

## QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 11 September 2017

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

**(ABPI/002) – ABF Amendment (Protected information) - Legislative Instrument**

-

Asked:

To advise whether it is common for legislation to be drafted to allow Departmental Secretaries to make legislative instruments, particularly in relation to criminal offences.

Answer:

It is very common for Departmental Secretaries to be given the power to make legislative instruments.

In the Immigration and Border Protection Portfolio, the Secretary of the Department may make the following legislative instruments:

(1) In the following provisions of *Migration Act 1958*:

- s175A - the determination relating to kinds of passports
- s245K - the approval of fall-back reporting system
- s245J - the approval of primary reporting systems

(2) In the *Australian Border Force Act 2015*, under ss 4((3) prescribing prohibited drugs for the purposes of the drug and alcohol testing regime.

The Comptroller-General of Customs may make the following legislative instruments under the *Customs Act 1901*. This position was previously an agency head and is now filled by the person who is the Australian Border Force Commissioner which is a statutory position:

- S179 - Australian Trusted Trader Programme Rule 2015
- S102DD imposition of additional obligations for cargo handlers
- S102CJ imposition of additional obligations for cargo terminal operators
- S126H arrange for use of computer programs to make decisions
- S153ZIH determination of goods wholly manufactured in New Zealand
- S183UC directions concerning the exercise of officers powers under Division 1 of Part XII
- S219ZJE direction about detaining persons under Division 1BA of Part XII

There are a number of examples whereby a subordinate instrument, including instruments made by a Secretary, may affect the context of an offence provision as follows:

Under aviation and maritime security legislation, the Secretary may, in writing, direct that additional security measures set out in the direction must be taken or complied with. It is an offence for a person to fail to comply with such a direction.

Under Division 301 of the *Criminal Code*, the relevant Minister, by legislative instrument, may make an emergency determination of serious drugs and precursors to be a border controlled drug, plant or precursor which are then subject to offences in the Code.

Under section 471.15 of the *Criminal Code*, regulations made set out the harmful or dangerous substances or things that must not be carried by the post. It is an offence for a person to cause such articles to be carried by the post.