

# CHAPTER 1

## Introduction and Background

### Referral of the inquiry

1.1 The Australian Border Force Bill 2015 (ABF Bill) and the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 (ABF Amendment Bill) were introduced into the House of Representatives by the Hon Peter Dutton MP, the Minister for Immigration and Border Protection (minister), on 24 February 2015.<sup>1</sup>

1.2 Pursuant to a recommendation of the Selection of Bills Committee, on 5 March 2015, the Senate referred the provisions of both the ABF Bill and the ABF Amendment Bill to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 7 May 2015.<sup>2</sup>

1.3 The ABF Bill and the ABF Amendment Bill were introduced into the Senate by the Assistant Minister for Health, Senator Nash, on 25 March 2015.<sup>3</sup>

### Conduct of the current inquiry

1.4 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to a number of organisations and individual stakeholders inviting submissions by 1 April 2014. Details of the inquiry were placed on the committee's website at [http://www.aph.gov.au/senate\\_legalcon](http://www.aph.gov.au/senate_legalcon).

1.5 The committee received 30 submissions in response to this inquiry. The submissions are published on the committee's website and are listed at Appendix 1 to this report. The committee did not hold a public hearing for this inquiry.

### Acknowledgement

1.6 The committee thanks the organisations and individuals who made submissions to the inquiry.

### Purpose of the bills

1.7 In 2014, the National Commission of Audit recommended the merging of the border control functions of the Department of Immigration and Border Protection (department) and the Australian Customs and Border Protection Service (customs) into a 'single, integrated border agency'.<sup>4</sup> As noted in the Explanatory Memorandum to the ABF Bill, on 9 May 2014, the government announced that customs would be integrated into a single department and that the Australian Border Force (ABF) would

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1 Votes and Proceedings, No. 98—25 February 2015, p. 1133.

2 *Journals of the Senate*, No. 82—5 March 2015, p. 2257.

3 *Journals of the Senate*, No. 89—25 March 2015, p. 2414.

4 National Commission of Audit, *Towards responsible Government: phase one*, February 2014, pp 207–8 at [http://www.ncoa.gov.au/report/docs/phase\\_one\\_report.pdf](http://www.ncoa.gov.au/report/docs/phase_one_report.pdf) (accessed 23 April 2015).

be established within the department. The two bills are aimed at providing the legislative basis for this decision.<sup>5</sup>

### ***The ABF Bill***

1.8 In his second reading speech on the ABF Bill, the minister stated that:

This bill establishes the statutory office of the Australian Border Force Commissioner, who will command the Australian Border Force as a new, front-line operational border control and enforcement entity within the Department of Immigration and Border Protection that will enforce customs and immigration laws and protect Australia's borders...This bill also enables the full integration of the Australian Customs and Border Protection Service and the Department of Immigration and Border Protection into a single department of state.<sup>6</sup>

1.9 The minister noted that the ABF Bill:

...removes unnecessary duplication and enables the deployment of a greater proportion of resources into the front line. It also contributes to a more efficient government footprint that will assist in achieving fiscal repair and ensuring the sustainability of government operations.<sup>7</sup>

1.10 The minister explained that the ABF Bill is also designed to 'underpin community confidence in Australia's immigration, customs and border arrangements' by establishing the ABF as a 'professional and disciplined workforce', enabling the department, and more specifically the ABF, to achieve the 'highest standards of operational effectiveness and integrity'.<sup>8</sup>

1.11 The minister concluded that:

This bill will enable the Australian Border Force and the department to create stronger borders. Stronger borders will contribute to safer communities and a prosperous and cohesive society.<sup>9</sup>

### ***The ABF Amendment Bill***

1.12 As noted by the minister, the ABF Amendment Bill is largely dedicated to repealing the *Customs Administration Act 1985* and making consequential amendments to a number of other Commonwealth Acts, including the *Customs Act 1901*.<sup>10</sup>

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5 Explanatory Memorandum to the Australian Border Force Bill 2015, p. 16.

6 *House of Representatives Hansard*, 25 February 2015, p. 1204.

7 *House of Representatives Hansard*, 25 February 2015, p. 1204.

8 *House of Representatives Hansard*, 25 February 2015, p. 1205.

9 *House of Representatives Hansard*, 25 February 2015, p. 1206.

10 *House of Representatives Hansard*, 25 February 2015, p. 1208.

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## Australian Customs and Border Protection Service

1.13 On 10 June 1985, subsection 4(1) of the *Customs Administration Act 1985* (Cth) established the Australian Customs and Border Protection Service. Customs primarily derives its powers from the *Customs Act 1901* (Cth) and related legislation. The service is controlled by a Chief Executive Officer (CEO), appointed by the Governor-General. With the exception of certain legislative powers that are vested directly in the minister, the CEO is responsible for most legislative decisions. The CEO reports to the minister.<sup>11</sup>

### Structure and key aspects of the bills

#### *The ABF Bill*

1.14 The ABF Bill is comprised of seven parts. Part 1 provides a simplified outline of the bill<sup>12</sup> and defines the key terms used in the bill.<sup>13</sup>

1.15 Part 2 of the ABF Bill would establish the position of Australian Border Force Commissioner<sup>14</sup> (ABF Commissioner) who would also act as the Comptroller-General of Customs.<sup>15</sup> Part 2 would also provide for both the mechanism for appointing the ABF Commissioner,<sup>16</sup> or acting ABF Commissioner where appropriate,<sup>17</sup> and would provide the terms and conditions for that appointment.<sup>18</sup> Clause 23 would allow the minister to give directions to the ABF Commissioner on policies or priorities affecting the ABF.<sup>19</sup> Within this framework, clause 10 of the bill would empower the ABF Commissioner to do all things necessary or convenient in the exercise of his or her role<sup>20</sup> and clauses 25 to 27 would enable the ABF Commissioner to delegate functions and give directions.<sup>21</sup> Under clause 24, the ABF Commissioner would be allowed to request a specified person to make and subscribe to an oath or affirmation.<sup>22</sup>

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11 Australian Customs and Border Protection Service, *Annual Report 2013–2014*, 19 September 2014, p. 195 at [http://www.customs.gov.au/webdata/resources/files/ACBPS\\_AR\\_2013-14.pdf](http://www.customs.gov.au/webdata/resources/files/ACBPS_AR_2013-14.pdf) (accessed 2 April 2015).

12 Australian Border Force Bill 2015, cl. 3.

13 Australian Border Force Bill 2015, cl. 4.

14 Australian Border Force Bill 2015, clause 9.

15 Australian Border Force Bill 2015, subclause 11(3).

16 Australian Border Force Bill 2015, clauses 11–13.

17 Australian Border Force Bill 2015, clause 14.

18 Australian Border Force Bill 2015, clauses 16–22.

19 Australian Border Force Bill 2015, clause 23.

20 Australian Border Force Bill 2015, clause 10.

21 Australian Border Force Bill 2015, clauses 25–27.

22 Australian Border Force Bill 2015, clause 24.

1.16 Part 3 of the ABF Bill would require an APS employee of the department to provide at least 14 days written notice of an intention to resign.<sup>23</sup> Moreover, under clause 30, if an employee of the department provides notice of an intention to resign in circumstances where the employee may have engaged in behaviour that could amount to serious misconduct, the ABF Commissioner would be empowered to delay the date of resignation by up to 90 days from the date specified in the notice, to allow for further investigation of the matter.<sup>24</sup>

1.17 Where the Secretary of the Department of Immigration and Border Protection (secretary) has terminated an employment contract where the secretary or the ABF Commissioner reasonably believed the employee had engaged in conduct amounting to serious misconduct, Part 4 of the ABF Bill would allow the secretary or the ABF Commissioner to make a declaration to that effect. The effect of such a declaration would be that the provisions of the *Fair Work Act 2009* (Cth) dealing with unfair dismissal, and notice of termination or payment *in lieu*, would not apply to the employment contract.<sup>25</sup>

1.18 Part 5 of the ABF Bill would allow an authorised person to require an Immigration and Border Protection worker (IBP worker) in the course of performing his or her duty to undergo an alcohol screening test, an alcohol breath test, an alcohol blood test or a prohibited drug test.<sup>26</sup> An authorised person would also be empowered to direct a person to take one of these tests if the IBP worker, in the course of his or her duties and in specified circumstances, had been directly involved in an incident that resulted in a person being killed or seriously injured. The IBP worker would not need to still be performing his or her duties for the direction to be given, but the direction would need to be given as soon as practicable after the incident occurred.<sup>27</sup> Tests would need to be conducted in accordance with prescribed rules and the results of a test would only be admissible in specified proceedings.<sup>28</sup>

1.19 Part 6 of the ABF Bill would incorporate secrecy and disclosure provisions. These provisions would provide that without prior authorisation an entrusted person must not make a record or disclose protected information unless he or she is authorised by a law or by an order or direction of a court or tribunal.<sup>29</sup> An authorised disclosed may be made to prescribed bodies and persons for a specified purpose<sup>30</sup> and in accordance with agreements, for permitted purposes or by consent.<sup>31</sup> A disclosure

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23 Australian Border Force Bill 2015, clause 29.

24 Australian Border Force Bill 2015, clause 30.

25 Australian Border Force Bill 2015, clause 32.

26 Australian Border Force Bill 2015, clauses 34, 35.

27 Australian Border Force Bill 2015, clause 36.

28 Australian Border Force Bill 2015, clauses 38–40.

29 Australian Border Force Bill 2015, clauses 42, 43.

30 Australian Border Force Bill 2015, clause 44.

31 Australian Border Force Bill 2015, clauses 45–47.

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would be considered as authorised if it were made to reduce a threat to the life or health of an individual or if the information had already lawfully been made available to the public.<sup>32</sup>

1.20 Part 7 of the ABF Bill would empower the secretary or the Comptroller-General of Customs to delegate, in writing, any of their respective functions with the exception of specified functions and allow for the subdelegation of functions by specified delegates.<sup>33</sup> A delegation could be accompanied by written directions.<sup>34</sup> Part 7 of the ABF Bill would also allow the secretary to give written directions to IBP workers relating to the administration and control of the department or the performance of functions or exercise of powers by such workers under a law of the Commonwealth.<sup>35</sup> Such directions could pertain to an essential qualification for performing duties, as used in sections 23 and 29 of the *Public Service Act 1999* (Cth).<sup>36</sup> An IBP worker would be compelled to comply with written directions of the ABF Commissioner, the secretary or the person acting as the Comptroller-General of Customs.<sup>37</sup> Clause 57 would allow the secretary or the ABF Commissioner to terminate the contract of engagement of a consultant or contractor if that person fails to comply with a direction.<sup>38</sup> Finally, clause 58 would let the minister make rules by legislative instrument to prescribe matters under the bill.<sup>39</sup>

### ***The ABF Amendment Bill***

1.21 The ABF Amendment Bill comprises nine schedules. Schedules 1, 3 and 4 propose to amend the *Customs Act 1901* (Cth), the *Migration Act 1958* (Cth) and the *Work Health and Safety Act 2011* (Cth) respectively. Schedule 2 of the ABF Amendment Bill would repeal the *Customs Administration Act 1985* (Cth) and make consequential amendments and savings provisions related to the repeal. Schedules 5, 6 and 7 of the ABF Amendment Bill propose to amend acts referring to 'the Customs', 'the CEO of Customs' and 'the Comptroller-General of Customs' respectively. The remaining two schedules of the ABF Amendment Bill make contingent amendments and other application and transitional provisions. As noted in the minister's second reading speech, the amendments would reflect:

...the changes to organisational arrangements and statutory roles associated with the integration of the Department of Immigration and Border

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32 Australian Border Force Bill 2015, clauses 48, 49.

33 Australian Border Force Bill 2015, clauses 53, 54.

34 Australian Border Force Bill 2015, subclauses 53(3), 54(2).

35 Australian Border Force Bill 2015, clauses 55, 56.

36 Australian Border Force Bill 2015, subclause 55(2).

37 Australian Border Force Bill 2015, subclauses 53(3), 54(2), 55(7), 56(4).

38 Australian Border Force Bill 2015, clause 57.

39 Australian Border Force Bill 2015, clause 58.

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Protection and establishment of the Australian Border Force within the department.<sup>40</sup>

1.22 However, as observed by the minister, the proposed changes to the *Work Health and Safety Act 2011* (Cth) (WHS Act) would be substantial amendments.<sup>41</sup> Schedule 4 of the ABF Amendment Bill would empower the ABF Commissioner to issue declarations about how the provisions of the WHS Act should apply to IBP workers in the ABF participating in national security and defence operations. However, before making such a declaration, the ABF Commissioner would have to consult the secretary and either the Director-General of Security or the Chief of the Defence Force, depending on whether the declaration applied to a national security or defence operation.<sup>42</sup>

1.23 Finally, further amendments to related legislation are noteworthy. Items 28 to 49 of Schedule 5 of the ABF Amendment Bill would have the effect of extending the provisions of the *Crimes Act 1914* (Cth) relating to controlled operations, integrity testing and assumed identities to officers of the entire department, not just to customs officers.<sup>43</sup> Likewise, items 143 to 146 and items 162 to 170 of Schedule 5 respectively would extend a right of a customs officer to apply for a freezing order under the *Proceeds of Crimes Act 2002* (Cth) and a stored communications warrant under the *Telecommunications (Interception and Access) Act 1979* (Cth) to any employee of the department. Finally, items 84 to 89 of Schedule 6 of the ABF Amendment Bill would extend the jurisdiction of the Australian Commission for Law Enforcement Integrity to cover the entire department, not just the Australian Customs and Border Protection Service.<sup>44</sup>

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40 *House of Representatives Hansard*, 25 February 2015, p. 1208.

41 *House of Representatives Hansard*, 25 February 2015, pp 1209–1210.

42 Customs and Other Legislation Amendment (Australian Border Force) Bill 2015, Schedule 4.

43 Customs and Other Legislation Amendment (Australian Border Force) Bill 2015, Schedule 5 clauses 28–49.

44 Customs and Other Legislation Amendment (Australian Border Force) Bill 2015, Schedule 6 clauses 84–89.