

The Senate

Legal and Constitutional Affairs
Legislation Committee

Australian Border Force Bill 2015 [Provisions]

Customs and Other Legislation Amendment
(Australian Border Force) Bill 2015 [Provisions]

May 2015

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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 2015.¹

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 2015.²

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 2015.³

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.

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'.⁴ 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

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 (accessed 23 April 2015).

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

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.⁶

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.⁷

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'.⁸

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.⁹

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*.¹⁰

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.

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.¹¹

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 bill¹² and defines the key terms used in the bill.¹³

1.15 Part 2 of the ABF Bill would establish the position of Australian Border Force Commissioner¹⁴ (ABF Commissioner) who would also act as the Comptroller-General of Customs.¹⁵ Part 2 would also provide for both the mechanism for appointing the ABF Commissioner,¹⁶ or acting ABF Commissioner where appropriate,¹⁷ and would provide the terms and conditions for that appointment.¹⁸ Clause 23 would allow the minister to give directions to the ABF Commissioner on policies or priorities affecting the ABF.¹⁹ 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 role²⁰ and clauses 25 to 27 would enable the ABF Commissioner to delegate functions and give directions.²¹ Under clause 24, the ABF Commissioner would be allowed to request a specified person to make and subscribe to an oath or affirmation.²²

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 (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.²³ 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.²⁴

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.²⁵

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.²⁶ 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.²⁷ Tests would need to be conducted in accordance with prescribed rules and the results of a test would only be admissible in specified proceedings.²⁸

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.²⁹ An authorised disclosed may be made to prescribed bodies and persons for a specified purpose³⁰ and in accordance with agreements, for permitted purposes or by consent.³¹ A disclosure

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.

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.³²

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.³³ A delegation could be accompanied by written directions.³⁴ 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.³⁵ 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).³⁶ 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.³⁷ 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.³⁸ Finally, clause 58 would let the minister make rules by legislative instrument to prescribe matters under the bill.³⁹

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

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.

Protection and establishment of the Australian Border Force within the department.⁴⁰

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.⁴¹ 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.⁴²

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.⁴³ 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.⁴⁴

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.

CHAPTER 2

Key Issues

2.1 The ABF Bill and the ABF Amendment Bill raise quite distinct issues. It follows that this chapter will examine each of the bills separately.

The ABF Bill

2.2 Submissions to the inquiry identified a number of key issues affecting the ABF Bill. These issues related to the provisions dealing with directions, oaths and affirmations, resignation from and termination of employment, alcohol and drug tests, and secrecy.

Directions

2.3 As noted in chapter 1, the ABF Bill empowers the minister, the secretary and the ABF Commissioner to give binding directions. Some submissions have argued that the ABF Bill allows for a dangerous lack of accountability, providing the minister and the ABF Commissioner with open-ended powers.¹ However, the joint submission of the department and customs explained that the ABF Bill is substantively based on the *Customs Administration Act 1985* (Cth) (CA Act) and, as such, the majority of the provisions in the ABF Bill, including those related to directions, have been made 'subject to parliamentary scrutiny on various occasions in the past'.² For example, the provision allowing the minister to direct the ABF Commissioner on the policies and priorities to be pursued and then to ensure that a copy of the direction is laid before each House of the Parliament within 15 sitting days correlates to section 4A of the CA Act.³ The joint submission also stated that the minister's power to direct the ABF Commissioner would be consistent with the direct accountability of the ABF Commissioner to the minister and, furthermore, the minister would remain bound by section 19 of the *Public Service Act 1999* (Cth), limiting the minister's capacity to make directions on breaches of the APS Code of Conduct and other individual employment matters.⁴

2.4 Some submitters claimed that, as directions of the secretary and the ABF Commissioner would be binding, IBP workers, including contractors, would be

1 Combined Refugee Action Group, *Submission 6*, p. 1; Ms Diane Parker, *Submission 8*, p. 1; Ms Andrea Callaghan, *Submission 9*, p. 2; Ms Kerin Faulkner, *Submission 13*, p. 1; Asylum Seeker Resource Centre, *Submission 15*, p. 5; Ms Jennifer Wills, *Submission 18*, p. 1.

2 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 4.

3 See *Customs Administration Act 1985* (Cth), s. 4A.

4 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 5.

compelled to adhere to a directive, irrespective of individual conscience, organisational code of conduct or perceived duty of care.⁵

2.5 The joint submission of the department and customs explained that:

Immigration and Border Protection workers will make decisions and exercise powers that affect the safety, rights and freedoms of individuals (sometimes significantly and irrevocably) as well as trade and commerce in Australia. They will hold a privileged place at the border and in the community, with access to secure environments and law enforcement databases. They will also exercise significant enforcement powers under the Customs Act, the Migration Act, the Maritime Powers Act and other Commonwealth laws. The community and Government trust Immigration and Border Protection workers to exercise these powers reasonably, lawfully, impartially and professionally...It is imperative that the ABF be established as a disciplined and professional workforce that can be flexibly deployed in line with changing requirements and risks.⁶

2.6 The department and customs clarified that the provisions that would empower the secretary and the ABF Commissioner to make binding written directions on the administration and control of the department and the ABF, respectively, were broadly modelled on section 4B of the CA Act.⁷

2.7 The Community and Public Sector Union (CPSU) and the Asylum Seeker Resource Centre (ASRC) in-principle did not have an objection to the specific legislative power to issue directions requiring essential qualifications but both criticised the lack of specificity as to how and when essential qualifications could be introduced.⁸ The ASRC did acknowledge that the Explanatory Memorandum to the ABF Bill contemplates that IBP workers may need to undergo psychometric and resilience training to ensure that they have the 'emotional and mental disposition suitable for the performance of certain duties'.⁹ The Law Council of Australia (LCA) stated that the person making a direction on essential qualifications should ensure that they are consistent with relevant obligations not just under the *Disability Discrimination Act 1992* (Cth), but also the *Age Discrimination Act 2004* (Cth), the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth).¹⁰

2.8 The department and customs stated:

5 Combined Refugee Action Group, *Submission 6*, p. 1; Ms Andrea Callaghan, *Submission 9*, p. 2; Ms Jane Willey, *Submission 17*, p. 5; Ms Jennifer Wills, *Submission 18*, p. 1.

6 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 6.

7 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, pp 6–7. See also *Customs Administration Act 1985* (Cth), s. 4B.

8 Community and Public Sector Union, *Submission 5*, p. 9; Asylum Seeker Resource Centre, *Submission 15*, p. 4.

9 Asylum Seeker Resource Centre, *Submission 15*, p. 4.

10 Law Council of Australia, *Submission 12*, p. 15.

Establishing a specific legislative power to issue such directions will assist the department to ensure the workforce has the necessary skills and attributes relevant to the roles being performed within the integrated department and enable the highest standards of operational effectiveness and professional integrity to be achieved.¹¹

2.9 The CPSU challenged the need for a specific legislative power to allow the secretary or the ABF Commissioner to make directions on mandatory reporting. The CPSU submitted:

The deployment of these powers will produce a work environment that is lacking in trust; a poor workplace culture that is likely to drive behaviours that are not conducive to uncovering the very behaviour that this legislation aims to prevent. Efforts to promote teamwork and bonds necessary between workers performing difficult and dangerous duties and their management will be undermined by this requirement. The introduction of these powers will only serve to make potentially criminal or corrupt elements within the Department more secretive and harder to detect by anyone.¹²

2.10 By contrast, the Australian Commission for Law Enforcement Integrity (ACLEI) stated:

Integrity measures, such as Mandatory Reporting and Organisational Suitability Assessments, help to mitigate the likelihood of staff members exercising inappropriate discretion about what to report.

To promote procedural fairness and accountability...it is appropriate and advisable for the Secretary and the ABF Commissioner to have a legislative basis for issuing binding directions relating to these integrity controls.¹³

2.11 The Explanatory Memorandum to the ABF Bill notes that the proposed mandatory reporting powers would be consistent with subsection 4B(2) of the *Customs Administration Act 1985* (Cth). The Explanatory Memorandum reasons that:

The intention of the power for the ABF Commissioner to impose mandatory reporting requirements is to support the identification and investigation of potential criminal behaviour or corruption that is likely affect the operation or reputation of the Department...Given the type of work that IBP workers perform and the importance of maintaining a high integrity workplace, mandatory reporting of such conduct or activities is considered a useful preventative, deterrence and response tool.¹⁴

Oaths and affirmations

2.12 A few submissions commented on the requirement for the ABF Commissioner to make and subscribe to an oath before beginning to discharge his or

11 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 7.

12 Community and Public Sector Union, *Submission 5*, p. 8.

13 Australian Commission for Law Enforcement Integrity, *Submission 1*, p. 7.

14 Explanatory Memorandum to the Australian Border Force Bill 2015, pp 30, 53.

her duties. The submissions argued that the particular form of the oath has not been specified as it would be prescribed by the relevant rules.¹⁵ The LCA and the Combined Refugee Action Group (CRAG) also questioned the need for a provision which would allow the ABF Commissioner to request an IBP worker to make and subscribe to an oath or affirmation, respectively arguing that junior clerks of the department and contractors should not be made subject to this provision.¹⁶ Moreover, the Australian Public Service Commissioner recommended that the content of any such oath or affirmation should be consistent with the APS Values, Employment Principles and Code of Conduct.¹⁷

2.13 The department and customs commented that the requirement to make and subscribe to an oath or affirmation would be:

...critical in an environment where significant enforcement powers are being exercised and there is community expectation of the highest standards of integrity.

The ABF Commissioner will have the same standing as the Chief of the Defence Force and the Australian Federal Police Commissioner. These offices have oaths or affirmations attached to them. It is therefore appropriate that the ABF Commissioner should also be required to make and subscribe an oath or affirmation and that he or she should be able to request certain ABF officers to make and subscribe an oath or affirmation as well. It is anticipated that the oath or affirmation given by these officers would be similar to the kind prescribed for certain Australian Federal Police officers under section 36 of the *Australian Federal Police Act 1979* (Cth).¹⁸

2.14 The committee notes that ABF Bill would only empower the ABF Commissioner to request an IBP worker in the ABF or a person whose services were made available to or who was performing services for the ABF, not junior clerks of the department, to make and subscribe to an oath or affirmation.¹⁹ The Explanatory Memorandum to the ABF Bill states:

Requiring employees responsible for exercising significant enforcement powers to subscribe to behaviour that upholds public service professionalism and ethics is essential to safeguard the reputation of the Department and the safety of the general public. The oath or affirmation is intended to be similar to the kind prescribed for certain AFP officers in the AFP Regulations.²⁰

15 Combined Refugee Action Group, *Submission 6*, p. 2; Ms Andrea Callaghan, *Submission 9*, p. 2; Ms Jennifer Wills, *Submission 18*, p. 1.

16 Combined Refugee Action Group, *Submission 6*, p. 2; Law Council of Australia, *Submission 12*, p. 16.

17 Australian Public Service Commissioner, *Submission 7*, p. 1.

18 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 6.

19 See Australian Border Force Bill 2015, subclause 24(1).

20 Explanatory Memorandum to the Australian Border Force Bill 2015, p. 28.

Resignation and termination

2.15 The CPSU challenged both the resignation and termination powers proposed by the ABF Bill arguing that they were superfluous, given that existing powers under the *Australian Public Service Act 1999* (Cth) would be sufficient to secure the integrity of the workplace.²¹ Other submitters, including the LCA, submitted concerns relating to the proposed provisions limiting the extent to which an employee could seek remedies under the *Fair Work Act 2009* (Cth) after a declaration is made by the secretary or the ABF Commissioner confirming termination of employment on grounds of serious misconduct.²² The CPSU and LCA argued that the proposed termination provision and associated declaration power would curtail an employee's right to natural justice by taking away any appeal mechanism to examine the merits of the decision to terminate the employment and removing the defence of reasonable excuse.²³ The CPSU, LCA and the Refugee Council of Australia (RCOA) came to the same conclusion: that the existing provisions in the *Public Service Act 1999* (Cth) that apply to serious misconduct are adequate to ensure the integrity of the immigration and border protection workforce as the Fair Work Commission would not overturn a termination decision that had merit; the Fair Work Commission would only question a case where the alleged misconduct was found not to have occurred, where it occurred but the employee had a reasonable excuse or where the misconduct was not serious enough to warrant dismissal.²⁴

2.16 The department and customs justified the proposed resignation powers by stating:

Under current provisions of the Public Service Act, an investigation into a breach of the APS Code of Conduct can continue after an employee has resigned but there is no provision to apply a sanction to the person as he or she is no longer an employee. This confines the ability of the department to address instances of serious misconduct and corrupt conduct. The proposed power to delay the date of effect of a person's resignation is an appropriate measure to address this issue as it will permit any investigation to be concluded, and where warranted, sanctions to be applied. This is an important demonstration to staff, the Government and the wider community of the department's commitment to professionalism and high standards of integrity and its unwillingness to tolerate conduct that threatens these values.²⁵

21 Community and Public Sector Union, *Submission 5*, pp 2–4.

22 Community and Public Sector Union, *Submission 5*, pp 3–4; Ms Andrea Callaghan, *Submission 9*, p. 3; Law Council of Australia, *Submission 12*, pp 15–16; Refugee Council of Australia, *Submission 16*, p. 2; Ms Jennifer Wills, *Submission 18*, p. 1.

23 Community and Public Sector Union, *Submission 5*, p. 4; Law Council of Australia, *Submission 12*, p. 16.

24 Community and Public Sector Union, *Submission 5*, p. 4; Law Council of Australia, *Submission 12*, p. 16; Refugee Council of Australia, *Submission 16*, p. 2.

25 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 8.

2.17 The department and customs also explained that the termination provision and associated declaration power would be an essential part of securing the integrity of the department as they would provide the secretary and the ABF Commissioner an ability to quickly and decisively remove an employee, thereby removing any possibility that highly sensitive information could be exposed. Furthermore, the efficient termination of an employment contract would avoid mixed signals being sent to other employees and the general public about the department's level of tolerance for serious misconduct.²⁶ The LCA and the joint submission of the department and customs highlighted that the termination and declaration-making powers of the secretary and the ABF Commissioner would not affect an employee's right of review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).²⁷ The joint submission also noted that general protections claims under the *Fair Work Act 2009* (Cth) and claims under anti-discrimination legislation would not be affected by the proposed provisions, adding that:

This provision mirrors the declaration provision currently applicable to ACBPS workers under section 15A of the Customs Administration Act and it is proposed to replicate its effect across the integrated department. Section 15A of the Customs Administration Act was modelled on the declaration of serious misconduct provisions applicable to Australian Crime Commission and Australian Federal Police staff. The provision was introduced in 2012 as part of a series of measures designed to increase the resistance of Commonwealth law enforcement agencies to corruption and to enhance the range of tools available to agencies to respond to suspected corruption. The declaration provisions were subject to parliamentary scrutiny at that time and the Committee recommended passage of the provisions in their entirety.²⁸

Alcohol and drug tests

2.18 Although the CPSU had no objections to the concept of drug and alcohol testing, the CPSU stated that it was concerned with the way in which the ABF Bill proposed to introduce the testing. The CPSU contended that the proposed universal drug and alcohol testing regime may act to undermine employee trust and the testing regime may be abused by management, opening up the possibility that certain employees could be unfairly targeted for tests or harassed by repeated requests for tests. Additionally, the CPSU was not convinced that the benefit of alcohol and drug testing certain employees, such as those in administrative roles, could justify the cost.²⁹

26 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 9.

27 Law Council of Australia, *Submission 12*, p. 16; Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 9.

28 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 9.

29 Community and Public Sector Union, *Submission 5*, p. 6.

2.19 ACLEI supported the proposed regime contending that passive integrity measures are not sufficient to address the emerging threat of corruption-enabled border crime. ACLEI cited operational experience that showed that mandatory reporting and drug testing have provided an effective deterrent to corrupt behaviour and a general rise in professional standards and threat awareness. ACLEI, through recent investigations, observed that law enforcement staff had used illicit drugs, but considered this behaviour to be private and separate from their law enforcement roles. ACLEI stressed that:

Those investigated...failed to realise that, by using illicit drugs, they exposed themselves to considerable risk of compromise, including possible exposure to blackmail in return for keeping their drug use hidden. Several had also failed to recognise the potential value to organised crime groups of the information each held as a result of their official duties...Accordingly, having regard to the sensitive functions undertaken by DIBP employees...broad-based drug testing of employees is an important corruption deterrence and detection measure.³⁰

2.20 The department and customs reiterated that the proposed alcohol and drug testing regime would help increase the department's capacity to better resist corruption and ensure a safer working environment. The joint submission explained:

Where Immigration and Border Protection workers are privately participating in the use and possession of illicit drugs, this behaviour is in direct conflict with their official duties and may enhance vulnerability to corruption. Corruption can have a significant detrimental effect on the ability to enforce the law, and the introduction of a drug and alcohol testing regime will provide another tool to detect corruption and misconduct across the broader department...The Government also considers that implementation of drug and alcohol testing is an appropriate response to the significant consequences that could arise from Immigration and Border Protection workers acting under the influence of drugs or alcohol in the course of their duties.³¹

2.21 The joint submission indicated that existing drug and alcohol screening arrangements have proven to operate effectively for customs, the Australian Federal Police and the Australian Crime Commission. As with the existing testing arrangements, the department and customs noted an intention that the testing would be conducted in line with the relevant Australian standards and procedures, helping to minimise any privacy concerns.³²

30 Australian Commission for Law Enforcement Integrity, *Submission 1*, p. 6.

31 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 7.

32 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, pp 7–8.

Secrecy and disclosure

2.22 Several submissions were critical of the proposed secrecy and disclosure provisions in Part 6 of the ABF Bill. The submissions argued that the provisions essentially criminalise any whistleblowing by IBP workers that does not fall within an exception, questioning whether the provisions would act to limit the public disclosure of human rights abuses or breaches of law.³³ The ASRC highlighted that the evidentiary burden of proving that whistleblowing falls within an exception would fall on the accused.³⁴ The LCA recommended that:

The secrecy offences should include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.³⁵

2.23 The committee takes the view that such an express requirement is not necessary as paragraph 42(2)(c) of the ABF Bill already provides an exception where 'the making of the record or disclosure is required or authorised by or under a law of the Commonwealth, a State or a Territory'.³⁶ The term 'a law of the Commonwealth' includes the *Public Interest Disclosure Act 2013* (Cth) that facilitates the 'disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector'.³⁷ Section 29 of the PID Act defines 'disclosable conduct' as conduct by an agency, public official or contracted service provider that falls under one or more items in the following table:

Disclosable conduct	
Item	Kinds of disclosable conduct
1	Conduct that contravenes a law of the Commonwealth, a State or a Territory.

33 Ms Carolyn Elliott, *Submission 4*, p. 1; Combined Refugee Action Group, *Submission 6*, p. 2; Ms Diane Parker, *Submission 8*, p. 1; Ms Andrea Callaghan, *Submission 9*, p. 2; Ms Kerin Faulkner, *Submission 13*, p. 1; Law Council of Australia, *Submission 12*, p. 13; Asylum Seeker Resource Centre, *Submission 15*, pp 4–5; Refugee Council of Australia, *Submission 16*, p. 2; Ms Jane Willey, *Submission 17*, p. 6; Ms Jennifer Wills, *Submission 18*, p. 1.

34 Asylum Seeker Resource Centre, *Submission 15*, p. 5.

35 Law Council of Australia, *Submission 12*, p. 13.

36 See Australian Border Force Bill 2015, para. 42(2)(c).

37 *Public Interest Disclosure Act 2013* (Cth), Long title.

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- 2 Conduct, in a foreign country, that contravenes a law that:
- (a) is in force in the foreign country; and
 - (b) is applicable to the agency, public official or contracted service provider; and
 - (c) corresponds to a law in force in the Australian Capital Territory.
-
- 3 Conduct that:
- (a) perverts, or is engaged in for the purpose of perverting, or attempting to pervert, the course of justice; or
 - (b) involves, or is engaged in for the purpose of, corruption of any other kind.
-
- 4 Conduct that constitutes maladministration, including conduct that:
- (a) is based, in whole or in part, on improper motives; or
 - (b) is unreasonable, unjust or oppressive; or
 - (c) is negligent.
-
- 5 Conduct that is an abuse of public trust.
-
- 6 Conduct that is:
- (a) fabrication, falsification, plagiarism, or deception, in relation to:
 - (i) proposing scientific research; or
 - (ii) carrying out scientific research; or
 - (iii) reporting the results of scientific research; or
 - (b) misconduct relating to scientific analysis, scientific evaluation or the giving of scientific advice.
-
- 7 Conduct that results in the wastage of:
- (a) relevant money (within the meaning of the *Public Governance, Performance and Accountability Act 2013*); or
 - (b) relevant property (within the meaning of that Act); or
 - (c) money of a prescribed authority; or
 - (d) property of a prescribed authority.
-
- 8 Conduct that:
- (a) unreasonably results in a danger to the health or safety of one or more persons; or
 - (b) unreasonably results in, or increases, a risk of danger to the health or safety of one or more persons.
-
- 9 Conduct that:
- (a) results in a danger to the environment; or
 - (b) results in, or increases, a risk of danger to the environment.
-
- 10 Conduct of a kind prescribed by the PID rules.**
-

2.24 ACLEI made the point that under clause 43 of the ABF Bill potential whistleblowers and potential witnesses could also provide any relevant information

directly to ACLEI without the need to seek authorisation, avoiding the onus of proving a defence.³⁸

2.25 The department and customs advised that the proposed secrecy and disclosure provisions were modelled on section 16 of the *Customs Administration Act 1985* (Cth), and adapted to ensure that the new provisions could operate efficiently and effectively within the context of the broader functions of the department and with other information protection and disclosure provisions in related legislation. The joint submission reasoned that:

The proposed application of these information protection provisions to the integrated department will enable the department to regulate the disclosure of sensitive information in a way that is appropriate and measured. This framework will also provide partner agencies and stakeholders, including industry and international law enforcement and intelligence partners, with assurances that information provided to the department can only be disclosed in the manners contemplated by the information protection provisions.

Similar information protection and disclosure provisions also exist in comparable legislation such as the *Australian Federal Police Act 1979*, the *Australian Security Intelligence Organisation Act 1979*, the *Income Tax Assessment Act 1997* and the *Australian Crime Commission Act 2002*.³⁹

The ABF Amendment Bill

2.26 The key issues pertaining to the ABF Amendment Bill may be broken down into three separate categories, being issues relating to the proposed amendments to the WHS Act, issues relating to the proposed extension of ACLEI's jurisdiction to investigate the whole department, and issues relating to the proposed consequential amendments to other Acts. Each of these categories will be examined in turn.

Proposed amendments to the WHS Act

2.27 The RCOA submitted that the proposed provisions of the ABF Amendment Bill that would permit the suspension of specified sections of the WHS Act are unnecessary, arguing that the WHS Act 'already offers significant flexibility in responding to the varied work health and safety issues which may arise in a wide range of workplaces'.⁴⁰

2.28 The statutory work health and safety regulator, Comcare, noted declaration powers similar to those proposed in Schedule 4 of the ABF Amendment Bill are already available to certain agencies under the WHS Act. Comcare cited that the consultation and approval requirements proposed would provide sufficient safeguards

38 Australian Commission for Law Enforcement Integrity, *Submission 1*, p. 6.

39 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 10.

40 Refugee Council of Australia, *Submission 16*, p. 2.

and submitted that it could not foresee any issues with its operations or the regulation of work health and safety in the ABF.⁴¹

2.29 The department and customs added that:

The proposed amendments to the WHS Act appropriately recognise the risks faced by Australian Border Force officers in protecting Australia's national security and defence. The declarations are not intended to weaken protections for workers, or remove any obligations for the department as an employer to ensure a safe workplace. In contrast, they can only be put in place where necessary, and with the required consultations and Ministerial approvals, to remove any uncertainty for ABF workers regarding their obligations under the WHS Act.

It is intended that ABF officers will continue to undertake risk assessments, follow instructions and be well-trained and equipped for the performance of all duties. At all times, the department will prioritise the health and safety of its workers and promote the objectives of the WHS Act to the greatest extent consistent with maintenance of Australia's national security and defence.⁴²

Proposed extension of ACLEI's jurisdiction to the whole department

2.30 Both the department and customs and ACLEI supported the proposed expansion of ACLEI's jurisdiction, which would allow it to investigate serious and systemic corruption issues throughout the department, not just the ABF. As noted by the department and customs:

...Immigration and Border Protection workers will have access to secure environments, protected systems and sensitive information which are valuable and therefore attract a heightened integrity risk...The consequences of any corruption in the department, including in the ABF, would pose a significant threat to the integrity of the border and Australia's national security...These provisions will ensure the Integrity Commissioner's unhindered ability to investigate suspected law enforcement related corrupt activity across the integrated department regardless of the specific role, location or job title of the individual worker.⁴³

2.31 ACLEI reiterated these points, adding:

...an emerging risk seen in a number of recent ACLEI investigations is that "back office" staff—administrative and other support staff who also have access to sensitive information—may be as vulnerable to compromise as operational staff. In addition, since they may be less prepared to respond to improper approaches, support staff may be more exposed to risk than was

41 Comcare, *Submission 3*, p. 1.

42 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, pp 11–12.

43 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, pp 10–11.

previously considered to be the case...A whole-of-agency approach also reduces the potential for disputation or legal contest over the scope of ACLEI's jurisdiction.⁴⁴

Proposed consequential amendments to other Acts

2.32 The department and customs explained that the proposed amendments in Schedules 2, 5, 6 and 7 of the ABF Amendment Bill were designed to provide transitional provisions and consequential arrangements to ensure continuity of operations and information and intelligence sharing between relevant agencies following the repeal of the *Customs Administration Act 1985* (Cth).⁴⁵

2.33 However, the LCA argued that some of these provisions dealing with the expansion of powers from customs to the department could be problematic. The LCA challenged the need to expand the controlled operations scheme and the assumed identities scheme of Part 1AB and 1AC *Crimes Act 1914* (Cth) to the department, recommending that it should be limited to IBP workers in the ABF. Similarly, the LCA argued that only authorised IBP workers in the ABF, not all authorised IBP workers, should be able to apply for a freezing order under the *Proceeds of Crimes Act 2002* (Cth).⁴⁶ The LCA also challenged the proposed amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth), recommending that only the ABF and not the broader department should be able to obtain a stored communications warrant. The LCA submitted:

Given the intrusive nature of stored communications warrants and their ability to reveal sensitive personal information, the Law Council considers that it is inappropriate to permit the broader IBP Department, rather than just the ABF, access to stored communications warrants, unless there is a demonstrated need to do so.⁴⁷

2.34 Finally, the LCA noted that the amendments in Schedule 5 of the ABF Amendment Bill would expand integrity testing to the department as a whole and this would allow ACLEI to apply for a warrant to use surveillance devices under the *Surveillance Devices Act 2004* (Cth) for the purposes of that testing. LCA submitted that these provisions should only apply to operational staff.

2.35 The minister, in his second reading speech, explained that controlled operations scheme and the assumed identities scheme of Part 1AB and 1AC of the *Crimes Act 1914* (Cth) were important provisions. The minister stated:

In its 2013 report into organised crime in Australia, the Australian Crime Commission details the significant impact serious and organised crime has on the everyday lives of Australians. The commission conservatively estimates organised crime costs Australia \$15 billion annually and notes the

44 Australian Commission for Law Enforcement Integrity, *Submission 1*, p. 8.

45 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission 14*, p. 12.

46 Law Council of Australia, *Submission 12*, pp 3, 5–11.

47 Law Council of Australia, *Submission 12*, pp 3, 5–11.

ability for such crime to undermine our border integrity, erode the confidence in institutions and law enforcement agencies and damage our prosperity and regional stability. This form of crime reaches across borders and can include trafficking in drugs or in people, corruption, and money laundering.

With the increasing threat of serious organised and transnational crime, it is vitally important that Australia's border arrangements continue to be able to operate with relevant powers and protections to conduct operations that counter these threats. Accordingly, the bill substitutes the Department of Immigration and Border Protection for the Australian Customs and Border Protection Service as the primary agency with overarching responsibility for protecting our borders. It therefore ensures these provisions will continue to apply to officers in my department when the new organisational arrangements are in place.⁴⁸

2.36 In its submission, ACLEI expressed support for integrity testing, by stating:

Integrity testing is a specific method of investigating suspected corrupt conduct, whereby an officer is placed in an observed situation that is designed to test in a fair way whether he or she will respond in a manner that is illegal, unethical or otherwise in contravention of the required standard of integrity. The consequences of failing an integrity test can include disciplinary action, termination of employment or criminal charges.

The inclusion of this measure reflects and responds to ACLEI's experience of the challenges involved in investigating corrupt conduct. It does so in a way which ensures accountability, protects the rights and reputations of individuals, and provides appropriate legal protection for officers who conduct authorised integrity tests.

Having regard to corruption enabled border crime risks, as well as the desirability of corruption investigation and deterrence measures being able to be applied across a jurisdiction, ACLEI supports the extension of integrity testing to DIBP.⁴⁹

2.37 The committee agrees with ACLEI's position on integrity testing and accepts that the controlled operations scheme and the assumed identities schemes should be expanded to the department as a whole.

2.38 Furthermore, the committee takes the view that, as the amended *Proceeds of Crimes Act 2002* (Cth) would only allow authorised officers of the department to apply for a freezing order, the proposed amendments do not drastically change the status quo. Following the same reasoning, the committee notes that the amended *Telecommunications (Interception and Access) Act 1979* (Cth) would not change the requirement that a certifying officer must be authorised to apply for a stored communication warrant. The committee cites the reasoning in the Explanatory

48 *House of Representatives Hansard*, 25 February 2015, pp 1208–1209.

49 Australian Commission for Law Enforcement Integrity, *Submission 1*, p. 8.

Memorandum to the ABF Amendment Bill, which states that the amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth):

...will enable the continued operation capability of key activities currently performed by the ACBPS, which will in the future be undertaken within the integrated Department.⁵⁰

Recommendation 1

2.39 The committee recommends that the Senate pass the Australian Border Force Bill 2015 and the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015.

Senator Barry O'Sullivan
Chair

50 Explanatory Memorandum to the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015, p. 95.

Appendix 1

Public submissions

- 1 ACLEI
- 2 Ms Coral Clarke
- 3 Comcare
- 4 Ms Carolyn Elliott
- 5 Community and Public Sector Union (CPSU)
- 6 Combined Refugee Action Group
- 7 Australian Public Service Commission
- 8 Ms Diane Parker
- 9 Ms Andrea Callaghan (12 submissions of similar form were received)
- 10 Nadeeka Jay (PDF 33 KB)
- 11 Department of Foreign Affairs and Trade
- 12 Law Council of Australia
- 13 Ms Kerin Faulkner
- 14 Department of Immigration and Border Protection and Australian Customs and Border Protection Service
- 15 Asylum Seeker Resource Centre (ASRC)
- 16 Refugee Council of Australia
- 17 Ms Jane Willey
- 18 Ms Jeni Wills

