



Australian Government
**Australian Customs and
Border Protection Service**

**SUBMISSION
TO THE
SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
FOR THE INQUIRY
INTO THE
PUBLIC INTEREST DISCLOSURE BILL 2013**

May 2013

Introduction

This submission is to the Senate Standing Committee on Legal and Constitutional Affairs (“the Committee”) which is currently inquiring into the Public Interest Disclosure Bill 2013 (“the Bill”). On 21 March 2013 the Senate referred the Bill to the Committee for inquiry and report.

On 27 March 2013 the Committee Secretary, Ms Julie Dennett wrote to Mr Michael Pezzullo, Chief Executive Officer of the Australian Customs and Border Protection Service (‘Customs and Border Protection’) inviting a submission to be made to the inquiry. In that letter it was noted that the terms of reference for this inquiry are the provisions of the Bill and that the Committee will not be considering or examining any material that relates to personal cases or grievances.

Customs and Border Protection welcomes the opportunity to make this submission to the inquiry and the development of an effective whistleblowing scheme in the public sector.

Executive Summary

- Customs and Border Protection regards the Bill as a positive development, enhancing whistleblower protection and as a means of encouraging individuals in the public sector to come forward with greater confidence and to provide information essential for the detection and investigation of wrongful and illegal conduct;
- Customs and Border Protection’s mandatory reporting scheme is part of a package of reforms to ensure there is early detection of serious misconduct, corrupt conduct and criminal activity so that it can be investigated and any necessary action taken, including prosecution. While the implementation of the administrative measures proposed in the Bill will require some adjustment to existing arrangements, those changes will assist those making disclosures and ensure their protection; and
- The current absence of a mandatory reporting requirement in the wider public sector in relation to serious misconduct, corrupt conduct and criminal activity may be an issue which might be considered for future reforms.

The context of the submission

The Australian Customs and Border Protection Service (“Customs and Border protection”) is the lead Commonwealth agency for managing the security and integrity of Australia’s borders. Its role is to:

- prevent, deter and detect the illegal movement of people across Australia’s border and the entry of prohibited, harmful and illegal goods into Australia;
- investigate suspected breaches of a range of border controls;
- counter maritime security threats in Australian waters through Border Protection Command, a joint Customs and Border Protection and Defence authority, located within Customs and Border Protection;
- facilitate legitimate trade and travel;
- deliver industry assistance including through Australia’s anti-dumping and countervailing and tariff concession schemes; and
- collect border related revenue and statistics.

The environment in which Customs and Border Protection operates is challenging, dynamic and requires a focus across the entire border continuum. It also requires an increasingly sophisticated intelligence-led, risk-based operating model as well as working closely with partner agencies internationally as well as domestically. As a law enforcement and border regulatory agency, Customs and Border Protection collaborates widely including with the Australian Federal Police (AFP), the Australian Crime Commission (ACC), the Department of Agriculture, Fisheries and Forestry, the Department of Immigration and Citizenship and the Department of Defence.

Within its operating environment Customs and Border Protection has long recognized that corruption and criminal infiltration could arise and engaged in considerable efforts to detect and prevent this kind of activity. This included promoting a strong integrity and professional standards ethic within the organisation and legislative measures to bolster existing powers as part of a package of reforms addressing the law enforcement community.

The jurisdiction of the Integrity Commissioner, which was originally limited to the AFP and the ACC, was extended to Customs and Border Protection with effect from 1 January 2011 (Law Enforcement Integrity Commissioner Amendment Regulations 2010 (No. 1) and confirmed by the Crimes Legislation Amendment Act (No. 2) 2011).

The *Law Enforcement Integrity Legislation Amendment Act 2012* (No. 194/2012) puts in place measures that:

- Authorise integrity testing operations for officers of AFP, ACC and Customs and Border Protection where there is a reasonable suspicion that an offence punishable by 12 months imprisonment has been or is likely to be committed;
- Provide investigative tools by amending the *Surveillance Devices Act 1984* so that law enforcement officers of AFP, ACC and ACLEI can seek a surveillance devices warrant for an integrity operation;

- Provide for an authorised integrity testing controlled operation to be conducted under the provisions of *the Crimes Act 1914*;
- By amendments to the *Telecommunications (Interception and Access) Act 1979*, permit:
 - the agency that originally obtained lawfully intercepted information to communicate it to the AFP, ACC or ACLEI if it relates to an integrity operation that is being, or could be, conducted by that agency;
 - ACLEI to pass lawfully intercepted information (originally obtained by ACLEI) to Customs and Border Protection where the information relates or appears to relate to a current or possible integrity operation;
 - the AFP, ACC or ACLEI to use lawfully intercepted information and lawfully accessed information for a purpose connected with designing, obtaining authority for, or applying for a warrant or authorisation under a Commonwealth law for the purposes of, an integrity operation; and
 - Customs and Border Protection to use lawfully intercepted information for a purpose connected with designing, or obtaining authority for an integrity operation.
- Introduce Customs and Border Protection specific measures through amendments to the *Customs Administration Act 1985* to provide power for:
 - The Chief Executive Officer (CEO) to make orders including for the introduction of mandatory reporting requirements for serious misconduct, corruption or criminal behavior;
 - The CEO to make a declaration that the termination of the employment of a worker was for serious misconduct; and
 - The authorization of drug and alcohol testing.

These measures were overwhelmingly welcomed by the majority of hard working and dedicated Customs and Border Protection officers who are committed to ensuring personal and professional integrity in the organisation. The instances of corruption and criminal behavior of a minority which have been reported in the media have been investigated and are being prosecuted to the extent of the law.

The experiences of Customs and Border Protection and other law enforcement agencies in relation to serious misconduct, corruption and criminal behavior illustrate the importance of ongoing vigilance in terms of officer integrity, but also as to the influence and potential infiltration of organized criminal groups. These lessons highlight the importance of effective intelligence and working collaboratively with other law enforcement agencies to ensure that corruption can and will be detected and investigated.

The Public Interest Disclosure Bill 2013

Customs and Border Protection welcomes the Public Interest Disclosure Bill 2013 ('the Bill') as a means of enhancing whistleblower protection so that individuals in public service can come forward with greater confidence to provide essential information for detecting and taking appropriate action against wrongdoing, misconduct and corruption. In particular we note that:

- Protection for whistleblowers from civil and criminal liability, from any possible reprisals and limiting the use and disclosure of the identity of the discloser are important initiatives to encourage people to come forward (see Part 2 Division 1);
- It is recognized that a reporting mechanism must address multiple circumstances and this is addressed with the provision of internal disclosure to an "authorised internal recipient", external disclosure in particular circumstances, emergency disclosure and disclosure to an Australian legal practitioner in given circumstances (Part 2 Division 2);
- There are limitations within the proposed scheme to ensure that it will not be misused by disgruntled employees or ex-employees who may simply strongly object to particular Government policy or financial arrangements or to court and tribunal decisions (see ss.31 and 32). Additionally, the requirement that a discloser "*believes on reasonable grounds that the information may concern one or more instances of disclosable conduct*" (s. 26 - Item 1 and 2) assists to prevent misuse of the scheme;
- The range of disclosable conduct covered by the scheme (see s. 29) is fairly extensive including criminal conduct, maladministration, abuse of office, wastage and conduct that raises unreasonable health and safety risks. The breadth of the conduct is such that it could also concern contractual arrangements and it is noted that officers and employees of contractors providing services to the Commonwealth may be regarded as public officials in certain circumstances (see s. 30); and
- Agencies such as Customs and Border Protection that are subject to the jurisdiction of the Integrity Commissioner in respect of corruption issues under the *Law Enforcement Integrity Commissioner Act 2006* (the 'LEIC Act') will also need to put in place internal arrangements that ensure the investigation provisions of the Bill will in practice operate consistently with the obligations of the head of the agency and the powers of the Integrity Commissioner under the LEIC Act and avoid duplication of effort in investigations.

Although the Bill does provide protection for those making public interest disclosures, and thus encourages reports being made, there is no existing statutory requirement on public officials to make a report where they come across wrongdoing, misconduct or corruption. The lack of such an obligation means that the public sector substantially relies on individuals volunteering such reports.

While there can be merit in voluntary schemes, the detection, investigation and prosecution of corrupt or other criminal behavior is dependent on the availability of

relevant information and there is a risk that the absence of a compulsion to report could mean that some information will not be forthcoming. This may mean that wrongdoing, misconduct or corruption may continue for some time until an individual has the courage to make a report.

The present Bill concerns situations where a report is made voluntarily, but can also apply where there is a mandatory reporting arrangement within a Commonwealth agency. Customs and Border Protection considers that it is advantageous for the legislation to apply in both circumstances.

Customs and Border Protection has instituted a mandatory reporting scheme through a Chief Executive Officer (CEO) Order¹ made under s. 4B of the *Customs Administration Act 1985* to ensure that serious misconduct, corruption and criminal behavior are reported by officers. This is an important initiative to ensure that such conduct is quickly identified and investigations undertaken. However, it is also crucial that officers are reassured that they will receive the statutory protections arising under the Bill if they make a report under this mandatory requirement.

Under this CEO's Order, Customs workers must report as soon as practicable conduct which they reasonably believe to be serious misconduct, corrupt conduct or criminal conduct. This can be made orally or in writing (including in electronic form) to at least one of the following:

- a) an officer of the Australian Customs and Border Protection Service:
 - (i) within Integrity and Professional Standards Branch; or
 - (ii) within the Integrity Support and Referral Network; or
 - (iii) within the Customs Incident Reporting Centre; or
 - (iv) at or above Customs and Border Protection Officer Level 4; or
 - (v) any SES officer or Regional Director; or
- b) an officer of the Australian Commission for Law Enforcement Integrity; or
- c) in the case of a Customs worker who is a consultant or contractor, the consultant or contractor may also make a report to the contract manager appointed by Australian Customs and Border Protection Service.

In considering the mandatory reporting order in the light of Bill:

- The scope of this mandatory reporting order in terms of the conduct to be reported (serious misconduct², corrupt conduct and criminal activity) is

¹ CEO Order No. 2 of 2013 – *Mandatory Reporting of Serious Misconduct, Corrupt Conduct and Criminal Activity involving Customs Workers* dated 15 February 2013.

² The following definitions arise at s. 3 of the *Customs Administration Act 1985*:

serious misconduct, by a Customs worker, means:

- (a) corruption, a serious abuse of power, or a serious dereliction of duty, by the Customs worker; or
- (b) any other seriously reprehensible act or behaviour by the Customs worker, whether or not acting, or purporting to act, in the course of his or her duties as such a Customs worker.

engages in corrupt conduct: a Customs worker **engages in corrupt conduct** if the Customs worker, while a Customs worker, engages in:

- (a) conduct that:
 - (i) involves; or (ii) is engaged in for the purpose (or for purposes including the purpose) of;

considered to extend to the full range of conduct envisaged by the definition of 'disclosable conduct' under the Bill (see s. 29 of the Bill);

- The mandatory reporting order enables Customs workers with relevant information to consult a member of the Integrity Support and Referral Network (ISRN) to allow a confidential discussion as to whether a matter should be formally reported. The Customs worker with the information retains the discretion to make a formal report themselves or ask the ISRN member to make a report for them. The ISRN arrangement is intended to provide assistance and encouragement as necessary to officers and it could also provide such a role in future on the Bill becoming law;
- Although the obligations under the mandatory reporting order are distinct from those arising under the Bill, some consideration may be necessary to ensure that those who make a report under the order also receive the proper protections under the Bill. This may necessitate some realignment of the mandatory order to ensure such reports are made to 'authorised officers' under s. 36 of the Bill and that this meets the reporting requirement;
- The Bill provides for those providing services to the Commonwealth as contractors and their officers and employees can in certain circumstances be regarded as a 'public official' (s. 30). Similarly, the definition of 'Customs worker' under the Customs Administration Act 1985 includes contractors and their employees providing services to Customs and Border Protection provided that they are the subject of a determination³ by the Chief Executive Officer that they are Customs workers. Ensuring that any mandatory reporting requirement applies appropriately and that there is awareness among contractors of their obligations under mandatory reporting as well as of the protections under the Bill will be part of the administrative arrangements;
- Under s. 4C of the Customs Administration Act 1985 a Customs worker required by a CEO Order (made under s.4B(2)) to give information, answer a question or produce a document has to do so even if by doing so they might tend to incriminate them or expose them to a penalty. However, the information, answer or document is not admissible in evidence against them in any proceedings except in particular circumstances which relate to drug and alcohol testing.⁴ This would operate in addition to the protections under the Bill; and
- Under s. 20 of the Bill it would be an offence to disclose information likely to identify a person who has made a public interest disclosure where that information was obtained in their capacity as a public official. Nevertheless, it is

the Customs worker abusing his or her position as a Customs worker; or

(b) conduct that:

(i) perverts; or

(ii) is engaged in for the purpose (or for purposes including the purpose) of perverting the course of justice; or

(c) conduct that, having regard to the duties and powers of the Customs worker as a Customs worker:

(i) involves; or

(ii) is engaged in for the purpose (or for purposes including the purpose) of; corruption of any other kind.

³ See s.3C of the Customs Administration Act 1985.

⁴ See s. 4C (2), (3) and s. 16G of the Customs Administration Act 1985.

understood that the Bill is not intended to derogate from the operation of the investigative regime under the LEIC Act. Disclosures to the AFP are authorised and in some cases required by s. 56 of the Bill. Additionally, disclosures to meet the obligations of the CEO of Customs under the LEIC Act would be permitted as these would be for the purposes of a law of the Commonwealth (see s. 20(3) (d) of the Bill). The intended legislation should operate consistently with the operation of the LEIC Act in ensuring that anticorruption efforts are effective.

In establishing new procedures for facilitating and dealing with public interest disclosures (see s. 59 of Bill), Customs and Border Protection remains committed to ensuring officers are not only encouraged, but also required to report serious misconduct, corrupt behavior or criminal activity that comes to their knowledge. This is especially important for law enforcement agencies such as Customs and Border Protection which have a vital role in ensuring the safety and security of the Australian community.

AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE

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