Submission in the Fair Work Commission, Matter No.: B2021/435 – Application for a protected action ballot order, 25 June 2021

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