



Australian Government

**Australian Customs and
Border Protection Service**

AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE

SUBMISSION TO

SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO

THE LAW ENFORCEMENT INTEGRITY LEGISLATION AMENDMENT BILL 2012

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INTRODUCTION

Corrupt conduct may take many forms – conflict of interest, improper association, abuse of office or power, perjury, inappropriate disclosure of information, fabrication or destruction of evidence, fraud and theft. Some types of corrupt conduct involve the commission of criminal offences. Others, while not criminal, still may undermine the integrity of the Service. Corruption has the potential to undermine the integrity of the border, the ability of the Australian Customs and Border Protection Service (Customs and Border Protection) to achieve its mission and the trust the community has in our role.

Customs and Border Protection employees are called upon to make reasoned, impartial and frequently instantaneous judgements that affect, sometimes significantly and even irrevocably, the safety, rights and freedoms of individuals. There is considerable faith and trust in Customs and Border Protection employees, conditional always on officials exercising their authority and powers lawfully and appropriately. While the vast majority of Customs and Border Protection workers are honest, hardworking people, it is an unfortunate fact that organised crime and other actors continue to actively target our workers due to the nature of their duties and the information they can access. Evidence has also been presented whereby individuals and groups have attempted to infiltrate the Service for possible access to information, intelligence and procedures.

Customs and Border Protection is aware that the community's perception of our integrity is critical. The amendments included in the Law Enforcement Integrity Legislation Amendment Bill 2012 (the Bill) will introduce a range of measures to increase the resistance of Commonwealth law enforcement agencies to corruption and to enhance the range of tools available to law enforcement agencies to respond to suspected corruption. The Bill will also introduce measures consistent with the community's expectation that we are doing all we can to fight this problem.

To assist the Committee the submission is divided into the following sections. Part 1 (**Customs and Border Protection Environment**) provides background on the role of Customs and Border Protection and the environment in which we operate. Part 2 (**What Does This Legislation Address**) identifies the gaps the legislation addresses. Part 3 (**This Legislation Supports the Customs and Border Protection's Integrity Framework**) describes how this legislation will support existing and planned Customs and Border

Protection initiatives. Part 4 (**Safeguards**) describes the mechanisms Customs and Border Protection will implement to ensure the legislation is used in a transparent and appropriate manner.

CUSTOMS AND BORDER PROTECTION ENVIRONMENT

Customs and Border Protection is Australia's lead border management agency. Our mission is to protect the safety, security and commercial interests of Australians through border protection designed to support legitimate trade and travel and ensure collection of border-related revenue and trade statistics.

We achieve this by:

- preventing, deterring, and detecting the illegal movement of people across Australia's borders;
- preventing, deterring and detecting prohibited, harmful and illegal goods from entering Australia;
- investigating suspected breaches of a range of border controls;
- countering civil 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;
- facilitating legitimate trade and travel;
- delivering industry assistance, including through Australia's anti-dumping and countervailing and tariff concession schemes; and
- collecting border-related revenue and statistics.

Customs and Border Protection operates at over 60 locations in Australia. We operate at all Australia's capitals as well as in remote corners of the country and cover nearly 147.7 million square nautical miles of Australia's Maritime Domain with air and marine assets to combat multiple maritime threats. Each week we inspect nearly 1 966 sea cargo containers, nearly 29 109 air cargo consignments, approximately 392 079 letters and more than 396 678 overseas parcels. We detect or seize numerous prohibited items including weapons, replica firearms, dangerous goods, protected wildlife, illegal pornography, material involving

breaches of copyright and tobacco; about 420 illicit drug imports and we collect: approximately \$215.3 million in revenue¹.

In addition Customs and Border Protection operates at 10 locations overseas². We recognise the risk of corruption is inherently greater in locations where there is a high 'corruption perceptions index'. We acknowledge that the current Transparency International 'corruption perceptions index' rates some of the countries where Customs and Border Protection operates as being significantly susceptible to corruption.

As a result of our work Customs and Border Protection collects, manages and retains large amounts of information. Much of this information is valuable to commercial, State and organised crime actors. The majority of Customs and Border Protection workers are honest and our integrity framework supports risk mitigation strategies to address risk and vulnerability. There are opportunities presented to workers whereby organised crime groups may infiltrate our workers or organisation.

WHAT DOES THIS LEGISLATION ADDRESS

Having regard to the significant consequences of Customs and Border Protection's role at the border and in controlling the import of prohibited items including weapons and drugs, access to highly sensitive and classified information and working closely with other law enforcement agencies, both Commonwealth and State and Territory, the consequences of corruption or misconduct in connection with the Service's law enforcement role are very serious.

The highest standards of integrity and professional conduct are essential if Customs and Border Protection is to fulfil its mission and maintain the confidence of the community, the Australian Government and our partner agencies in law enforcement, both domestic and international. While Customs and Border Protection has a robust fraud control policy and integrity framework, Customs and Border Protection has recognised that we require

¹ These figures are extracted from the Draft Annual Report which due to be tabled at parliament and available to the public on 23 October 2012. Until the report is tabled, this information cannot be considered as final and may be subject to change or amendment.

² Customs and Border Protection has officers located in Bangkok, Beijing, Brussels, Colombo, Jakarta, Kuala Lumpur, New Delhi, Papua New Guinea, Solomon Islands and Washington.

strengthening of our framework to align us with other law enforcement agencies and allow Customs and Border Protection to be resistant to corruption. This legislation will assist us to mitigate these deficiencies.

The nature of our work means corrupt workers may be aware of law enforcement methodologies so corrupt conduct can be hard to detect. This limits the ability of anti-corruption investigators to obtain required evidence. The measures proposed by the Bill will strengthen Customs and Border Protection's ability to be resistant to corruption and ensure the integrity of the Service – providing investigators with additional options to identify and prevent corrupt and criminal conduct, and minimise opportunities and motivation of misconduct.

The Bill will provide Customs and Border Protection, and other Commonwealth law enforcement agencies, with a framework that enables integrity testing of workers. The Bill will also provide three capabilities specific to Customs and Border Protection:

- a. The power for the Chief Executive Officer (CEO) to make a declaration of serious misconduct; and
- b. The power to undertake drug and alcohol testing of Customs and Border Protection workers; and
- c. The power of the CEO to make orders (CEO's orders). This provision will provide Customs and Border Protection the power to implement Mandatory Reporting requirements, support existing integrity mechanisms.

While the declaration of serious misconduct, drug and alcohol testing and CEO's orders in the Bill are specific to Customs and Border Protection – bringing us into line with other law enforcement agencies, the power to undertake integrity testing will apply to Customs and Border Protection as well as other Commonwealth law enforcement agencies.

Integrity Testing

No one measure alone can deter corrupt activity or misconduct. Integrity testing will form a vital part of a multifaceted approach to ensure integrity in the Service. All aspects of the Customs and Border Protection's integrity and professional standards framework play an important part in deterring corruption. Customs and Border Protection recognises the

deterrent effect of integrity testing, and considers that the introduction of an integrity testing regime will further strengthen our toolkit in combating potential corruption. While it is possible to establish an integrity testing regime without a legislative basis, endorsement of an integrity testing regime by the Parliament, through legislation, will enhance confidence that integrity testing will be carried out in a consistent, accountable and transparent manner.

Any integrity test will need to balance the positive anti-corruption benefits of any proposed test against the possible unintended negative effects that may be caused to the trust-relationship between Customs and Border Protection and its workers. This calculation will also need to consider any erosion to the preparedness of Customs and Border Protection workers to act with confidence, especially in the fast paced border environment in which quick judgements are required and officers have a large degree of discretion in the performance of their duties. For this reason, Customs and Border Protection supports the Government's position in its response to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity's Report on the Inquiry into Integrity Testing that integrity testing should be targeted and based on an intelligence-led, risk-based approach. This will minimise any negative impacts, will be a more resource efficient method than random integrity testing and is in line with the position of other Australian law enforcement agencies.

Declaration of Serious Misconduct

This measure was formerly referred to as 'loss of confidence'. This terminology has been changed to better reflect the intent of the legislation and provide assurance to workers and the community as to how this power will be implemented.

Employment as a Customs and Border Protection officer confers special responsibilities and powers on an individual. The distinctive nature of Customs and Border Protection's role is important when determining where an officer should remain in the Service. The usual tests for unfair dismissal are not well suited to addressing this – particularly where integrity issues are concerned. For example, section 29 of the *Public Service Act 1999* (Cth) (PS Act) already provides the CEO of Customs and Border Protection the power to dismiss employees within the Service, including on the ground that an employee has breached the Code of Conduct (paragraph 29(3)(g)). However, under the existing legislation Customs and Border Protection

may be directed by Fair Work Australia to reinstate a dismissed employee **even where the reason for dismissal is held to be valid.**

The distinctive nature of Customs and Border Protection's role is an important consideration when it comes determining the appropriateness of a person continuing in employment in circumstances where they have been found to have engaged in serious misconduct that bares a nexus to the Service's law enforcement role. Further, in such cases of serious misconduct, the sensitive nature of the law enforcement environment means that review of the termination of a person's employment, and potential reinstatement, can result in the exposure of highly sensitive information, potentially compromising on-going and future investigations and adversely impacting on public confidence in law enforcement.

Customs and Border Protection's rationale for the Declaration of Serious Misconduct provision encompass the:

- community's expectation of high standards in its border management agencies and the need for special standards of integrity on the part of the Customs and Border Protection workers as primary guardians of the border. Standards which are not necessarily expected in other forms of employment outside of the Police;
- principle that the CEO is entitled to expect that members of Customs and Border Protection will perform to a high standard of integrity, and that he should not be expected to retain any person who fails to meet these standards; and
- fact the continued retention of those members who choose not to act ethically and do not meet the required standards of integrity will remain a focus of disaffection and potential corruption.

Safeguards to ensure this power is used appropriately will be implemented. These are discussed later in this submission.

Drug and Alcohol Management Program

A primary function of Customs and Border Protection is to detect, deter and disrupt drug trafficking across Australia's borders. The abuse of drugs by Customs and Border Protection workers is not consistent with this role. Further, Customs and Border Protection recognises the serious effects that drug and alcohol abuse can have on

individuals and the potential abuse of these substances has for creating vulnerabilities within the organisation, and the potential for workplace health and safety incidents.

To ensure the integrity and safety of staff and the community and to allow protection of the border Customs and Border Protection officers are expected to be free of impairment by alcohol or any other form of illicit drugs in the workplace. Customs and Border Protection currently maintains a zero tolerance in relation to the use, possession, sale, importation and distribution of illicit drugs for all Customs and Border Protection workers at all times and has a range of guidance on alcohol in the workplace which officers are already expected to comply with. In addition, parts of the Service currently maintain a no alcohol policy, notably the no alcohol policy on Australian Customs Vessels or when carrying firearms. However, apart from Civil Aviation Safety Authority (CASA) testing, which only applies to staff working at airports, Customs and Border Protection has no power to determine if a worker is under the influence of illicit drugs or alcohol. The legislation will also support and align our work standards with other law enforcement agencies with who Customs and Border Protection works seamlessly at the border.

The provisions of the Bill will give Customs and Border Protection the ability to ensure workers comply with the standards expected of them in this regard and ensure workplace health and safety rules are adhered to. This Bill will ensure that the Customs and Border Protection workplace is drug and alcohol free and thereby promotes workers rights in the workplace, namely the right to a safe and healthy work environment.

The provisions of this Bill will give Customs and Border Protection the ability to ensure workers comply with the standards expected of them in this regard. Customs and Border Protection notes the experience of other agencies such as the Australian Federal Police (AFP) that have found initiatives such as workplace drug and alcohol testing may be open to individual legal challenges in the absence of a legislative basis.

“This situation occurred in relation to AFP drug testing, which was conducted on an administrative basis until 2000 when the AFP Act was amended to provide a legislative base for drug testing. In 1997, Finn J of the Federal Court of Australia, in Anderson v Sullivan [1997] FCA 1008 (24 September 1997) considered whether an AFP member could be lawfully directed to provide a urine

sample for drug testing purposes in the absence of a legislative basis for such testing to occur”³.

The provisions of the Bill will enable:

- Reasonable suspicion resting by means of alcohol screening;
- Random testing by means of alcohol screening, breath testing, or prohibited drug testing;
- Post incident testing by means of alcohol screening, breath testing or prohibited drug testing.

The Bill will also enable Customs and Border Protection to introduce drug and alcohol screening as part of the recruitment and selection process – strengthening integrity measures from when a person first joins the Service.

CEO's Orders

The Bill proposes powers that will enable the CEO to make orders in respect to the control of Customs and Border Protection as well as specifically in relation to the mandatory reporting of corruption and misconduct.

The introduction of these powers will allow Customs and Border Protection to implement measures which will further strengthen existing integrity arrangements. For example, the introduction of CEO's orders will support the introduction of drug and alcohol testing, the integrity support and referral network and mandatory reporting. The proposed introduction of these powers is an acknowledgement of the seriousness which Customs and Border Protection attaches to these issues.

Mandatory Reporting

The introduction of CEO's orders will allow the CEO to issue an order directing all staff to report any incidents of serious misconduct and corruption when they become aware of such incidents. This will include self reporting of incidents to ensure individuals are resistant to

³ Submission by the Australian Federal Police to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity Inquiry into integrity testing. August 2011.

corruption. The introduction of mandatory reporting requirements will reinforce the ethics and integrity standards of Customs and Border Protection. The introduction of mandatory reporting also aims to overcome the reluctance of some individuals to become involved in suspected cases of corruption by imposing a duty to do so. Mandatory reporting is not about spying on colleagues or ‘dobbing people in’, it is about not ignoring corruption and misconduct and allowing Customs and Border Protection to manage identified risks and vulnerabilities. Mandatory reporting is sending a message to the community and our colleagues that corruption and misconduct will not be ignored.

Enforcement of an order on mandatory reporting, as with any other order made under the powers proposed by the Bill, will be by means of section 13 of the PS Act (Code of Conduct) that imposes an obligation on employees to comply with a reasonable and lawful direction.

The introduction of CEO’s Orders through this Bill are essential for this initiative to function effectively and will bring uniformity to the process – bringing Customs and Border Protection into line with other law enforcement agencies. The introduction of mandatory reporting (backed by legislation) reinforces the message that it is the responsibility of every Customs and Border Protection worker to fight corruption.

THIS LEGISLATION SUPPORTS THE CUSTOMS AND BORDER PROTECTION INTEGRITY FRAMEWORK

The introduction of this legislation supports and will underpin existing Customs and Border Protection initiatives aimed at strengthening the Service against corruption and assuring the integrity across the ‘life cycle’ of employment – from recruitment to separation. Customs and Border Protection is positioning itself to meet the regulatory and law enforcement challenges of the next two decades and to maintain the confidence and respect of Government, our partners and the community we serve.

As part of this program Customs and Border Protection is investing significant effort in:

- Enhancing engagement with internal and external stakeholders on integrity;
- Preventing infiltration and corruption; and
- Increasing expertise within the organisation to facilitate an integrity strategic change program.

This work includes improving recruitment processes, educating staff and raising awareness on integrity issues, implementing processes to improve the ability of staff to report corruption and serious misconduct matters.

Integrity Support and Referral Network

Customs and Border Protection will establish an Integrity Support and Referral Network to provide advice and support to staff regarding integrity and mandatory reporting obligations. Providing a facility for staff to readily access support, advice or be able to come forward with information relating to misconduct, corrupt or criminal behaviour can be an important step in ensuring these behaviours are not able to manifest in Customs and Border Protection. Such a facility will be critical if mandatory reporting of misconduct and corruption is introduced, as it provides a fair and confidential mechanism for staff to meet their reporting obligations. A similar program has been successfully run within the AFP for 16 years.

Consultation and Acceptance in the Workplace

Previous studies have found that while new integrity measures may initially be met with resistance, over time they have become essential tools in the fight against corruption and the maintenance of public trust. Customs and Border Protection notes the experience of the New South Wales Police:

“targeted testing became accepted as an essential anti-corruption tool by key stakeholders in policing in NSW; including the union, who argued it provided a means to remove officers who betrayed their colleagues and also to address public distrust of police”⁴.

In order to prepare the Service and ensure acceptance of the new proposals by Customs and Border Protection workers, there will be ongoing consultation with staff and their representatives regarding the implementation of the integrity measures, including in the development of policy and guidance material for staff, and in education and staff awareness. A collaborative approach is being adopted with staff and their representatives to ensure

⁴ Prenzler, Tim (2006). Senior police managers' views on integrity testing, and drug and alcohol testing. *Policing: An International Journal of Police Strategies & Management*. 29 (3), 394-407.

guidance material and processes are practical, effective and a shared understanding of responsibilities is achieved.

There has been ongoing consultation with the Community and Public Sector Union (CPSU) regarding the integrity measures. As part of this consultation process the CPSU were provided paid time meetings during September 2012 to raise staff awareness of the integrity measures and to seek member feedback.

SAFEGUARDS

The Bill provides Customs and Border Protection, the AFP, Australian Crime Commission and the Australian Commissioner For Law Enforcement Integrity substantial powers to fight corruption. However, Customs and Border Protection recognises these powers if not used appropriately may also undermine the integrity of the Service and be a source of serious misconduct. Customs and Border Protection will put in place a number of safeguards to ensure these additional powers will only be used for their intended purpose – that is, to ensure integrity and fight corruption.

Integrity Testing

The legislation puts in place strict criteria for the authorisation of integrity tests. Tests will only be allowable where there is a reasonable suspicion that an offence, punishable by at least 12 months' imprisonment has been committed or is likely to be committed. This will ensure integrity testing is conducted on a targeted basis, rather than on a random or arbitrary basis.

The Bill also proposes integrity testing can be authorised by the CEO of Customs and Border Protection or an SES employee of Customs and Border Protection who has been authorised in writing by the CEO to authorise integrity testing. However, not every SES employee of Customs and Border Protection will be able to authorise integrity testing. There will be strict guidelines and an internal governance framework developed to manage any risks.

In addition to the criteria that must be satisfied before an integrity test is authorised, there will also be strict rules about the use and disclosure of information obtained during integrity testing. While it is proposed to permit the use of that information in criminal and disciplinary proceedings, unauthorised disclosure will be an offence punishable by 2 years' imprisonment,

recognising the consequences that may follow by the disclosure of the fact an integrity test has occurred.

In addition, the legislation will require Customs and Border Protection to report to the Minister each year on the number and nature of integrity tests undertaken. Customs and Border Protection will also be required to notify the Integrity Commissioner when an integrity test is authorised. Where the tests relate to a corruption issue, the Integrity Commissioner will have the same level of oversight as he exercises in relation to corruption investigations and will be informed of all integrity tests.

The use of other powers in support of integrity testing will remain subject to the existing safeguards for those powers already in place.

Drug and Alcohol Management Program

Customs and Border Protection is developing a comprehensive drug and alcohol management program to underpin the proposed drug and alcohol testing legislation. These include:

- development of a dedicated education and awareness process so all Customs and Border Protection workers are aware of their responsibilities, the testing process and their rights and clarifying our duty of care responsibilities (around what to do if somebody self declares or tests positive);
 - **Individuals who self declare prior to being selected for testing:** Customs and Border Protection will assist and support any such individual to the extent that it appropriately can through the Employee Assistance Program;
- development of a robust random sampling methodology so individuals (or work areas) are not unduly targeted;
- identifying a person for targeted drug and alcohol testing through an intelligence led-risk based approach; and
- building a drug and alcohol response program which takes into account the individuals personal circumstances and nature of alleged offence.

The results of all testing will be handled in accordance with the requirements of the *Privacy Act 1988* (Cth) (Privacy Act) and other legislative requirements.

Declaration of Serious Misconduct

The Bill's Explanatory Memorandum states that this power will be reserved for only the most serious occurrences of misconduct and corruption where there is nexus between the conduct and Customs and Border Protection's law enforcement functions. Therefore it is expected to be used in limited and exceptional circumstances.

Further, as per the Minister of Home Affairs's second reading speech, the agency will put in place arrangements for a panel of persons independent of the CEO to advise the CEO on each occasion use of the power is being considered. The role of the panel is to advise the CEO, on each occasion, whether or not a written declaration of serious misconduct is appropriate, given the details of particular dismissal, the legislative criteria and the connection necessary to the agency's law enforcement functions.

Scrutiny of the use of the power is provided for by way of a provision of the Bill that requires the CEO to report to the Minister each time a declaration is issued. The report must include the following:

- (a) the grounds for the CEO's belief; and
- (b) the nature and findings of any investigation of, or inquiry into, the staff member's conduct or behaviour; and
- (c) details of any other matter the CEO considers relevant.

This will require the CEO to provide an appropriate level of detail to enable both the Minister to assess the use of the power by the CEO. This will ensure there is appropriate oversight of the use of the power.

Further the Bill also requires the CEO to give a copy of the declaration to the staff member. This is another safeguard to ensure the staff member is made aware of the declaration that has been made in respect of his or her dismissal and the effect it will have on the availability of seeking review of the decision to terminate his or her employment.

The making of a declaration of serious misconduct will not limit other legal avenues available to a dismissed employee, such as claims under anti-discrimination legislation and under Part 3-1 of the FW Act (adverse action). As a decision to dismiss a Customs and Border Protection employee is a decision made under an enactment, the possibility of review in accordance with

the *Administrative Decisions (Judicial Review) Act 1977* (Cth) continues. Further, the Bill's provisions also do not alter the provisions by the PS Act that the Service must adhere to in investigating serious misconduct and imposing a sanction of dismissal.

Privacy

Measures contained in the Bill will also increase the collection and use of personal information within Customs and Border Protection's workplace, such as: results from mandatory drug and alcohol testing, mandatory disclosure of personal information, the compulsory physical intervention of a person for testing purposes. These measures do not limit the obligations of Customs and Border Protection under the Privacy Act 1988 and the Information Privacy Principles in general. Customs and Border Protection will continue to adhere to the safeguards aligned to the eleven Information Privacy Principles to ensure no unlawful interference with privacy, honour or reputation occurs. The interferences with the right to privacy contained in this Bill are proportionate to the need to protect against corruption in law enforcement.

CONCLUSION

Integrity is the keystone of our Service. It is essential to our identity and our effectiveness as the primary guardian of Australia's borders. This Bill will ensure that the Customs and Border Protection workplace is resistant to corruption, is drug and alcohol free and that individuals who undermine the integrity of the workplace can be removed - maximising the overall integrity of the organisation and strengthening the public's confidence in Customs and Border Protection. In addition, the Bill advances rights of Customs and Border Protection workers, ensuring they will continue to have a safe work environment and will enable honourable officers to have a higher degree of individual integrity. In addition, these measures have the potential to identify areas for improvement where systems, processes and procedures have the potential to support individual or systemic criminal and corrupt behaviour. This will allow the Service to better manage these risks and mitigate where appropriate.

The Bill and the powers it provides sends a message that Customs and Border Protection is serious about strengthening its corruption framework and remaining resistant to criminal influence.

The Australian Customs and Border Protection Service strongly supports the changes proposed in the Law Enforcement Integrity Legislation Amendment Bill 2012.