

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Immigration and Border Protection

Australian Border Force Act 2015

Australian Border Force (Secrecy and Disclosure) Rule 2015

Section 58 of the *Australian Border Force Act 2015* (the Act) provides, in part, that the Minister may make rules, not inconsistent with the Act, prescribing all matters which are required or permitted by the Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the Act.

Purpose

The Act provides the legislative framework for the Australian Border Force, a single frontline operational border control and enforcement entity, that will be formed within the Department of Immigration and Border Protection (the Department) from 1 July 2015. This follows the Government decision to integrate the Department and the Australian Customs and Border Protection Service (ACBPS) into a single department of State.

Every day, the Department and the Australian Border Force within it will create, receive and use critical and important information including intelligence and personal information. Much of this information will be sensitive and complex. It is therefore necessary that information secrecy and disclosure arrangements should be in place not only to protect information but also to enable the disclosure of information in appropriately controlled circumstances.

To support this framework, Part 6 of the Act sets out the prohibition on the recording or disclosure of protected information by an entrusted person, unless certain exceptions apply.

Section 44 of the Act authorises an entrusted person who is authorised by the Secretary for the purpose of that section to disclose protected information, including a class of protected information, to:

- a Department, agency or authority of the Commonwealth, a State or a Territory;
- the Australian Federal Police;
- a police force or police service of a State or Territory;
- a coroner;
- any other person who holds an office or appointment under a law of the Commonwealth, a State or a Territory; or
- any other body or person prescribed by the rules for the purposes of paragraph 44(4)(f) (excluding a foreign country, an agency or authority of a foreign country or a public international organisation).

Section 45 of the Act authorises an entrusted person who is authorised by the Secretary for the purpose of that section to disclose protected information, including a class of protected information, to:

- a foreign country;

- an agency or authority of a foreign country; or
- a public international organisation;

if the Secretary is satisfied that the information will be used in accordance with an agreement with that foreign country, that agency or authority of a foreign country, or that public international organisation.

Paragraph 44(2)(b) of the Act provides that protected information that contains personal information may only be disclosed to the relevant body or person if the Secretary is satisfied that the disclosure of the information is necessary for a purpose mentioned in section 46, which lists a number of permitted purposes. Paragraph 45(2)(b) of the Act similarly provides that protected information that contains personal information may only be disclosed to the relevant foreign country, agency or authority of a foreign country, or public international organisation if the Secretary is satisfied that the disclosure of information is necessary for a purpose mentioned in section 46. Paragraph 46(o) provides for the rules to prescribe additional permitted purposes to those listed in section 46.

Paragraph 44(2)(d) of the Act provides that, in relation to a class of protected information that contains personal information, the relevant body or person must be prescribed in the rules and that class of information must be prescribed in the rules as a class of information that may be disclosed to that body or person before the information can be disclosed. Similarly, paragraph 45(2)(d) of the Act provides that, in relation to a class of protected information that contains personal information, the relevant foreign country, agency or authority of a foreign country, or public international organisation must be prescribed in the rules and that class of information must be prescribed in the rules as a class of information that may be disclosed to that foreign country, agency, authority or organisation before the information can be disclosed.

The purpose of the *Australian Border Force (Secrecy and Disclosure) Rule 2015* (the Rule) is to prescribe:

- additional bodies and persons for the purposes of paragraph 44(4)(f) of the Act;
- the classes of information that may be disclosed for the purposes of paragraphs 44(2)(d) and 45(2)(d) of the Act;
- the bodies and persons and the classes of information that may be disclosed to those bodies and persons for the purposes of paragraph (44)(2)(d) of the Act;
- the foreign countries, agencies or authorities of a foreign countries, and public international organisations and the classes of information that may be disclosed to those foreign countries, agencies, authorities or organisations for the purposes of paragraph 45(2)(d) of the Act; and
- additional permitted purposes under paragraph 46(o) of the Act.

Details of the Rule are set out in the Attachment.

The Rule is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Timing

The Rule commences on 1 July 2015.

Consultation

The Australian Government Solicitor was consulted in the development of this Rule. No other external consultation was undertaken specifically in relation to the provisions as they are of a minor or machinery nature and do not substantially alter existing arrangements. However, extensive consultation and communication has been undertaken with the Department's business lines.

DETAILS OF THE *AUSTRALIAN BORDER FORCE (SECRECY AND DISCLOSURE) RULE 2015*

Section 1 – Name

This section provides that the title of the Rule is the *Australian Border Force (Secrecy and Disclosure) Rule 2015*.

Section 2 – Commencement

This section provides that the Rule commences on 1 July 2015.

Section 3 – Authority

Section 3 provides that the authority to make the Rule is the *Australian Border Force Act 2015*.

Section 4 – Definition

Section 4 inserts one definition for the purposes of the Rule:

Act means the *Australian Border Force Act 2015*.

Section 5 – Bodies and persons

Section 44 of the Act, subject to the requirements of that section, authorises an entrusted person who is authorised by the Secretary for the purpose of that section to disclose protected information, including a class of protected information, to:

- a Department, agency or authority of the Commonwealth, a State or a Territory;
- the Australian Federal Police;
- a police force or police service of a State or Territory;
- a coroner;
- any other person who holds an office or appointment under a law of the Commonwealth, a State or a Territory; or
- any other body or person prescribed by the rules for the purposes of paragraph 44(4)(f) (excluding a foreign country, an agency or authority of a foreign country or a public international organisation).

Section 5 of the Rule provides that the bodies in Schedule 1 are prescribed for the purposes of paragraph 44(4)(f) of the Act. The effect of this section is that the Secretary may authorise disclosure to the bodies mentioned in Schedule 1 for the purposes of section 44 of the Act.

Section 6 – Classes of information

Section 44 of the Act authorises an entrusted person who is authorised by the Secretary for the purpose of that section to disclose protected information, including a class of protected information, to certain domestic bodies.

Section 45 of the Act authorises an entrusted person who is authorised by the Secretary for the purpose of that section to disclose protected information, including a class of protected information, to:

- a foreign country;
- an agency or authority of a foreign country; or
- a public international organisation;

if the Secretary is satisfied that the information will be used in accordance with an agreement with that foreign country, that agency or authority of a foreign country, or that public international organisation.

Paragraph 44(2)(d) of the Act provides that, in relation to a class of protected information that contains personal information, the relevant body or person must be prescribed in the rules and that class of information must be prescribed in the rules as a class of information that may be disclosed to that body or person before the information can be disclosed. Similarly, paragraph 45(2)(d) of the Act provides that, in relation to a class of protected information that contains personal information, the relevant foreign country, agency or authority of a foreign country, or public international organisation must be prescribed in the rules and that class of information must be prescribed in the rules as a class of information that may be disclosed to that foreign country, agency, authority or organisation before the information can be disclosed.

Subsection 6(1) provides that, for the purposes of paragraph 44(2)(d) of the Act:

- the bodies and persons mentioned in Parts 1, 2, 3, 4, 5, 6, 7, 8 and 9 of Schedule 2 are prescribed;
- the classes of information mentioned in Schedule 3 are prescribed; and
- a class of information mentioned in an item in Part 1, 2, 3, 4, 5, 6, 7, 8 or 9 of Schedule 2 is prescribed as a class of information that may be disclosed to the body or person mentioned in that item.

Subsection 6(2) provides that, for the purposes of paragraph 45(2)(d) of the Act:

- the foreign countries, agencies or authorities of foreign countries, and public international organisations mentioned in Part 10 of Schedule 2 are prescribed;
- the classes of information mentioned in Schedule 3 are prescribed; and
- a class of information mentioned in an item in Part 10 of Schedule 2 is prescribed as a class of information that may be disclosed to the body, person, foreign country, agency, authority, or organisation mentioned in that item.

The effect of this section is that, in relation to a class of protected information that contains personal information, the Secretary may only authorise the disclosure of a specified class of

information to the bodies, persons, foreign countries, agencies or authorities of foreign countries, or public international organisations prescribed in Schedule 2.

Section 7 – Permitted purposes

Section 44 of the Act authorises an entrusted person who is authorised by the Secretary for the purpose of that section to disclose protected information, including a class of protected information, to certain domestic bodies.

Section 45 of the Act authorises an entrusted person who is authorised by the Secretary for the purpose of that section to disclose protected information, including a class of protected information, to:

- a foreign country;
- an agency or authority of a foreign country; or
- a public international organisation;

if the Secretary is satisfied that the information will be used in accordance with an agreement with that foreign country, that agency or authority of a foreign country, or that public international organisation.

Paragraph 44(2)(b) of the Act provides that protected information that contains personal information may only be disclosed to the relevant body or person if the Secretary is satisfied that the disclosure of the information is necessary for a purpose mentioned in section 46, which lists a number of permitted purposes. Paragraph 45(2)(b) of the Act similarly provides that protected information that contains personal information may only be disclosed to the relevant foreign country, agency or authority of a foreign country, or public international organisation if the Secretary is satisfied that the disclosure of information is necessary for a purpose mentioned in section 46. Paragraph 46(o) provides for the rules to prescribe additional permitted purposes to those listed in section 46.

Section 7 provides that, for paragraph 46(o) of the Act, the purposes mentioned in Schedule 4 are prescribed. The effect of this section is that the Secretary may, subject to the requirements of sections 44 and 45 of the Act, authorise the disclosure of personal information if the Secretary is satisfied that the information is necessary for a purpose mentioned in Schedule 4.

Schedule 1 – Bodies and persons

In accordance with section 5, this Schedule prescribes additional bodies or persons for the purposes of paragraph 44(4)(f) of the Act.

By prescribing the bodies or persons to whom that information may be disclosed, this Schedule gives effect to the Department's day-to-day information sharing practices in appropriately controlled circumstances.

Schedule 1 specifies bodies or persons to whom the Department may disclose information, subject to the requirements of section 44 of the Act, to assist those bodies to exercise their powers or perform their functions.

Schedule 2 – Classes of information – bodies, persons, foreign countries, agencies or authorities of foreign countries, and public international organisations

In accordance with section 6:

- Parts 1, 2, 3, 4, 5, 6, 7, 8 and 9 of this Schedule prescribes the bodies and persons and the classes of information that may be disclosed to those bodies and persons for the purposes of paragraph 44(2)(d) of the Act; and
- Part 10 of this Schedule prescribes the foreign countries, agencies or authorities of foreign countries, and public international organisations and the classes of information that may be disclosed to those foreign countries, agencies, authorities, or organisations for the purposes of paragraph 45(2)(d) of the Act.

By prescribing what type of information and to whom that information may be disclosed, this Schedule gives effect to the Department's day-to-day ongoing information sharing practices in appropriately controlled circumstances.

Schedule 3 – Classes of information

In accordance with section 6, this Schedule prescribes the classes of information that may be disclosed for the purposes of paragraphs 44(2)(d) and 45(2)(d) of the Act.

By prescribing what type of information may be disclosed, this Schedule gives effect to the Department's day-to-day ongoing information sharing practices in appropriately controlled circumstances.

Schedule 4 – Permitted purposes

In accordance with section 7, this Schedule prescribes a purpose relating to defence or national security as an additional permitted purpose pursuant to paragraph 46(o) of the Act.

The Department undertakes its role of protecting Australia's borders in collaboration with the Department of Defence and other partner agencies responsible for national security and as such may need to disclose protected information that contains personal information to these agencies. Including this permitted purpose will clarify the basis on which the Department discloses personal information.

Statement of Compatibility with Human Rights

(Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*)

Australian Border Force (Secrecy and Disclosure) Rule 2015

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Rule

The *Australian Border Force (Secrecy and Disclosure) Rule 2015* (the Rule) prescribes:

- additional bodies and persons for the purposes of paragraph 44(4)(f) of the *Australian Border Force Act 2015* (the Act);
- the classes of information that may be disclosed for the purposes paragraphs 44(2)(d) and 45(2)(d) of the Act;
- the bodies or persons and the classes of information that may be disclosed to those bodies and persons for the purposes of paragraph 44(2)(d) of the Act;
- the foreign countries, agencies or authorities of foreign countries, and public international organisations and the classes of information that may be disclosed to those foreign countries, agencies, authorities, or organisations for the purposes of paragraph 45(2)(d) of the Act; and
- additional permitted purposes pursuant to paragraph 46(o) of the Act.

The Rule commences on 1 July 2015.

Human Rights implications

Right to privacy

The Rule engages the right to privacy contained in Article 17 of the *International Covenant on Civil and Political Rights*, relevantly being that no one shall be subjected to arbitrary or unlawful interference with his or her privacy.

The Rule allows the disclosure of prescribed classes of personal information to prescribed bodies and prescribes a permitted purpose for which the disclosure of personal information can be authorised by the Secretary of the Department of Immigration and Border Protection (the Department). In the Act, ‘personal information’ has the same meaning as in the *Privacy Act 1988* (Privacy Act), which is defined as:

information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not and whether the information or opinion is recorded in a material form or not.

The Privacy Act is the principal piece of Commonwealth legislation protecting the handling of individuals' personal information. This includes the collection, use, storage and disclosure of personal information in the federal public sector. The Privacy Act also acknowledges that other statutory provisions, such as those in the Act, affect privacy.

The ability to disclose personal information under sections 44 and 45 of the Act and the Rule, which is authorised under the Privacy Act, gives effect to the Department's day-to-day information sharing practices in appropriately controlled circumstances. Authorising the disclosure of such information is not arbitrary and is only permitted where the Secretary is satisfied that the disclosure is for a permitted purpose.

For classes of personal information, the classes of information and the bodies and persons to whom a class of information may be disclosed is prescribed in the Rule. The Rule is precise as it states what type of information, and to whom the information, can be disclosed. For this reason, the impact on individuals' privacy is reasonable, necessary and proportionate to the objectives contained in the Act, and given effect by the Rule, of providing assurances to industry and law enforcement and intelligence partners in Australia and internationally that information provided to the Department will be appropriately protected and disclosed in appropriately controlled circumstances.

In addition, the disclosure of personal information is authorised by law under Part 6 of the Act, and consequently complies with Australian Privacy Principles 6 and 8 which place limits on the disclosure of personal information. Under those Principles, personal information shall not be disclosed unless, amongst other things, the disclosure is authorised by law.

Conclusion

This legislative instrument is compatible with human rights because it is consistent with Australia's human rights obligations and, to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

Minister for Immigration and Border Protection