

18 November 2022

The Hon. Claire O'Neill MP
Minister for Home Affairs

By email: ci.reforms@homeaffairs.gov.au

ETU Submission to the Minister for Home Affairs on the Security of Critical Infrastructure (Critical infrastructure risk management program) Rules

The Electrical Trades Union of Australia ('the ETU') is a division of the Communications, Electrical and Plumbing Union ('the CEPU')¹. The ETU is the principal union for the electrical industry, put broadly, in Australia, representing well over sixty thousand workers around the country. The CEPU represents close to one hundred thousand workers nationally, making us amongst the largest trade unions in Australia.

In the spirit of reconciliation, the ETU acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea, and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

The ETU welcomes the opportunity to make a submission to the Minister for Home Affairs' consultation on the draft risk management program (RMP) rules for critical infrastructure assets under section 2A of the Security of Critical Infrastructure Act (2018) and would appreciate the opportunity for further discussion and consultation on these rules.

ETU members that will be affected by the proposed draft rules will predominantly be those employed at, or with access to **critical electricity assets**, and **critical energy market operator assets**. These members will be subject to the impacts of different entities' RMPs but have no current legislative standing within the Act or the draft Rules to be consulted or involved in developing the RMP's or determining the proportionality of an entity's response to the risks.

As the proposed RMP rules currently stand, the level of ambiguity surrounding the compliance requirements under these rules is unacceptable and will lead to inconsistent introduction of risk management programs within industries. These inconsistencies will undoubtedly impact on labour mobility within affected industries, they will lead to increased costs within power companies which will ultimately flow to consumers, and the lack of guidance will necessitate employers taking a precautionary approach and therefore a maximalist approach at the expense of workers. And we know some employers will deliberately use the shield of these Rules to justify the introduction of highly invasive workforce screening practices.

Of particular concern is the capacity for poor risk management program implementation on an industry subsector level including how it might impact on investment in the renewable transition currently underway. Onerous regulatory requirements which may be favoured by one subsector are unlikely to be fit for purpose for other subsectors and the potential downstream effects may inadvertently limit or delay the major investments needed to meet

¹ CEPU is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).

Government's commitments on emissions reductions, especially for larger scale projects that are more likely to be captured by the rules.

In order to address these concerns, the draft rules require modification to the extent that:

1. Less discretion is given to individual entities to determine and manage risks in favour of mechanisms for developing industry guidelines for risk management programs on an industry sector and industry subsector level.
2. A definite right for workers and their representatives to be consulted is included, as well as a requirement to consult worker representatives when developing industry risk management program guidelines.
3. Clearer definitions for critical workers, assets, and components are included, or developed by industry guidelines, to prevent unnecessary coverage of non-critical workers under the Act.
4. Removal of consideration of "accidental manipulation of a critical component" as a material risk for consideration under risk management programs
5. The crimes schedule should be modified to move certain crimes contained in Schedule 1-1 to Schedule 1-2 to ensure proportionality of the offences being assessed
6. The crimes schedule needs to clarify the purpose of including categories of offence that are incapable of being spent and how inconsistencies in spent convictions and disclosures will be managed.
7. Protections are included to ensure risk management programs do not infringe on workers' privacy, rights to organise protected industrial action, or union officials' right of entry in workplaces that are critical infrastructure assets
8. Prevents entities from allowing less stringent risk mitigation practices to apply to external contractors and subcontractors than internal staff.
9. Provides further clarification surrounding the requirements for AusCheck background checks and guidelines for entities that may opt to perform equivalent checks.

The ETU has prepared some draft amendments to the draft risk management program rules that would go a long way to addressing our concerns which can be found in Attachment A.

Recommendation 1: Implement Industry-based Risk Management Program Guidelines

The proposed rules allow individual entities considerable discretion to determine for themselves how they will seek to minimise risks. While we understand that it would be impractical for the Department to attempt to prepare a blanket set of guidelines given the disparate industry sectors required to prepare and adhere to risk management plans, the current settings will produce an inconsistent patchwork of programs even within individual sectors. The ETU has concerns that these inconsistencies may lead to a situation wherein qualified workers are able to work for one entity but not another within the same industry.

Such a situation would have serious downstream implications on labour mobility during a shortfall of qualified domestic workers in skilled industries such as the acute shortage currently facing the electrical industry. This has the capacity to be a national security risk, should workers need to be given cross-site access to perform emergency repairs or aid in a disaster response.

Developing a mechanism by which industry stakeholders may request the creation of an industry sector or subsector RMP guidance framework (RMP Guidelines) would ensure that sectors maintain consistency in their risk management programs, whilst still allowing for entity specific

contextualisation in the implementation. Such RMP Guidelines would serve as a protection against incentivising a maximalist approach caused by entities taking a precautionary approach to implementation, as well as protecting workers from overzealous entities seeking to impose unnecessarily invasive and overreaching personnel risk management practices.

We would further suggest that as an act of good faith to entities engaging in the process of developing RMP Guidelines, the rules be modified such that 6 months is afforded to develop industry RMP guidelines and then a further 6 months is provided for implementation. For the electricity sectors, this additional time would not prejudice the security of critical assets from cybersecurity hazards since these entities have been participants in the Australian Energy Sector Cyber Security Framework (AESCSF), originally designed to complement expected legislative requirements for critical infrastructure, since 2018.

Recommendation 2: Introduce Consultation Obligations

Giving workers themselves a say in the risk management plans that will govern the security of their workplaces will not only serve to protect workers' interests but will also provide additional insight and perspective from the coalface into potential hazards, perceived risks, and practical management strategies. The affirmative right for workers and their representatives to be included in the process of adopting, reviewing, and varying an entity's risk management plan ought to be required under the rules to guarantee these benefits. Any mechanism for the development of RMP Guidelines should also similarly require consultation with worker representatives.

Recommendation 3: Legislate Clearer Definitions for Key Terms

The Act defines critical workers and components 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.*

The ETU has concerns that the lack of a more delineated and clear definition for the term "critical worker" will end up doing much of the heavy lifting in any future attempts from entities to comply with the Act, forcing unnecessary cover of non-critical workers under the program. There is also a gulf between a worker having "access to" versus "control and management of" a critical component, especially for electrical workers in the power supply industry. The clash of terminology and its intention between usual electricity industry vernacular and the Act's definitional verbiage effectively forces every worker and every component of the energy industry to be critical. Again, acknowledging the broad scope of the Act and RMP Rules, these concerns could easily be addressed by establishing a mechanism for RMP guidelines as outlined above.

Recommendation 4: Removing Accidents from Material Risk Considerations

The draft risk management program rules legislation 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. We have serious concerns that this provision may serve to further legitimise entities that seek to take maximalist and anti-worker approaches to compliance, as well as be used as an excuse not to employ and train apprentices in these critical industries. The categorisation of workplace accidents as a material risk to national security under this legislation introduces significant uncertainty and should be removed.

Recommendations 5 & 6: Modify the Criminal History Criteria

The many blue-collar industries impacted by this framework often provide an avenue to secure, well-paid work for many Australians who come from low socio-economic and at times troubled backgrounds. It is simply a statement of fact, that there will be a number of workers in the energy sector who will have some form of criminal record. The ETU is advocating a more sensible and proportional approach to the application of the criminal history criteria to ensure it does not have the unintended consequence of unnecessarily limiting career opportunities of working-class people. It is also important that the criteria does not inadvertently act as a secondary punishment to those who have demonstrated full rehabilitation from their previous actions and have shown themselves capable and willing of change for the better. For the avoidance of doubt, this recommendation is in no way seeking to excuse or diminish the seriousness of any criminal activity.

Schedule 1 of the draft RMP rules outlining the criminal history criteria against which critical worker backgrounds are checked needs to have a clearer connection to the potential national security risks being targeted. Also problematic is the inclusion of crimes that are incapable of ever being spent (i.e., they will remain on a person's record forever). To ensure proportionality under the rules, consideration should be given to moving certain crimes from schedule 1-1 to schedule 1-2.

The criminal criteria also includes offences which carry varying timeframes for spent convictions across jurisdictions. Consideration should be given to developing a uniform framework to address disclosures of spent convictions and avoid inconsistencies. Guidance must be provided for consistency, but also to ensure entities understand the relationship between the listed offences and the risks posed by persons who have committed them.

Recommendation 7: Include Protections for Workers, Rights to Organise and Privacy

Neither the Act, nor the proposed Rules, make clear whether employers are to consider protected industrial action as a material risk to be identified and managed within their respective RMPs. Section 5(b) of the draft Rules will give scope to entities seeking to use national security as a shield to engage in union busting by suggesting protected action is a matter that would enliven this regime. We know this because Endeavour Energy did just that, invoking their critical infrastructure asset status as justification for objecting to a proposed Protected Action Ballot Order in the Fair Work Commission in June 2021², before the Bill legislating positive security obligations on entities had even passed.

Protected industrial action is a lawful right of workers guaranteed by both Australian law and our obligations under international agreements³. The Rules need to be clear that protected industrial action is not an activity that may be captured by this regime as a hazard or risk, nor will workers be able to be assessed as risks based on their likelihood of organising or participating in such protected action, or their membership of and participation in their union. Existing mention of the Act not negating employer responsibilities under Australian workplace laws have been effectively buried, found in Section 217E of the addendum to the explanatory memorandum under the Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022, and should be reiterated in the RMP Rules for the avoidance of doubt.

² 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

³ Article 8, International Covenant on Economic, Social and Cultural Rights (1966)

Lastly it is unclear how the information gathered by entities and agencies in managing personnel risks will be treated and what the delineation is between privacy law and employment law or what rights employees will have to accessing and reviewing these records. Noting that many entities in the electricity industry happen to be owned by State governments and are thus subject to differing state-based privacy laws, uniform privacy provisions need to be implemented to ensure critical workers' information is protected to the same high standards across all entities given the additional information gathering and retention requirements under the Rules.

Recommendation 8: Protecting critical infrastructure through Secure Jobs

The ambiguity of the current proposed rules will allow complete discretion to employers who wish to apply varying risk mitigation standards to internal and external employees, despite the act defining all workers as capable of being classed as critical workers. Whilst the level of investment in skills, training and apprenticeships in the power sector is an ongoing concern, the paltry investment by power industry contractors is a massive handbrake on addressing the skills needs of the sector. Most contractors underinvest or do not invest at all in apprenticeships and if this regime inadvertently incentivises further outsourcing then the number of apprentices in training will fall even further.

The ETU believes that protecting secure jobs at these critical infrastructure assets is one of the most effective ways to protect the integrity of this legislation and its objectives. Precarious working conditions breed exploitation, and with it comes the risk of giving access to critical components to workers who are either uninvested in producing quality work, actively interested in undermining their exploitative employers, or more susceptible to malicious outside influences. The security offered by permanent, well-paying work means that workers are better afforded the opportunity to meaningfully embed themselves in their communities and develop a sense of loyalty to their workplace, their industry and pride in the effective operation of the energy network, and consequently are far less likely to engage in behaviours that may lead to an escalation in personnel risks.

Absent more thorough RMP Guidelines for risk management program implementation, the ETU has concerns that these rules will result in the internal workforce becoming much more expensive than external contractors. This will ultimately result in a preference by entities to outsource secure work which will drive down industry wages and conditions and impact on the quality, safety and productivity of the sector.

The practical reality is that the regulator will simply outsource compliance monitoring and reporting to the entity who will subsequently subcontract that obligation onto their contract service providers. This merry go round of *laissez faire* regulation will lead to sub-optimal oversight while delivering a race to the bottom for wages and conditions within a sector that has traditionally prided itself on secure jobs with fair employment practices.

Recommendation 9: Clarifying AusCheck Eligibility

Section 9 of the draft rules and Section 30AH of the Act permit background checks for the purpose of assessing the suitability of a critical worker to have access to the critical components of an asset. Whilst we appreciate the guidance given in the rules as to privacy protections and criteria against which backgrounds must be assessed, there is no clarification given as to the bar for a critical worker to require an AusCheck or equivalent background check. Further the guidance note indicates that several critical asset classes are not envisaged to be subject to the AusCheck regime but nothing in the Rules reinforces this and in fact, further parts of both the Rules and the Auscheck guidance note reinforce AusCheck or equivalent programs as both available and an acceptable threshold for entities to apply in order to meet their obligations should they choose to.

A further added incentive in the energy sector is the cost pass through option which is available to entities who incur new regulatory costs. As was the case with Essential Energy in March 2022 who applied for, and was subsequently allowed to pass all additional regulatory costs associated with Critical Infrastructure Licence Conditions to consumers and \$30.6 million dollars of regulatory costs were added to consumers power bills over two years⁴. AusCheck background checks alone have the capacity to cost the electricity generation, supply, and market operation sectors an additional \$26,000 per year for every 1 percent of the workforce that is unnecessarily required to undergo a check. This figure does not include the additional cost of lost productivity from workers attending to these checks and the additional overheads that will be required in energy companies to administer these processes which together are likely to cost the same amount again.

The *AusCheck Background Checks for the purpose of a Risk Management Program* consultation document specifically outlines in section 2.7 that background checks will not be required for all critical workers, however there is no further clarification as to what factors may determine that a background check is required for a given worker. The ETU has firsthand experience of entities seeking to exploit this discretion as a bargaining tool to hold over workers seeking to negotiate for better pay and conditions.

Introduction of RMP Guidelines as previously suggested would be an effective way to manage these concerns and to introduce sector-based guidance for entities in determining which workers are in fact critical and the proportional level of background checks needed to manage any perceived risks.

Lastly, the framework does nothing to assess or recognise the existing systems and protections embedded in the industry already.

⁴ AER Determination, Essential Energy Critical Infrastructure License Condition cost pass through, March 2022

Conclusion

The ETU appreciates the intention of these guidelines in securing Australia's critical infrastructure and acknowledges that matters of national security are not often the purview of trade unions such as ours. However, as has been voiced through consultation on this and earlier related legislation, this legislation is incredibly expansive in scope and has the capacity to significantly affect the lives of our members.

This submission, whilst only dealing with 2 of 13 classes of critical infrastructure asset, has highlighted how improper administration of provisions in the draft Security of Critical Infrastructure (Critical infrastructure risk management program) Rules could see negative downstream impacts on:

- Consumer electricity prices
- Labour mobility
- Disaster response capabilities
- Secure work, and
- Criminal rehabilitation

The ETU believes that more comprehensive, sector or subsector specific, risk management program guidelines are the best way forward to ensure that the risk posed by these externalities are minimised whilst maintaining the integrity of the legislation's intent. Our discussions within our industry indicate that many of our concerns would be shared by entities and their associations as well.

We appreciate the opportunity to consult with both the Minister and Department of Home Affairs on the draft risk management program rules. The ETU would welcome the opportunity to engage further with the Minister or their representative to discuss sensible improvements that address the concerns raised.

Attachment A

In the interest of ensuring our feedback as part of this consultation process is as constructive as possible, the ETU has prepared some draft amendments to the draft risk management program rules that would go a long way to addressing our concerns.

That Section 3 of the draft Rules be amended to add

consultation means to appropriately inform employees, inviting and considering their response prior to a decision being made. Employees' opinions should not be assumed. Sufficient action must be taken to secure employees' responses and give their views proper attention. Consultation requires more than a mere exchange of information. Employees must be able to contribute to the decision-making process, not only in appearance but in fact.

That Section 4(2) be amended to add

"unless subject to Section 4(2)(c)" to the end of both 4(2)(a) and 4(2)(b); and (c) for any critical infrastructure asset where that industry sector is engaging in the development of an industry sector risk management program guidelines – ending 6 months after the commencement of such guidelines.

That Section 5(c) of the draft Rules be amended to strike *"or accidental"*

That Section 5 of the draft Rules be amended to add

(h) for the avoidance of doubt, section 30AH (8) of the Act does not include workers exercising their rights under the Fair Work Act or other industrial and work health and safety laws including the taking of protected industrial action or exercise of lawful Right of Entry, by Entry Permit Holders.

That Section 7(1)(d) of the draft Rules be amended to add

*(iii) for participating in the creation, monitoring, and review of an industry sector risk management program guidelines in consultation with relevant employer and employee representative bodies of a particular critical infrastructure asset class
(iv) for ensuring that an entity's program is consistent with any guidelines developed under subparagraph (1)(d)(iii)*

That Section 7(2) of the draft Rules be amended to add

*(j) consultation with the relevant Union or Unions representing the interests of workers who may be impacted by the program, and
(k) any agreed industry sector risk management program guidelines that have been developed in consultation with relevant employer and employee representative bodies of workers and entities of a particular critical infrastructure asset class*

That Section 9(5) of the draft Rules be amended to add

*(f) consultation with the relevant Union or Unions representing the interests of workers who may be impacted, and
(g) any agreed industry sector risk management program guidelines that have been developed in consultation with relevant employer and employee representative bodies of a particular critical infrastructure asset class*

That Schedule 1 of the draft Rules be amended so that items 11, 13, 14, 16 & 18 are moved from section 1 to section 2.

That Schedule 1 and 2 of the draft Rules be amended to include clarification of the purpose of including categories of offence that are incapable of being spent and how jurisdictional inconsistencies in spent convictions and disclosures will be managed.